

The view from the top – building a culture of compliance in Australia’s labour supply chains

Address to Australian Labour and Employment Relations Association (ALERA) National Conference by Natalie James, Fair Work Ombudsman

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Where we started – raising supply chain risks

Back in August 2014, I spoke to your National Conference about the risks for a business that neglects its labour supply chain.

I spoke about the strong correlation between outsourcing of low skilled work, the prevalence of vulnerable workers in such labour markets, and worker exploitation, and I gave the examples of trolley collecting, cleaning and security

I spoke about the increasing use of accessorial liability under the *Fair Work Act 2009* by my agency, the Office of the Fair Work Ombudsman (the **FWO**), as we seek to extend responsibility for breaches of workplace laws beyond the direct employer to others who have played a part in the conduct.

I warned that a company that cares about its reputation, and wants to stay out of the headlines and the court, owes it to its shareholders to take an interest in what’s going on in its labour supply chain.

And I advised that we would use all of the levers available to us to protect vulnerable workers at the bottom of supply chains.

Almost two years on, these messages are more relevant than ever

Where we are now – a growing supply chain consciousness...

The community and the media have noticed something that we at the FWO have known and have been actively working on for some time...

That visa workers are over-represented in our complaints data, and that their complaints involve the most serious examples of exploitation. For example, people being paid well under the minimum wage of \$17.29 an hour. We see cases of \$8, \$10, \$12 an hour. And when we see this, the workers are often employed by an operator who is part of a much bigger supply chain or network. By an operator who is elusive and who avoids my Inspectors’ calls, refuses our requests for a record of interview, and ignores our Notices to Produce Documents. By an operator who, in the event that we do gather enough evidence to take them to court, has a tendency to fold their corporate entity, avoiding the full consequences of their actions and leaving their employees without the wages they are entitled to.

We have seen this in cases like Baiada Poultry, producers of the Lilydale and Steggles brands and suppliers to major supermarkets and fast food outlets. In cases like 7-Eleven. In cases involving the many supply chains that provide fruit and vegetables to our supermarkets.

Given these cases, it won't surprise you that it is now business as usual for us at the FWO to look up the supply chain in these circumstances and ask, 'what part does the business at the top—the buyer, the franchisor, the price maker—play in this worker exploitation?' It is now business as usual for us to investigate the drivers of behaviour in complex supply chains and develop strategies to shine a light on and stamp out non-compliance with workplace laws.

The community expects nothing less. The community is sceptical of protests from an established, profitable business that it is not legally responsible for workers in its labour supply chains or network. Especially where there is a sense that those profits have come off the back of the underpayment of workers. And the community expects such a business to play a part in the solution.

I share this expectation, and it's one that I'm pleased to say hasn't gone unmet.

To illustrate this, I'm going to return to a topic that I focused on at my last outing here nearly two years ago – trolley collectors.

Partnering with Coles - taking supply chain responsibility

Now, you wouldn't give trolley collecting the status of an 'industry.' There are only a few thousand workers pushing trolleys around our carparks at any point in time. But for a small number of workers, the FWO has put in an extraordinary effort as we work to stamp out the systemic exploitation of these vulnerable, often migrant, workers.

We've put over \$700,000 back into the hands of at least 544 of Australia's trolley collectors in the last 9.5 years. We've put 13 matters involving trolley collectors into the courts. We've obtained penalties of more than \$650,000 against operators in the 10 of these matters that have been finalised. And, last year, we were able to reconcile a significant underpayment to Mr Bhupinder Singh, a former Coles trolley collector.

You may think there's nothing remarkable about that. After all, the FWO recovers more than \$20 million a year for workers who have been underpaid. But what was different here was that Mr Singh, a young Indian migrant, was not repaid by his employer. His employer, an operator that had paid him between \$7 and \$8 an hour, was not in a position to repay Mr Singh in spite of our court action against him. Rather, the \$90,000 in wages owing to Mr Singh was paid to him by Coles. This came about when Coles took responsibility for the underpayment of its contractors' workers, and agreed that it had played a part in the conduct that led to these workers being exploited.

