

“Good Practice or Malpractice – How the Fair Work Ombudsman sees the on-hire industry”

Recruitment and Consulting Services of Australia Acumen Speaker Series

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Introduction

Good afternoon everyone. Thank you for inviting me to speak to you today.

I would like to begin by acknowledging the Eora (yura) people who are the Traditional Custodians of this land upon which we meet. I would also like to pay respect to the elders past and present of the Eora nation and extend that respect to other Aboriginal and Torres Strait Islanders who are present.

An ever changing labour market

The labour market today is presenting more options than ever – for workers and for those who need them. It’s been a long time since the only option for a person in need of a worker was to employ one themselves.

In an ever changing global economy, businesses are increasingly looking for ways to innovate and be more productive. And workers are looking for choice as well.

People want autonomy and control over their lives. While many prefer predictable income and routines of traditional full time employment, the option of working for yourself appeals to many. (In fact, there were almost 1.3 million non-employing entities operating at 30 June 2015, representing 61% of actively trading businesses). Some even combine the two.

How many of us have had an Uber driver who drives others around after university, or on weekends when they aren’t at their 9 to 5 job, and who says they love that they can work whenever they want?

There are of course swings and roundabouts to these arrangements. Working for yourself also means no one else taking care of your superannuation or paying you to stay home when you are ill.

How many people in your labour supply relationship?

More and more we are seeing working arrangements where there are more than two people in the relationship:

- A skilled worker, placed in a business to fill a short term need by an on-hire firm;
- Cleaners provided to a major hotel under an outsourcing arrangement;
- A young person in a uniform with a logo familiar throughout the world behind the counter at my local burger outlet;
- A person who comes to do my garden matched up to me via an App on my phone;
- A cyclist in a pink or blue uniform who delivers my Thai take- away matched with my favourite local restaurant by a third-party using technology.

Triangular relationships have been around for a while. Some have emerged more recently than others. The market is responding to business and consumer demands for flexibility, choice and intermittent needs for labour.

And some of the more recent arrivals, filling a niche or creating a whole new market, may also present challenges to our traditional approach to “employment”.

And while many of these models are longstanding and entirely legitimate, we, at the FWO, are seeing such models feature more and more in our compliance work.

The risks of not knowing enough about the relationship

Whether it’s franchising, outsourcing or labour hire, we are seeing very vulnerable workers providing labour in arrangements of questionable lawfulness, where the beneficiary of the labour is not directly employing them. In situations where this entity may not have any awareness of the work arrangement in place. And importantly, may not know whether the workers are being paid in accordance with workplace laws.

Legally, the recipient of the labour is not responsible for the entitlements of someone else’s workers. But we’ve seen that the court of public opinion has a different judgement, especially when it comes to light that exploited workers are providing their labour for the benefit of an established, profitable brand.

- Backpackers picking fruit on the harvest trail, working for well-meaning growers providing our fruit and veg to our supermarkets; but sourced by dodgy “labour hire” entities that operate out of a van, with a first name and a mobile phone number the only identifying information¹;
- International students systemically underpaid by a profitable and well-known convenience store franchise²;
- Visa holders working on the factory lines to provide Lilydale and Steggles chickens to supermarket fridges, working excessive hours and being paid well under lawful award rates³;
- Or packing cheesecakes for supermarkets or vitamins and complementary medicines for chemists⁴;
- Cleaners, picking up the mess left behind by gamblers at Crown Casino⁵;
- Or, housekeepers at Oaks hotels who have deductions made from their wages without their authorisation, or who are engaged as ‘contractors’⁶.

These are not headlines that usually feature RCSA members. Or if they are, they don’t remain members for long!

The ‘on-hire’ model

The traditional ‘on hire’ model used by many RCSA members is perhaps one of the most long standing arrangements for delivering workers under ‘triangular arrangements’ . Historically established by operators familiar with the complexities of the award system and which invest in getting their human resource processes right.

¹ Harvest trail, see *Lettuce farm contractor signs workplace pact after short-changing almost 100 overseas workers*, 28 June 2016, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/june-2016/20160628-tsh-eu-presser>, or *Queensland Labour hire operator allegedly underpaid overseas workers \$77,000*, 13 January 2016, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/january-2016/20160113-maroochy-sunshine-litigation>

² 7-Eleven, see *Brisbane 7-Eleven outlet faces Court action*, 18 November 2016, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/november-2016/20161118-s-and-a-enterprises-litigation>

³ Baiada, see *Statement of Findings- Baiada Group*, 18 June 2015, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/june-2015/20150618-baiada-group-statement-of-findings> v

⁴ Global Express Consultancy Pty Ltd, see *Penalty for employers who viewed Asian workers as “younger, cheaper and faster” than locals*, 21 October 2016, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/october-2016/20161021-global-express-penalty>

⁵ Oz Staff Career Services, see *Penalties for ‘appalling’ conduct in unlawfully deducting \$130 000 from cleaners’ wages*, 24 October 2016, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/october-2016/20161024-oz-staff-penalty>

⁶ Oaks Hotels and Resorts Ltd, see *Cleaners at Oaks Hotels & Resorts back-paid 1.9 million*, 9 November 2016, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/november-2016/20161109-oaks-cleaners-back-pay>

We recognise that the on-hire industry helps business place labour efficiently and find the best person for the job. The industry is an important contributor to the economy and employs hundreds of thousands of individuals.

