

SPEECH FOR THE NATIONAL SMALL BUSINESS SUMMIT

FWO's Deal With Small Business

8 August 2014, Melbourne

INTRODUCTION

Thank you for having me here today.

I would like to acknowledge the Wurundjeri people who are the Traditional Custodians of the Land upon which we meet. I would also like to pay respect to the Elders both past and present of the Kulin Nation and extend that respect to other Indigenous Australians who are present.

My name is Natalie James and I am the Fair Work Ombudsman. My agency is the national workplace relations regulator. We provide education and advice about workplace laws.

MOST PEOPLE WANT TO DO THE RIGHT THING

You may know of us because of our litigation. It's true that we take some people to court. That's what grabs headlines.

In a minority of cases, we find ourselves reaching for our enforcement tools to resolve an issue. Usually because there has been a deliberate breach of the law or one involving vulnerable workers. Or, a person hasn't been willing to engage with us and something is clearly wrong.

We actively promote our court action to deter deliberate breaches of workplace laws.

There should be serious, visible consequences for such breaches. Otherwise, it invites others to break the law. This undermines those businesses that do the right thing.

It undercuts those who pay the right wages and results in enabling them to gain an unfair competitive advantage.

Our experience however, is that most people want to do the right thing. The people calling us for advice, or the people who receive our calls when a problem arises want to understand where they have gone wrong so they can fix it.

We have thousands of interactions with business owners every day. And yet very few issues see us reach for enforcement tools.

Only one in every 500 or so complaints ends in court action from us.¹

Let me give you an example of the sort of case that ends up in court.

¹ Calculated using the approximate figures of 50 litigations from 25,000 complaints each year (= 0.002)

One that started back in early 2012 when we were contacted by employees from an Italian restaurant on NSW's Central Coast called 'My Favourite Italian'.

We had dealt with complaints about the same employer 12 months earlier. Underpayments had occurred at one of their other restaurants and they voluntarily fixed this.

So in March 2012, the Fair Work Inspector organised a meeting with the business owner to get their side of the story. The employer acknowledged that employees had been underpaid and said they'd provide the relevant time and wage records.

When the records weren't forthcoming, the Inspector made a formal request for the records in the form of a Notice to Produce documents under the Fair Work Act. A few months later some records trickled in.

Between July and October, the Inspector sought to access the rest of the records and contacted the employer in person, via phone and by email.

Another meeting was eventually organised, but the employer did not turn up.

Another formal request for records was issued and some documents were provided.

After using what was available to calculate amounts owing, the Inspector attempted to inform the employer of the findings by mail, email and phone. Again, there was no response.

In total, the Inspector initiated 33 separate and largely unsuccessful points of contact with the employer over a 16 month period in an attempt to resolve the matter.

Is it any wonder this case saw us reaching for our formal enforcement tools? One of the final letters sent to this employer, well over a year after the first meeting, was a formal compliance notice.

A compliance notice sets out certain actions a person must take, such as correcting underpayments.

Under the legislation, if an employer does what is required, that is the end of the matter. Legally, the Fair Work Ombudsman could not then commence court action. But, like the many other opportunities beforehand, this letter was ignored.

Blatantly refusing to engage with us and rectify problems that an employer has acknowledged did occur, leaves us with few options other than to progress to court.

Especially when we have had previous interactions about similar issues.

In the end, nearly two years after the complaint was made, the Federal Court ruled that the employer needed to back pay over \$12,000 to nine staff, including two junior employees, as well as ordering the company to pay penalties of over \$19,000 and the Director almost \$4,500.

Does anyone think this was a productive way to resolve this matter?

For the employees to have to wait for a court to order that their minimum entitlements must be paid? Almost two years after they first raised their concerns?

Or for the business, now slapped with fines of almost \$25, 000, court costs and a reputation tarnished by court action?

And does anyone think we were unreasonable to take this matter to court? We would have preferred not to. Litigation is resource intensive for us too.

