

“The Changing Landscape of the Australian Workplace: The Modern Advisor“

Key Note Presentation

Law Institute of Victoria Workplace Relations Conference 2016

Natalie James, Fair Work Ombudsman

Friday 28 October 2016

Introduction

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.

It's a pleasure to be standing in front a room full of fellow members of the legal profession. I may not be working as a lawyer today - but I still think of myself that way.

Now I have a bunch of them working for me.

Now I'm the demanding, unreasonable client who wants to push the envelope, understand the risk, find ways around rules that I sometimes feel restrict me from doing what I think needs to be done.... like when they tell me best not send that tweet out using the term 'dodgy boss'.....

I appreciate that when you advise someone as a lawyer, you represent them. You are their agent. It's your role to act in their interests. But, of course, it's not entirely straight forward. You aren't just a gun for hire.

As lawyers, whether you work in-house or for a firm, you have other, higher duties. You're accountable to the Court and to the Law Society, for example. You also have ethical obligations that our profession requires you to fulfil. If you work in government, you have duties to the public as well.

As legal advisors, you need to balance all of these responsibilities and interests.

And I hate to say it, but getting the balance right is becoming more difficult than ever when it comes to employment law. And I acknowledge, though don't apologise, for the role I may be playing in making it a little bit harder than it once was.

Don't get me wrong, I'm not setting out to make your life difficult. But in the modern world of employment law, things are not as simple as they may once have been. The environment, the

expectations of your clients, and the actions of the regulator, are all conspiring to make things more complex – more opportunities and more risks with more serious consequences

Legitimate but complex business structures, such as outsourcing, labour hire and franchising, are growing. And the opportunities of the digital economy are leading to completely new ways of doing things, like the arrangements seen in businesses such as uber, deliveroo, airtasker and foodora, which break with the traditional paradigms of employment.

This makes it all more complex and presents new risks, and being a good lawyer means helping your clients to understand those risks.

Today I will share with you how I think you can best serve your clients' interest by considering the scope of your advice in the context of an active regulator in an environment where stories of worker exploitation are of high interest across the range of media. I will also provide some insight into the way our Agency works as it goes about responding to requests for assistance, so you can tell your clients what they need to know about our current work and practices.

I also want to share with you some tips on how we can work effectively together, consistent with your clients best interests and how to avoid pitfalls practitioners have fallen into when advising on matters involving our Agency.

As legal advisors, you often consider and advise on how to mitigate against the worst case scenario for your clients. Ending up in court is often that scenario. Losing in court is definitely a red box on your risk matrix. But, is the worst case scenario always a day in court?

As a legal advisor have you considered non-legal risks to you and your client?

Like the reputational risk of being caught up in a scandal and ending up on the front page of the paper?

I'm sure every advisor in the WR space knows the case of 7-Eleven. While it may be that 7-Eleven has not been found to breach any laws, it has found itself judged as guilty as you can be in the Court of Public Opinion.

7-Eleven has paid for the actions of its franchisees – the employers of a vulnerable and exploited workforce. Earlier this week, the company's wage repayment program website reported it had paid over \$42 million to over eleven hundred workers, none of whom were directly employed by the

franchisor. As you would know, this eclipses the penalties available under the Fair Work Act by a significant margin.

More troubling for the company and its board is the price they've paid in their reputation.

Thinking about this for a moment, wouldn't your clients be just as keen to remain out of the newspapers as they are to remain out of the courts?

7-Eleven is a case in point that businesses, and their advisors, need to look more broadly than just their obligations under the law. You need to consider the impact your advice or actions could have on your reputation or the reputation of your clients.

And 7-Eleven isn't alone in this respect. Coles and Woolworths have both made the front page since 2014 because of non-compliance with workplace laws in their supply chain. Our Inquiry into the employment practices of Baiada Poultry Group landed them in the news for all the wrong reasons as well – resulting in them having to front a Senate committee.