It ensures that business has access to a labour force with the skills it needs at the point it needs them. This is critical in areas of the economy where business requirements fluctuate.

But it's probably not lost on you that the legitimate and longstanding business model the RCSA represents risks being tarred with a different brush at the moment.

Protecting lawful labour hire/on-hire operators

The term "labour hire" is often bandied about alongside other terms: "exploitation"; "visa holder"; "dodgy".

Increasingly, we are seeing an appetite for some operators to engage in high risk behaviour and questionable workforce models to gain efficiencies and a competitive advantage.

Recent state government Inquiries into "labour hire" have found that exploitation of workers, particularly migrant workers, in the industry warrant new regulation.⁷

Of course, "labour-hire" or "on-hire" operates across a range of industries. Many of which have a good reputation for compliance with work laws. But there are worrying trends in some others.

It is low-skill, labour-intensive work performed by vulnerable workers in highly competitive markets where the FWO has seen the more significant issues arise. And often, we see workers on a visa in these jobs. Indeed, visa workers featured in 76%⁸ of the matters we took to court last financial year.

Cleaners; security guards; visa workers picking fruit and vegetables on the harvest trail come to mind.

Applying basic risk management principles, I suggest those businesses operating in these areas have more to be concerned about. And if they do not take steps to ensure their workers are paid correctly, it may impact on reputations of all the parties involved in the procurement and supply of the labour; and indeed entire industries and regions.

⁷ The QLD Inquiry did **not** recommend licensing. The Committee was made of Government and non-government members, and the non-government members were not supportive of licensing. The Government members issued a Statement of Reservation indicating their support for a licensing regime. The SA Inquiry recommended that all "labour hire" contractors be registered. Victoria recommended that only specific industries (horticulture, cleaning, meat processing) be registered.

⁸ <https://www.fairwork.gov.au/annual-report/02-performance-report/enforcement-outcomes>

Those legitimate and prudent operators who have been in the business of supplying labour long term – are at risk of being tarred with the same brush.

We have a mutual interest – the legitimate industry organisations such as the RCSA and the FWO – in ensuring that those who source labour are able to distinguish between a legitimate provider of workers who is ensuring the workers receive their lawful entitlements and....the “dodgy” ones.

Lifting standards: shared risks and opportunities

The users of the labour, the workers and customers should be able to make informed purchasing choices based on assurances that workers are being paid correctly.

With that goal in mind, we know that FWO must work collaboratively with the business community and industry stakeholders to share information and educate employers and employees about their rights and obligations.

The RCSA and other industry groups are central to this effort.

I am pleased to partner with the RCSA to educate those in the market for labour to make ethical and lawful choices, provide them with information on how to go about it, and point out the benefits of doing so.

In 2013 the FWO and RCSA jointly produced a fact sheet – *Understanding On-hire Employee Services – A Guide for On-hire Businesses and Host Organisations*. Given recent developments, this may benefit from an update identifying risks and tips for those in the industry.

Last week Charles Cameron called out the poor practices of ‘dodgy labour contractors’ and the risks involved for host businesses of engaging “Jimmy the Fixer’ rather than a professional labour hire firm’⁹.

Charles’ comments will resonate with many in the community who feel that the beneficiaries of labour should take steps to ensure their supply chain is compliant.

And certainly, if they suspect it is not, they should make appropriate inquiries. If not because it’s the right thing to do, to manage their risk – the reputational as well as legal risks.

⁹ RCSA’s web article titled *Know who is in your supply-chain for labour says RCSA*, <http://www.esicode.com/copy-of-cs1-placement-sham>

The FWO is increasingly using accessorial liability provisions to hold all responsible parties legally to account. Last year, 92%¹⁰ of the matters we took to court involved an accessory as well as the person directly responsible under the law for the conduct in question.

FWO will use these mechanisms to ensure that breaches of the law are remedied, including where underpaid workers are left with an employing entity with no assets.

And we are holding to account a wider range of persons involved in breaches: Directors of companies, payroll and managerial staff, external advisers and, yes, other entities in the supply chain.

We are also seeking a broader range of orders against accessories. Courts have shown a willingness to make accessories audit their business and personally pay back workers.

But some others, especially those procuring labour, might respond to Charles' comments differently. They might say: "how am I supposed to know?". That's a fair question. How are they supposed to know what someone else pays their workers?

And it's one that we and responsible organisations and partners need to be able to answer.

It's important that we support those who want to take this approach with the right tools and knowledge to do so.