WE KNOW IT CAN BE COMPLICATED...

Fair minded business people who want to do the right thing are entitled to ask “how do I avoid that? Being taken to court? Having fines imposed and media releases issued about me?”

After all... the system can be complicated. It is possible to get things wrong.

We are very much aware that workplace laws can be complex for the uninitiated.

We know they also exist amongst a whole pile of rules you have to follow about all sorts of things.

At times I listen into calls my Advisors take to get a sense of the issues people grapple with.

Often, we are asked about seemingly basic issues like which award applies or what the minimum rate of pay is for weekends.

For those who aren't industrial experts, the margin for error is high.

It is true that the system has got simpler. It is now a national system. Thousands of state and federal awards were reduced to just 122 by the Fair Work Commission a few years ago.

This has dramatically reduced the pages of workplace regulation.

But, there are many people who are a long way from understanding the intricacies of things such as the interaction between the National Employment Standards and awards, or the difference between above award payments, enterprise agreements and an Individual Flexibility Arrangement.

This is why we are publicly acknowledging that the system could be simpler. That we should take every opportunity to make the framework clearer.

Currently, we have such an opportunity. The Fair Work Commission is conducting a formal review of Modern Awards as required by the Fair Work Act.

It's a four yearly event, where people can make submissions about making changes to awards. Mostly, the people who get involved are the traditional award 'parties'. Unions and employer organisations who have been involved with awards for decades. Some of whom are arguing for changes in the nature of the entitlements in awards.

From the Fair Work Ombudsman's point of view, this is an opportunity to make changes that bring greater clarity to ordinary people.

A chance to look at the 122 awards and how they can be simpler.

How could we not put forward our experience based on the thousands of interactions we have with businesses and employees each year? Over half a million phone calls a year with ordinary people who often aren't members of industrial organisations and aren't workplace relations experts.

When, year after year, our most common enquiries and complaints are about minimum wages and entitlements.

It is our obligation to make sure the experience of ordinary people – those not directly involved in the proceedings – is considered.

And to assist in achieving the Modern Award Objective of ensuring “a simple, easy to understand, stable and sustainable modern award system for Australia”².

We have no vested interest.

We have nothing to say about whether entitlements are too generous or not generous enough. We are solely focused on the need for simplicity.

For example, we have suggested that awards should contain tables displaying hourly rates.

That way, businesses don't need to do the maths nor read lots of clauses and piece them together.

We've also suggested making award coverage more straight forward.. 122 awards are better than thousands; but people still need to pick the right one.

And for the uninitiated, 122 is still a long list to choose from – particularly when more than one award might apply.

Similarly, we have said there should be clearer definition about when penalty and overtime rates apply and how they intersect with casual rates.

Australian Bureau of Statistics data indicates that 34% of employees work extra hours or overtime in their main job³ and around one third of people work at least some of their time on weekends.⁴

Knowing the correct minimum rate of pay for this work is fundamental and clearly an everyday issue for businesses – but it's not as straight forward as it could or should be.

² Section 134 of the *Fair Work Act 2009*

³ [Australian Bureau of Statistics, Cat. 6342.0, Working Time Arrangements, November 2012, pp. 9](#)

⁴ [Australian Bureau of Statistics, Cat. 6342.0, Working Time Arrangements, November 2012, pp. 29](#)

Unless you are an industrial relations expert we think that only 12 of the 122 awards are really clear on when overtime hours apply and only five on when penalties apply.

Our contribution to the process is to bring greater clarity to the system. To focus on the areas where the margin for error is high and the impact on compliance may be significant. This is good for employers, who will have less complexity to deal with, and for their employees, who will be more likely to receive the wages and conditions they are entitled to. And if they don't, it will be easier for them to work this out for themselves.

If we can decrease complexity then this reduces the red tape you have to grapple with.

There is a clear productivity benefit.