These examples have shown that the public and the media do not abide exploitation of employees in Australia and look to who they see as morally and ethically responsible. An assertion that the franchise has 'no control' over franchisees that are 'separate businesses' draws an incredulous response from the public when things go wrong. So too, do assertions that major supermarkets have no influence over whether their trolley collectors are correctly paid. Or when Baiada's contractor's, contractor's, contractors are found to have ripped off 417 visa holders.

We actively and appropriately use the media to promote our compliance work, including our court matters. We do this to ensure that we send a strong message that those who engage in deliberate exploitation of workers or fail to cooperate with the regulator will face visible consequences – legal and reputational.

And this is also making your life harder because it's not just the legal consequences you need to consider when advising your clients on a course of action.

You may be thinking 'I'm not a PR adviser', but the actions taken, or not taken, by your clients could have implications beyond the regulatory response.

And you're the one advising on the workplace arrangements of your client. If you don't raise concerns at that critical decision making point, who will?

7-Eleven ended up on the front pages of the papers because they didn't act to address the systemic exploitation of employees in their network. In spite of signs and warnings, including from us, for nearly a decade.

Of course the best defence is not having an allegation like that to defend.

You don't need to wait for us, or Adele Ferguson, to come knocking before you work with your clients to ensure their house is in order. You can be advising on best practice from the get go and you can be proactive in supporting your clients to put good systems in place to ensure breaches of the law do not occur.

Advising on best practice does not just mean looking at the law as it is now. You also need to be forward looking and preparing your clients for any changes or shifts in the regulatory environment.

We know the Government has committed to changes to the law like enhancing penalties under the Fair Work Act, including for serious breaches and for creating false employment records. The consequences of breaching the laws will soon be even more serious.

We also know that the Government has committed to new provisions that capture franchisors that fail to deal with exploitation by their franchisees. And so once again, this is likely to make your life a little more difficult. You know these changes are coming and you can be working with your clients to prepare them.

Rather than reacting when a distressed client brings you one of our letters— consider advising them on how to get their house in order so we need never come knocking.

There are some companies, like McDonald's, that are obviously getting the right advice. They've established good systems - like auditing of their franchisees, an employee hotline, and state-of-the-art time recording to ensure that workers get paid for every hour they work.

And these systems have worked. In the two years ending at 30 June 2016, my agency received just 33 requests for assistance from McDonald's' employees out of a total of some 100,000 employees. Of those 33, only 10 resulted in a finding that the worker needed to be back-paid – which they were, promptly, once the issue was referred to McDonald's.

McDonald's didn't wait for workplace compliance issues to blow up in their face – they were proactive in their engagement with us. And this option is open to you and your clients as well.

At the Fair Work Ombudsman we are looking to work in partnership with businesses and to assist businesses to ensure they are meeting their obligations as employers. We offer Compliance Partnerships, which are an opportunity to very publicly commit to taking steps to ensure the business and even its supply chain is compliant with workplace laws. If a formal arrangement isn't for you, then we can also provide advice to you and your clients in a less structured way.

There are going to be times when you're faced with a client whose house isn't in order.

And your value proposition to that client would be well informed by a contemporary view of the regulator.

We have been active in our patch, we have been testing the law and of course we are open about it. You can see our approach in our Compliance and Enforcement Policy, which is available on our website. While I appreciate an active regulator does make your life a little harder, if you understand our approach you will easily be able to advise your clients as to how to avoid getting into serious trouble.

You may have heard that we typically put around 50 matters into court every year. That may seem like a lot. But the overwhelming majority of matters that come to us are resolved informally or by mechanisms other than formal enforcement tools.

In 2015-16 we helped customers resolve over 29 900 workplace relations matters; 94 per cent of those matters were resolved without the need for formal enforcement action, such as enforceable undertakings or litigations. Those matters were resolved through conversations between my workplace advisers and the parties over the phone.