Responsible players are responding to this need. One such example we have come across is associations in the horticulture sector, such as the NFF and Growcom, which have designed products to assist growers with the engagement of labour hire businesses.

And FWO's tips for growers sourcing labour hire¹¹ have been very well received as practical support to help farmers procure the workers on their farms and hire them under compliant workplace arrangements.

We know how much farmers need the right sort of labour at the right time to ensure they can get their crops off the trees or vines and on their way in the journey that puts food on all our tables. Our work on the Harvest Trail and examining the dynamics the 417 visa have told us this loud and clear.

And we know that most growers and farmers want to ensure their labour is paid correctly. Their reputation and that of their region is tarnished when stories arise of underpaid workers in their fields.

¹⁰ In the 2015-16 Financial year, 46 out of 50 of the matters FWO filed in court (92%) sought orders against accessories.

¹¹ <https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/harvest-trail-campaign#labour-hire>

Our supporting material encourages growers to do their due diligence, starting with some simple questions about ABNs, and the arrangements in place to pay the workers. While these things may be a normal part of business for RCSA members, they are the sorts of things that to some, new to the world of procuring labour, haven't thought to ask. And this exposes them as well as their workers.

We are developing further material that will assist businesses to take responsibility for their workers – not just those who they directly employ but those that work with them under triangular relationships like on-hire, outsourcing and the like.

New options that enable businesses to take responsibility for their labour supply chain. Options that can be tailored to the industry and business in question.

You can expect us to focus on things like, understanding the lawful price of labour by checking award rates on our online pay tool, and including clear contractual requirements for those supplying labour to comply with work laws, with consequences if they do not.

There are other things that businesses should consider, especially if they are engaging in the sorts of higher risk markets I've mentioned.

And it's not just work laws you need to worry about

Are the workers permitted to work in Australia? Because if the workers are on a visa, work conditions may apply. Not all visa holders are entitled to work.

And in addition to Fair Work Act sanctions, there are offences and penalties that apply if a person employs a visa holder outside of their visa conditions.

Under the Migration Act if you employ or refer a person for work who is not allowed to work in Australia, even if it is through a third party supplier or contractor, you may be liable for penalties. There is no need to prove there was an intention to do so.

You could be issued with an infringement notice, a civil penalty, or even charged with a criminal offence¹².

If you knowingly or recklessly allow a visa holder to work in breach of their conditions you can be sentenced to up to two years imprisonment or fined \$21,000 for an individual or \$108,000 for a body corporate.

¹² <https://www.border.gov.au/News/Pages/Hiring-legal-foreign-workers.aspx>

And in aggravated circumstances, where worker exploitation is involved, the criminal offence goes up to five years imprisonment with a penalty of \$54,000 for an individual or \$270,000 for a body corporate.

Last week we saw the media cover a story of visa holders working on the Harvest Trail for well under lawful minimum wages. These workers purportedly had no work rights at all.

Backpackers and student visa holders have certain conditions on their work rights. Those engaging visa holders need to check whether those individuals have a right to work and ensure they don't engage them in a way that results in them breaching their visa conditions.

And they can do this online, using the Department of Immigration's Visa Entitlement Verification Online (VEVO) system. An organisation can register to search VEVO, or can require a worker to email their visa status direct from VEVO to confirm they are working lawfully.

The tool is there, and those engaging labour should use it.

If they do not, they put themselves at risk. And the worker too: potentially compounding their vulnerability because if they have breached a visa condition they are less likely to seek help about their work situation.

Working with the RCSA

So regulators working with industry will only be more important. Because only by working together can we build a culture of compliance throughout Australian workplaces.

Which is why it's so pleasing that we've already formalised our relationship with the RCSA, in signing a Memorandum of Understanding earlier this year. This is a fantastic development and one which we think will deliver strong outcomes for the FWO, the RCSA and the community more broadly.

Through our MOU, we will share information on issues relating to the on-hire and broader recruitment industry to facilitate a well-functioning labour market in Australia and to protect the rights of workers and employers.

We will keep the RCSA directly informed about our significant education, compliance and enforcement activities and outcomes involving employers, industry sectors or regions of mutual interest.

And we ask you to keep us informed about what you are seeing and hearing – particularly about competitors in the labour supply market who are not playing by the rules. Ripping off vulnerable workers and undercutting your legitimate business.

I commend the work of the RCSA in looking to ways to ensure the legitimate on-hire industry is providing appropriate employment standards and building best practice in the industry.

Conclusion

And so we see that the world today delivers more options than ever. But there are more risks as well. And, as always, opportunistic, devious and dishonest operators that will seek to exploit these markets for their own profit, with little care of the consequences for others: Their workers, or the people who rely on them for workers. These are not the majority, but they are the ones making headlines. And they are having a detrimental impact – on individuals, on our labour market and our reputation.

The on-hire industry is an established player within the landscape of the Australian labour market. You are well placed to stand with us to stamp out this conduct.

By working together, we can support businesses to source workers under fair and lawful arrangements. And ensure a fair and informed market for all those operating in it.