

ALERA 2014 National Conference

29 August 2014

“Risk, Reputation and Responsibility”

Introduction

I'd like to acknowledge and pay respect to the traditional Aboriginal people of the Gold Coast region and their descendants.

We also acknowledge the many Aboriginal people from other regions as well as Torres Strait and South Sea Islander people who now live in the local area and have made an important contribution to the community.

My name is Natalie James and I'm the Fair Work Ombudsman.

Today I'm going to talk about responsibility, choices and risk.

Like all organisations, the Fair Work Ombudsman deals with questions around our responsibility, choices and risk every day.

We make choices about our activities.

We consider our legislative responsibilities and the expectations of the public and stakeholders in deciding how to discharge those responsibilities.

We adopt a risk management approach to our work – the risk of non-compliance in different industries or regions is a basis for us deciding where to focus our attention and resources.

For some time now, we have had a focus on vulnerable workers and the industries that engage them.

Young workers, and workers born overseas for example, often come to us with legitimate concerns about being paid below the minimum wages they are entitled to.

These workers encounter barriers to understanding and enforcing their entitlements themselves.

They are at greater risk that an unscrupulous employer may deliberately take advantage of their vulnerability.

Business Choices: Sourcing Labour

So too, business must make choices about its activities and managing its resources.

A business does this with reference to its responsibilities to regulators, shareholders and customers.

It considers all of this in the context of the risks and opportunities that exist in its environment.

At the Fair Work Ombudsman, we get a sense of the range of choices open to business when it comes to its workforce.

We see how choices business make to be more profitable can also impact the labour market.

We often see it at the less positive end of the spectrum of workplace experiences – when it manifests in a formal complaint to us.

We see trends over time about the types of workers and industries that feature in cases of non-compliance with workplace laws.

Our experience is that some types of work attract large numbers of vulnerable workers.

For example, work that is labour intensive and able to be done by low-skilled individuals. This sort of labour is often supplied to business through procurement or outsourcing arrangements.

Trolley, Security & Cleaning

Three types of work that fall into this category that have come to our attention are cleaning, security and trolley collecting.

These industries have a number of features in common.

This work is relatively low skill and highly labour-intensive.

It's work that less educated, vulnerable workers can do, and so they feature predominately in these sorts of industries.

And these are highly competitive industries in which businesses compete for contracts, and where the profit margins, particularly on the labour component, are often low.

In the cleaning industry around 1 in 2 people are born overseas and over 1 in 3 speak a language other than English at home.

Since January 2010, the Fair Work Ombudsman has received a total of 2605 complaints from workers in the cleaning industry and recovered a total of \$1.8 million for those cleaners.

The 2011 census tells us that around one quarter of those working in security were born in non-English speaking countries and the workforce generally has a lower than average education attainment.

Last financial year we completed 443 complaints and recovered \$117,831 for 64 security workers.

The 2011 census also tells us that about 50 per cent of trolley collectors are under the age of 25 and 40% don't have education beyond year 10.

In the past six years, the Fair Work Ombudsman and its predecessor have recouped more than \$433,000 for 528 trolley collectors at supermarket sites across Australia.

And yet 2011 census data tells us that there are only around 1500 trolley collectors in the entire industry.

We have also placed 11 matters before the courts alleging underpayment of trolley collectors.

Of the 7 matters that have been decided, penalties totaling \$288,000 have been handed down in cases alleging the underpayment of dozens of trolley collectors by more than \$426,000.

These figures don't always fully represent the problems that can be occurring in the workforce either, as we suspect that many workers, perhaps more so when they are vulnerable, can be reluctant to report their working conditions.

Where does responsibility lie?

There may be many layers between the workers in these scenarios and the ultimate beneficiary of their labour.

It is of course a legitimate choice to procure labour through many hands. Whole industries have developed around the efficiencies this practice delivers.

But where do the responsibilities to the employees begin and end?

And, if it turns out the workers are being underpaid, perhaps deliberately, what risks might arise for organisations up and down the chain?

Our experience with these sorts of cases is that some employers do take advantage of the situation by underpaying their workers.

Those who do this may increase their profit margins.

It may also give them a competitive advantage over lawful operators within industries that frequently have highly competitive tendering processes.

This can drive others in the sector to follow suit – pushing the market rate of labour below the minimum legislated standards.

So who's responsible?