My advisors aim to equip employees and employers with the information needed to resolve matters locally or by providing mediation or other services to assist the parties to resolve their concerns. In many cases, an employer becomes part of that 94 per cent because they engage with us cooperatively to resolve the matter at hand.

We aren't trying to make it difficult – quite the opposite! Those who refuse to engage are more likely to form part of the smaller percentage of cases where enforcement action is taken.

The 6% of matters that end up in the enforcement action pile usually involve vulnerable workers, deliberate exploitation and/or repeat offenders. Whether an investigation proceeds to enforcement action and what that enforcement action looks like depends on what we find and how your client responds.

We don't appreciate encountering employers who are uncooperative, provide us with false information or try to misdirect our investigations. And nobody was ever offered an enforceable undertaking in lieu of litigation that sought to obstruct, deny and obfuscate.

Your client is entitled to your support and defence, but engaging in tricky tactics on behalf of your clients is not going to help them, particularly not in terms of our posture towards you - or the Court's should we all end up there. So I would strongly encourage you and your clients to work with us, not against us.

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

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'. One of my Inspectors 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.

However, the time and wage records were not forthcoming. Over 16 months the Inspector initiated 33 separate and largely unsuccessful points of contact with the employer. This included a formal Notice to Produce documents and records, and a Compliance Notice, both of which were ignored.

Blatantly refusing to engage with us and rectify problems leaves us with few options other than to progress to court. 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. (25, 000)

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

We weren't trying to make this operator's life difficult. We would have preferred to resolve this in a much more straight forward way. Litigation is resource intensive for us too.

The need to engage with us honestly and openly is never more relevant than if your client does become one of the few respondents in our litigations. Most matters that come to us do not end up in court, but when they do, we are very serious about them.

You will find we will progress to a hearing in almost every case. In this respect, we are not a "commercial" litigant. We are not trying to make your life difficult but we are working in the public interest and the public interest of generating a message of general deterrence is not served by

horse-trading a settlement behind closed doors. We put a media releases out when we institute proceedings and we are responsible to the public for the final outcome.

And once we've commenced we're extremely persistent.

In the case of labour-hire company Oz Staff Career Service Pty Ltd, the company Director and Human Resources manager were both penalised for unlawfully deducting \$130,000 from the wages of 102 Melbourne cleaners and falsifying pay records to hide the practice. This case was filed in 2013 and strongly contested.

The company had been put into liquidation so we were left with pursuing the individuals involved in the contravention. We persisted right through to the penalty decision, which was handed down this month. Even though the penalty of \$15, 000 against the individuals involved was far less than the unlawful deductions. I note that under the Government's plans, penalties for false records will be going up.

The first thing you should tell any client involved with us is to make good any underpayments they owe. If the matter is tracking towards court action, it may cause us to change our approach. If it proceeds, it will help to demonstrate co-operation and contrition, which the court considers in setting any penalty.

I would encourage you to read our litigation policy and discuss the approach of the Regulator with your client prior to turning up to any mediation. And if your client finds itself in a room with a FWO lawyer and a Federal Circuit Court registrar, I strongly recommend working with us to craft a comprehensive statement of agreed facts, avoiding a contested liability hearing and perhaps even beginning a discussion around proposed penalty ranges and agreed orders.

The client who comes into the room knowing the clear benefits of this approach ahead of time will more readily recognise the value you have offered by assisting them to that resolution.

By all means – if we've missed something exculpatory then bring that evidence to light. But the client whose lawyer tries to take every technical point, or counsels against co-operation, will likely find a long and expensive contested trial and a more significant penalty at the end of the process.

In a recent matter before the Courts, a Respondent revealed that their solicitor had advised them to file a cross claim and delay making good the underpayments that we alleged to be owed. That advice ended up in the pages of the decision in Fair Work Ombudsman v Global Express Consultancy Pty Ltd. Instead, the Respondent ceased instructing those lawyers and directly engaged with the FWO

and entered into an agreed statement of facts, which delivered a much better outcome for all involved.