OUR JOB - TO MAKE IT SIMPLER FOR YOU

Achieving a simpler system is better for everyone. However the Modern Award Review process will take at least 18 months and it won't solve everything.

So, what about right now?

You are entitled to have access to reliable information to help you work out your obligations.

The Fair Work Ombudsman has a job to do in making the existing system as easy to navigate as possible.

We know you have pages of regulation you have to follow.

Our job is to make it as easy and as clear as we can.

To help, we have recently created a new website based on feedback from uninitiated users.

It prioritises the most common and fundamental information people look for.

It also tailors information for the user where possible and provides specific answers that you can act on.

You can save pages and set up your own space for information that matters to you.

Other online tools relate specifically to pay rates such as 'Paycheck Plus' which calculates minimum wages for you. These pay tools have been used almost 5 million times!

Our new online learning centre offers free courses you can take at any time that suits you, on topics such as hiring workers and having difficult conversations.

The Small Business Helpline also offers small business owners the option to talk to a real person about their workplace relations questions.

The Helpline was launched in December last year and has already taken over 100,000 calls.

Usually you'll wait no more than 5 minutes to get through and typically you'll get the information in around ten minutes. You can get a reference number so if you need to call back or refer to the call later, we can access the relevant information.

OUR DEAL WITH SMALL BUSINESS

And, perhaps most importantly, underpinning all of this is the public commitment we've made to callers to the Small Business Helpline. That we will give you advice you can rely on so you can act with confidence.

When you ring us, and in good faith seek our advice, we expect you to act on that advice. And when you do, if it turns out we have got it wrong, we will acknowledge this and not seek a penalty from you if breaches have occurred as a result.

This is our deal with you.

We ask that you engage with us honestly and openly. That you use our tools and resources. Inform yourself.

In return, you will be able to act with confidence.

This protects you.

It means that if, down the track, a problem arises, you can demonstrate your intention to do the right thing.

SO WHAT IF A COMPLAINT IS MADE AGAINST ME?

So you've got our advice. And you have followed it.

That's a good start. But of course this doesn't guarantee that problems won't arise.

One of your employees may make a complaint.

Often this has as much to do with the culture of your workplace as it does your employees. Ideally, your employees should feel they can raise issues directly with you, rather than relying on us to do it for them.

If an employee calls us with a concern, we advise them on their correct entitlements. We encourage them to talk to their employer and try and sort it out. Without any direct involvement from us.

We provide them with information and support to have a conversation, including through our 'difficult conversations' online learning course.

If your employee does come to you to query their wages or conditions, it is important you engage with them.

They are entitled to ask. And they are protected by law from being punished because they have done so. We take such conduct very seriously so it's important you don't take action against your employees simply for asking about their wages or coming to us to ask.

When complaints arise, our most common response is to help people discuss the issues.

This may be through assisted resolution or mediation. It is usually done over the phone, and most matters are finalised in less than 30 days.

You'll get to have your say and you can discuss whatever you like in that process.

You and the employee control the outcome and the agreement you make.

If we do contact you about a complaint, we ask that you work with us. And use the tools and resources we have available.

Talk to your employee and try and resolve things directly where possible. And if you find a mistake was made then fix it, and let us know you've done so!

Nearly all matters are resolved through these processes. This resolves things quickly, and enables both you and your employee to get on with your work, perhaps with greater confidence that you are complying with your obligations.

The deal here is that, if you engage with us openly, if you are responsive and fix problems, if you demonstrate you have acted in good faith, you won't find us reaching for our enforcement tools.

In other words, you are not our concern.

Not unless you deliberately exploit employees or take advantage of those who are vulnerable.

Or refuse to fix problems that arise. Or continually ignore advice giving you a competitive advantage over those doing the right thing.

CONCLUSION

For the deal to stick, we must both uphold our sides of the bargain.

So are you up for this deal, small business?

Seek advice and act with confidence.

Engage openly and honestly.

Be responsive.

The enforcement tools stay in the toolbox.

And you can get on with running a productive business.