Of course the direct employer is.

The law is clear – it's the employer who is responsible for paying an employee and meeting the minimum requirements.

If an organisation has made a legitimate choice to outsource the work, the responsibility for employee entitlements have been passed down the line.

Or has it?

Liability throughout the supply chain

The workplace relations legislation provides a mechanism through which someone other than the employer who is *involved* in a contravention of workplace laws may be held accountable for the contravention, and subject to penalties.

Section 550 of the Fair Work Act provides for accessorial liability.

It isn't novel – the notion of accessorial liability has been around for a long time.

There were equivalent provisions in the previous workplace relations legislation¹ and it is common elsewhere too, including occupational health and safety as well as corporations, competition and consumer legislation.

We are using accessorial liability more and more, so that we can hold individuals involved in contraventions to account.

Last financial year, 38 penalty decisions were handed down in matters that the Fair Work Ombudsman has put before the courts.

Thirty of those involved penalty orders against an accessory, amounting to a total of \$753,809.

In 9 of these matters, the employing company was in liquidation and the Court ordered that compensation owed to employees be paid from the accessory's penalty.

We carefully consider whether Directors or human resource staff, or external advisors such as lawyers and accountants, have played a part in the conduct that has led to underpayment of employees that warrants them being held legally accountable.

So to return to the question I posed – where does the responsibility lie?

Well, of course the employer is directly responsible.

But perhaps it does not end there.

The responsibility may extend up that chain of contracts, even to the very top organisation if that entity has directly or indirectly been in any way knowingly concerned with the conduct in question.

So ask yourself ... if you are involved in procuring services and the cost is very low, lower than what seems reasonable ...

¹ Accessorial liability provisions under the *Fair Work Act 2009* (s550) and the *Workplace Relations Act 1996* (s728) are almost identical in their wording.

... and, knowing the market and the industry as you do ... might you, even without knowing for sure, be at risk of being 'involved in' underpaying the employees?

Trolley Collecting matter before court

The Fair Work Ombudsman is asking the courts to specifically consider this question with respect to trolley collectors.

Our argument is that a large retail store whose car-parks the employees worked in knew that the cost of their contract for trolley collecting services could not be sufficient to cover minimum wages for those performing the work.

The employees involved are predominately from non-English speaking backgrounds and were being paid as little as \$8 per hour.

Our concern is that the company at the top of the chain has effectively received the benefit of labour below the minimum standards, and has not taken responsibility for the impact of the labour sourcing arrangements they entered into.

The court is yet to determine these matters and we will keenly await the proceedings and decisions.

PCD – United Trolley Collections

In contrast, another national company has taken quite a different approach to its responsibilities when it comes to sourcing and providing labour.

United Trolley Collections Pty Ltd is a big industry player providing trolley services direct to the big retailers.

They have more than 60 contractors and provide services right across Australia, including at more than 700 major supermarket sites.

United Trolley Collections has recently partnered with FWO through a Proactive Compliance Deed.

The agreement commits United Trolley Collections to ensuring that all of its sub-contractors are fully compliant with workplace laws.

This agreement came about after the Fair Work Ombudsman approached United Trolley Collections to open up a dialogue about working together.

United Trolley Collections had become the provider servicing the retail store involved in the court case I mentioned earlier.

When we met with United Trolley Collections, the Director was very keen to sign up to a cooperative arrangement right away.

He has been in the industry for almost 20 years and along the way has seen people operating poorly.

He believes this draws unnecessary attention to the industry and he is motivated to demonstrate what his business is doing and inspire others to consider whether they are doing the right thing.

United Trolley Collections chose to look down its supply chain and to take responsibility for what's going on beyond its direct relationships.

Such an agreement has the power to effect real change in the industry plagued by compliance problems.

Proactive Compliance Deeds are a cooperative agreement, not a punitive tool.

We can tailor them to the needs and issues presented by a business and the environment they operate in.

These deeds can involve things like self-auditing, auditing throughout the supply chain and providing mechanisms for workers to query their correct entitlements.

In partnering with us, the business gains a better understanding of their legal obligations, providing them with a layer of protection from litigation, as well as gaining opportunities to improve their workplace practices more broadly.

They provide a mechanism for an employer to send positive messages about its commitment to behaving in an ethical and lawful way with respect to its workers.

We have had similar experiences in the cleaning industry.