The Respondent's lawyers had been involved in drawing up contracts between the employer and their clients. But it was the employer that decided to deprive the workers of their rightful entitlements because of a highly misguided notion about "market rates" applying to its migrant workforce.

Had we thought the adviser was involved in this conduct, they may also have found themselves in court beside their client as a respondent and had Global Express been better advised about its approach to the case from the outset, it may have saved all involved a great deal of time and expense, with the investigation and legal action taking a decidedly different path.

As you would know, under the Fair Work Act it is not only an employer who may be liable for a breach of employment laws. As advisors you need to take care that you do not facilitate or involve yourself in breaches of the law. If you do, and that matter ends up in court, you may become liable for the sins of your clients.

The concept of accessorial liability is not new. Since its inception in the Fair Work Act in 2009, the Fair Work Ombudsman has been using section 550 of the Fair Work Act to link accessories to breaches of the Fair Work Act. What you need to know, though, is that the FWO is still exploring the boundaries of accessorial liability. Human resource staff, day-to-day managers, accountants administrative staff and companies or individuals involved in a supply chain are all examples of accessories that have been found to have been involved in breaches of workplace laws.

I'm fairly sure none of you wants to set the precedent of being the first ever lawyer found to be an accessory to a breach of workplace laws.

Accessories have been ordered to pay penalties, have had their assets frozen and have been the subject of injunctions to prevent future contraventions.

Just this year in the case of Step Ahead Security Services, we achieved our first order from the court that required an accessory – in that case the former company director - to personally back pay employee entitlements on a joint and several basis with the corporate employing entity.

So why did FWO seek these orders against the accessory, Mr Jennings, in this case?

First, the matter involved employees who were considered vulnerable due to the precarious nature of their work in the security industry.

Second, Mr Jennings tried to exploit the legal framework to avoid paying employees their entitlements. After we initiated proceedings against Step Ahead, Mr Jennings commenced proceedings to wind-up the company. While the employees were left without the payments they were owed, Mr Jennings became involved in a new company doing exactly the same work, with the same workers and operating from the same address.

Third, Mr Jennings had an extensive history of non-compliance and his conduct was clearly deliberate. Mr Jennings had been known to us for over a decade, during which time he had been associated with a number of security businesses. During the period 2006 to 2014, at least 13 individuals made complaints to us about their employment with Mr Jennings and his businesses. We audited his businesses 3 times and wrote to him on numerous occasions, including issuing a formal compliance notice and letter of caution. Mr Jennings had also previously deregistered one of these companies once we started investigating for breaches of workplace law.

In the Federal Circuit Court in Brisbane, Judge Jarrett found that Mr Jennings had:

“...demonstrated calculated and deliberate conduct which plainly amounts to a blatant disregard for Australia's workplace laws and the rights and entitlements of [his] employees.”

Mr Jennings was ordered to pay a hefty penalty of \$51,400 after he was found to be involved in the underpayment of eight security guards employed by Step Ahead. Of even greater significance, he was also ordered to personally repay the eight employees almost \$23,000 in lost wages and an injunction was imposed restraining Mr Jennings from underpaying security industry workers in future.

In practical terms this means that should Mr Jennings resume his unlawful practices he would be exposed to a very serious action of contempt of court, in addition to new substantive breaches of the Act.

Our action against Mr Jennings meant that the employees involved received payment of their entitlements, even though their employing entity had gone into liquidation. The case also expanded the scope of the types of orders we can seek against accessories in the future.

And this certainly makes your life more difficult, because the range of orders we are seeking, and the targets of those orders, are expanding every day. We are determined to ensure that people involved

in serious exploitation of vulnerable workers are held to account. And in particular, to ensure workers receive the entitlements owing to them.

If the corporate employer no longer exists or won't cooperate, appears to have insufficient funds, or can't be found, we will look up the supply chain and out to individuals or organisations who were involved in the conduct that led to the underpayments. And we will use every tool available to us, on the statute books and via the media, to right these wrongs.