This happened after we commenced court proceedings against all three levels of the Adelaide-based Coles trolley collection supply chain that employed Mr Singh, for underpaying 10 vulnerable trolley collectors over \$220,000:

- Against subcontractors who directly employed the trolley collectors, at the bottom
- Against the business contracting directly to Coles, in the middle, and
- Against Coles, the buyer and price maker, at the top.

And, to its credit, after a period of contemplating the court action, Coles stepped up.

In October 2014, Coles entered into an Enforceable Undertaking (**EU**) with us and agreed to back pay their contractors' employees, including Mr Singh.

Since signing the EU, Coles has:

- Repaid seven trolley collectors a further \$41,000, on top of the \$220,000 they repaid under the EU
- Audited the wages of 400 trolley collectors working for 15 of their contractors
- Brought trolley collection services in-house at almost 72% of their stores, and
- Delivered workplace relations training to relevant Coles team members.

Coles also provides us with quarterly updates about their ongoing efforts to ensure compliance within their supply chains. The insourcing aspect is not something we required of Coles in the EU – outsourcing is a legitimate business decision and we don't dictate to businesses what their business model should be. But it is interesting that Coles chose to do this, and that it reports it is achieving better results for the business with its own directly employed trolley collectors than it does with its contractors – in part, because its own trolley collectors are happy to be part of the Coles brand and to have opportunities for development within Coles.

I commend Coles for cleaning up its act and working with us to put a stop to exploitation in its trolley collection supply chains.

Incidentally, we ended up scoring victories at all levels of this particular Coles trolley collection supply chain – the trifecta. As well as the EU with Coles, we obtained:

- Declarations against the subcontractors who directly employed the trolley collectors, and
- Penalties of \$188,100 against the director and general manager of the business contracting directly to Coles – 75% of the maximum penalty.

These victories are of critical importance given the trolley collecting industry's status as a problem industry, and Coles' status as a major buyer.

Work still to do – building supply chain responsibility throughout the sector

While the part of the market working on Coles' sites has seen welcome improvements, we're not done yet.

I wish I could say these positive outcomes are reflected throughout the entire sector. But they are not.

Other major buyers in the industry are already on notice – we expect them to step up and take responsibility for their supply chains, just like Coles has done.

At the moment, we have three matters before the Courts:

- Two recently filed matters involving businesses that provided trolley collection services to Woolworths, and

- One matter filed back in 2011 involving several businesses that provided trolley collection services to Woolworths, Coles and Foodland across Adelaide.

In the matter of *FWO v Civic National Pty Ltd and Said Sabbagh*, the FWO is alleging that the former operator of a trolley collection business and the company he owned and operated provided false and misleading records in response to a Notice to Produce issued by one of my Inspectors. We decided to commence legal action in this matter because of the deliberate nature and seriousness of the alleged conduct. The business previously provided trolley collection services at three Woolworths supermarkets and a Big W site in Wagga.

In the matter of *FWO v Green World Management and David Kim*, the FWO is alleging that a trolley collection business and its director underpaid a trolley collector--a migrant worker on a subclass 417 working holiday visa--more than \$26,000 over just 14 weeks. The FWO also alleges that the business and director required the trolley collector to work unreasonable additional hours of 91 hours per week, failed to meet frequency of pay obligations and failed to provide pay slips or keep accurate employment records. This matter is likely to be complicated and drawn out for the very reason the employer did not keep proper records of hours worked, and now those are contested. The business previously provided trolley collection services at a Woolworths supermarket in Punchbowl.

We are finalising an Inquiry into the procurement of trolley collection services by Woolworths – Australia’s largest procurer of contracted trolley collection services. We commenced this Inquiry in June 2014, in response to ongoing concerns about the exploitation of vulnerable trolley collectors at Woolworths’ sites, including disturbing allegations of physical intimidation of workers by contractors at some sites.

The chief aim of the Inquiry has been to identify and address the levels and drivers of non-compliance by businesses involved in the Woolworths’ trolley collecting supply chains. We have in the course of our Inquiry uncovered familiar concerns around record keeping and underpayments. Like in the 7-Eleven matter, we confront the challenges of working out the gap between what a worker has been paid, and what they should have been paid, given the unreliable employment records. The Inquiry also raises concerns around contractors not taking their workplace obligations seriously, and illustrates the tight market within which these businesses are operating.