We recently entered into a proactive partnership with Asset Industries who are an Australian company specialising in commercial cleaning services.

Asset Industries agreed to work in partnership with the Fair Work Ombudsman and to put processes in place to ensure employees and contractors are paid at the right rates.

And, they proudly acknowledge this partnership on their website.

Weighing Up Risks – Reputation & Ethics

A business might choose to accept the risk that we'll come knocking on their door, up there at the top of the supply chain.

That's a choice for them to make.

But if it turns out the cleaners or security guards on their premises **have** been underpaid, there are other risks to consider, even if they're not legally responsible.

There is the very real risk to reputation.

Consider the reaction of customers, suppliers and shareholders if it hits the press that you have been profiting from using underpaid labour.

Vulnerable and exploited labour.

This is not good for a business' bottom line.

When The Age revealed that Sherrin footballs were being made by children in India being paid 7 rupees per ball, the consumer backlash resulted in a recall of half a million balls and the company quickly sourcing a new supplier.

We all know the power of consumers in an information and digital-driven world.

Social media has enhanced our capacity to inform ourselves about our choices.

I have a 'shop ethical app' on my phone – it gives me information immediately and on location.

Information about who owns the company, that company's activities in developing countries, it's ranking on the Corporate Equality Index, it's animal testing policy, etc.

Informed consumers can now communicate those choices and opinions instantly and independently.

Whilst standing in a store, a consumer can cause a lightning storm in the 'twitter-sphere' without any connection to major media outlets.

There is a reason companies encourage people to 'like' them on Facebook. Online campaigns can be brutally effective and difficult to manage.

This has the potential to impact on a business' bottom line.

We see the evolving risk around reputation reflected in the regulation of listed companies.

The ASX guidelines on corporate governance observe that a listed entity's reputation is one of its most valuable assets and, if damaged, can be one of the most difficult to restore.²

As the ASX says, investors and other stakeholders expect listed entities to act ethically and responsibly, and that anything less can destroy value over the longer term.

Businesses have a choice about how they approach the question of ethics.

There is no doubt others make judgements on those choices, and those judgments may have an impact on share value and relationships.

In the case of sourcing labour through third parties, you might assert, reasonably, that you can't possibly be expected to know what price is 'too low'.

² ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, 3rd Edition, page 19.

You can't take responsibility for that.

After all, you are looking to source services for a range of reasons, and getting the services cheaper is a legitimate outcome to look for in an outsourcing arrangement.

Local Government Security Initiative

In one industry, an industry association and employer association chose to take proactive steps to make it easier to know how low is 'too low'.

In May this year, we announced an agreement between the security industry employer association, Australian Security Industry Association Ltd, and the relevant union, United Voice, to help the Fair Work Ombudsman mount a proactive education campaign about wage rates in the sector.

This was in response to concerns that the highly competitive procurement processes were contributing to low levels of compliance in the industry.

The campaign involves raising awareness that if a council is buying in security services at a price that does not allow the contractor to pay an average of \$24 an hour, then there is a real possibility that employees are being underpaid.

By promoting this figure, we are making it easier for those who want to do the right thing to comply.

We are also making it harder for someone further up the supply chain to say they didn't know.

The industry body and the union are standing up with us and taking responsibility for what goes on up and down the supply chain.

For them, responsibility doesn't begin and end with only those they directly employ.

Ultimately it's Your Choice

There are lots of reasons you might want to carefully consider how you go about exercising your choices when it comes to contracted labour.

Whether it's because you want to do the right thing and be seen to act ethically.

Or because you don't want to risk your reputation or an investigation by my Inspectors.

If people are working on your premises, for your benefit, then the technical boundaries of your formal responsibilities may not be the beginning and end of the risk you carry.

The Fair Work Ombudsman will use the levers available to us to protect vulnerable workers at the bottom of the chain, through litigation and active use of accessorial liability.

Or collaboration, such as via Proactive Compliance Deeds. And we will continue to actively use the media.

If a business is interested in looking down the supply chain and taking responsibility for what is going on within it, then the Fair Work Ombudsman would love to have a conversation about how we can help.

To those who choose not to look down the supply chain, to keep their eyes fixed narrowly, that may be a legitimate choice.

But I can't promise that we won't be having a different sort of interaction at some point – perhaps one that takes place in a court.