So let's talk about how you might navigate this more complex world with some scenarios.

I'm sure all of us as legal professionals can recall a situation or have heard a story where a client has asked for advice about how to avoid certain employer obligations. Or has presented a set of instructions that rings alarm bells inside your head. This is where it could all begin to go wrong.

So let me ask you a question. What would you do if your client wanted to engage some cleaners as independent contractors?

You advised them that there is some subjectivity in the legal test but on balance, in the facts of the particular matter, you believe they are likely not truly independent contractors but employees, entitled to be paid under the Cleaning Service Award.

What if you were instructed to draft the service contracts for these people, to look as little like employees as possible? Would you act on those instructions?

And how about a situation where a client instructs that you put their company into liquidation in order to avoid paying employee entitlements after we've started investigating claims of underpayment?

Or a client that tells you they pay their workers in cash and run two sets of payroll records – one 'official' one representing payments aligned with award rates and another that records the real, significantly lower, rates of pay.

I would caution against assuming that legal professional privilege will insulate you from culpability. You don't own legal professional privilege – your client does. Should we become involved in a matter where your advice has been relied upon to support a course of unlawful conduct, your client's interests and your own might begin to separate.

Because at this point your client may be best served by providing the advice they relied upon to demonstrate they had reason to believe they were entitled to adopt the approach. There is always

the risk that when things go wrong, your client may waive their privilege to save their own skin. Or even that they might tell us you have advised on a particular course, when in fact all you have done is put in place an underlying arrangement without asking enough questions.

Are you confident that the advice you have provided is properly confined and contextualised in those circumstances?

The courts take a dim view of employers and their advisors that exploit otherwise legitimate employment structures to avoid paying employee entitlements.

In our litigation against Jooine (Investment) Pty Ltd and its Director, Mr Jae Kye Lee, for example, it was found that Jooine and Mr Lee had deliberately underpaid a worker and breached sham contracting laws by knowingly misclassifying the worker as a contractor, rather than as an employee.

The judge in this case speculated that the contract material appeared to have been prepared by someone who was familiar with employment law. The FWO had not brought a claim of accessorial liability against an advisor in this case and did not have specific evidence that an advisor had drafted the contract documents. Nonetheless, the Court saw fit to send a strong message to those advisers who would construct exploitative arrangements for their clients, stating that:

“This can only be seen as a deliberate attempt to avoid the substantial and protective provisions of the FW Act. Consequently, the penalty made in this matter should be a strong and specific deterrent to Mr Lee and to others who seek to pursue this type of contracting versus employment structure. The deterrent should also extend to the advisors who have facilitated the orchestration of these scams, to prevent the further proliferation of such advice and facilitation.”

This is exactly the sort of situation where a lawyer is exposed to being found to be an accessory. In the modern world, the nature of the problems that come through your door are perhaps changing.

Is your client exploring a new business model, engaging in the gig economy, taking an entrepreneurial approach and creating a new offering in the market? Or are they simply creating a structure that is depriving their workers a fair day's pay? So what do you do?

What do you do if that client comes through the door and asks you to dress their duck in the feathers of a chicken? Your client doesn't need to accept your advice but, equally, you don't need to follow every client instruction. You are professionals with ethical obligations and it is you that will need to make that call.

The modern workplace relations adviser has a real world and holistic view of their role. They understand the broader context and how to work with my agency; they give robust advice and they can spot a duck from a mile away.

They also understand the reputational as well as legal risks associated with their work and know that their client's reputation can be a valuable asset, just as important as a clean rap sheet or balanced books.

They appreciate that the best way to resolve disputes is to work with us – to engage early and cooperatively about any problems that arise.

And they are also protective of their own reputation and are wary of dealing with clients who are deliberately setting out to disguise breaches of the law.

And if you adopt this approach, then your life will not be so difficult.