Now, we can keep taking Woolworths trolley collectors to court. But really, there has to be a better way. As the beneficiary of these services, we are hopeful that Woolworths, like Coles before it, will step up and recognise that it has a moral and ethical responsibility to join with the FWO to stamp out exploitation of workers in its labour supply chain. And perhaps this would assist the company to reverse the recent tumble their reputation has purportedly taken, if you believe the AMR’s 2016 Corporate Reputation Index where they’ve dropped from 17th to 40th in this consumer rated index.

Unless something changes in this part of the trolley collecting industry, we’ve not finished the job. We expect to publish our Inquiry report in the coming weeks. In the meantime we look forward to continuing our discussions with Woolworths. We will also be keeping our eye firmly trained on other buyers of trolley collecting services, including the up and comers.

Pulling all the levers – legal and reputational

We aren’t just talking about morality here.

Where we are unable to secure backpay from the direct employer – for example, where the corporate entity folds or has insufficient funds, its employees don’t get their money back. We will

look to all of the avenues available to us to put unpaid wages back into the hands of those employees. Where a party other than the employer has played a role in the exploitation of workers, we consider whether the law can make them legally responsible.

We are pushing the boundaries of the accessorial liability provisions contained in the FW Act. This is how Coles ended up in court. So far this financial year nearly every matter we have filed in court—94% in fact—has also roped in an accessory. We are increasingly pursuing a broader range of accessories, including accountants and human resources managers. We're also seeking a broader range of orders from the courts to ensure that we hold those involved in non-compliance with workplace laws to account including:

- Orders that accessories personally repay wages to workers
- Freezing orders to prevent businesses and accessories transferring assets, and
- Injunctions to prevent a person from contravening the FW Act in the future, exposing them to contempt of court if they fail to comply.

We have seen others step up and take responsibility for their labour supply chains, eventually.

When we conducted our Inquiries into Baiada Poultry and 7-Eleven, their initial posture was framed by the traditional legal response – that the contractors and franchisees were responsible for their workers' concerns. And indeed, these businesses weren't the direct employers of the exploited workers. But when the media got a hold of what was going on at their sites and in their stores, their posture shifted.

After the delivery of our damning Inquiry report, Baiada signed up to a compliance partnership with us. And, as the one year anniversary of our partnership with them approaches, I am happy to say that Baiada are assuming a responsibility for compliance that was not in evidence 18 months ago. Workers have been backpaid and new electronic time recording systems ensure there are records with some veracity. Contractors are being terminated where evidence is uncovered of underpayment of workers. We are also pleased to see Baiada is proactively commencing its own investigations into its contractors where there are allegations of underpayment of workers, and we have found that Baiada is more than willing to terminate the services of these contractors if its investigations disclose evidence of serious non-compliance with the law.

We are currently in discussions with 7-Eleven about a compliance partnership that would create a robust and transparent arrangement with respect to the franchise's workers' pay. I recently said in an opinion piece after the release of our Inquiry report into 7-Eleven that if boardrooms are not considering the procurement and compliance risks in their labour supply chains and networks then someone is asleep at the wheel. A strong statement perhaps but it doesn't seem over the top in light of the 7-Eleven case – a case where we are told that the Board did not know about the systemic underpayment of staff in its business over many years.

But of course, this is a choice for business. You don't have to take this approach. Myer chose not to accept my invitation to enter into a Compliance Partnership after we found serious problems with their contracted cleaners. We had found they had been misclassified and underpaid. Myer felt it could manage this situation itself, and sacked those cleaning contractors. Only to encounter problems with its new provider, Spotless. This suggests that Myer needs to have a greater role within its supply chain than to simply take the view that it can contract out responsibility. It is not a case of 'out of sight, out of mind.'

But it's your risk to assess and manage. To decide whether to get out in front of any problems in your labour supply chain or network, or to wait for someone else to go looking – one of my Inspectors or the media.

We at the FWO are happy to work with anyone who is interested in taking steps to protect their workers and their reputation, and we can tailor the arrangements to suit any business.

Compliance with workplace laws is everyone's business

If we are serious about putting a stop to worker exploitation in this country, we need to do more than respond to individual complaints that come through my door.

Most employers in this country want to do the right thing - that is the FWO's experience. It is also our experience that those who come awry, do so because they've run into difficulties applying our complex system of workplace regulation.

But at the other end of the spectrum, we have a disturbing stream of cases where workers are getting paid well under the minimum hourly rate of pay. And that's before we consider penalties, allowances and overtime.

If we want to turn this around, we need to accept that we all have an interest in compliance with workplace laws. When workers get ripped off, everyone is affected. When workers get ripped off, businesses that are trying to do the right thing can't compete with those who are willing to find a competitive advantage by doing the wrong thing. And when they can't compete, those well-meaning businesses often have to make hard choices. To let some of their workers go, or not hire the additional workers that they in truth need. At the extreme, to go out of business altogether, leaving consumers with fewer legitimate choices and potentially driving up prices. And, worst of all, to follow the lead of those unscrupulous businesses and underpay their workers.

Non-compliance with workplace laws distorts the market, and this affects all of us. It creates a race to the bottom, and black market rates of pay well below the lawful minimum rates. It impacts on the reputation of industries, sectors and regions.

Compliance with workplace laws is not just the business of the Fair Work Ombudsman. Compliance with workplace laws is everyone's business.

So we are putting out the call to the whole community: workers, consumers, concerned citizens, businesses, everyone. If you suspect a business is exploiting its workers, or if something doesn't seem right, we want you to tell us – we want to know.

Launching our "Anonymous Report"

And we have just made that a whole lot easier...

I am pleased to announce today that we are formally launching our new online Anonymous Report.

This new Anonymous Report functionality enables members of the community to alert us to potential non-compliance online. The Anonymous Report is for situations where someone suspects something isn't right, but does not wish to lodge a complaint with us.

We think there are three main groups of people who might benefit from using the Anonymous Report:

- Vulnerable workers, who might be getting ripped off themselves but are afraid to take active steps to address it – in spite of the protections in the law, we know many workers feel they cannot raise concerns without risking their job, especially visa workers
- Concerned citizens, who may have seen or heard something to indicate something is awry, and
- Employers, who are concerned that other businesses might be getting a competitive advantage by engaging in unlawful practices.

We have had the Anonymous Report operational in a pre-launch phase on our website since early April.

And we have had a great response from the community. In the first four weeks of Anonymous Report going live, we received nearly 500 anonymous reports. 3 in every 4, or 77%, of these reports raised concerns about rates of pay, predominantly underpayment of hourly rates, non-payment of wages and penalty rates. A little over a third, or 36%, of reports raised concerns about the hospitality industry, predominantly the restaurant and café sub-industry. Almost 70% of reports identified the affected workers as having one or more vulnerabilities, predominantly those of being a young worker, a student, a mature aged worker and/or a visa holder.

Anonymous tip-offs provided to us in the past as part of our campaigns and Inquiries, like our Harvest Trail Campaign and Sub-class 417 Working Holiday Visa Inquiry, have already provided us with valuable intelligence. Now we have clear mechanism through which people can provide this information, with the comfort that they need not disclose their identity and that it will be put to good use.

Of course we won't be storming into a business on the basis of one anonymous tip-off. We are looking for trends and patterns here. The information will be collated and analysed by our Intelligence Team, who will consider it alongside our complaints and other data, report on trends and generate leads for our compliance areas to follow up.

Our data and intelligence capability has evolved significantly in recent years. Data and intelligence is now at the centre of our operating model, focusing our priorities and enabling us to direct our resources to where we will be able to have the greatest impact on the community. And now we invite members of the community to provide us with their information to inform our work to help keep workplaces fair, and the level the playing field for business.

The Anonymous Report is in its early days, and will be refined along the way to ensure that it meets the needs of the community, and our needs. We are always happy to hear feedback from the community about how we can improve our services.