

## **Regulation of Work and Workplaces:**

The Fair Work Ombudsman's Role in the Development of Workplace Law

**Australian Labour Law Association National Conference 2016**

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It is a pleasure to be following Peter Harris up onto the stage.

In his role as Chair of the Productivity Commission, it's his job to deal with the big questions.

- Is the Fair Work Act achieving its stated aims?
- What is the impact of the Workplace Relations framework on equality and productivity?
- What capacity does the framework have to adapt into the future?

There are plenty of people with an opinion on these questions.

Work has changed a lot in 100 years and our framework has adjusted in many ways, though many of its core principles remain grounded in those 100 year old foundations.

Those foundations have been built upon and built upon again until, today, we operate under a national workplace relations framework with a national workplace relations regulator in the form of the Fair Work Ombudsman.

I'm a regulator. It's not my role to be proffering answers the big questions. I enforce the law as I find it. Impartially and in the public interest.

But it's not as clear cut as it sounds

Because the way a regulator goes about overseeing her framework is relevant to those big questions.

If the laws are administered in a way that is out of step with community needs and expectations, it is likely to have a detrimental impact on the integrity of the framework. Our regulatory posture, therefore, does impact on the answers to the big questions about whether the law is delivering what the country needs today and into the future.

And so I may not be offering up comment on the big policy questions, but we at the Fair Work Ombudsman need to consider our own questions every day as we go about our work. Deciding how and when to intervene in the thousands of matters that come to us each year.

And I can tell you that this is a real balancing act. With respect to each issue, we ask: What is the degree of harm? How much support do the parties need to resolve the matter? Is one or other party especially vulnerable? Was the conduct a deliberate breach of the law? Will the parties involved work with us to resolve the problem or must we resort to using our compliance tools? What level of intervention is in the public interest here?

To what end might the Fair Work Ombudsman put a matter into court or ask an entity to enter into an enforceable undertaking, as opposed to working with the parties to assist them resolve the issue...as we did in 94% of the cases we dealt with last year?

We provide guidance on these questions in our Compliance and Enforcement Policy. But we need to weigh them up with respect to each and every matter that comes to us.

Employers are entitled to access legitimate business choices: labour hire, outsourcing, franchising, independent contracting and their chosen corporate structure. All options that enable those who create jobs to structure their business in a way that is efficient and profitable.

And yet we also know these structural devices can be used by unscrupulous operators to avoid employee entitlements, reduce labour costs at the expense of employees and create an unfair and unlawful competitive advantage.

There's a story that is becoming uncomfortably familiar. Vulnerable workers performing low skilled work being exploited in tight labour markets that often feature outsourcing and competitive procurement. And multiple levels of contracting where the middle operators skim money out of the system that should have been put into the hands of the workers.

We at the Fair Work Ombudsman are responsible for protecting vulnerable, exploited workers... but there may be occasions where some parties may judge us to be inhibiting innovative new systems that deliver choice and opportunity to workers and consumers alike.

The Fair Work Ombudsman has to balance these different drivers and make a call about what level of intervention is in the public interest. So how do we manage this balancing act?

In 2015-16 we had over 25 million customer interactions...*25 million!* Obviously we didn't take 25 million employers to court...the majority of this work comes from our core business of providing information, tools and advice to employers, employees and their representatives. We have a lot of great resources on our website – and these are being widely used.

In 2015-16 we had:

- over 15 million visits to [fairwork.gov.au](http://fairwork.gov.au);
- over 5 million calculations on our Pay and Conditions Tool;
- over 4 million downloads and views of our fact sheets, guides and templates;
- nearly half a million calls to our Fair Work Infoline and Small Business Helpline; and
- tens of thousands of email subscribers, online enquiries and online learning centre courses commenced.

We've asked the public interest question and we've come to the conclusion that the most effective way to promote compliance with workplace laws is to ensure employers and employees are well informed.

While some people come to us for information, others come wanting a higher level of assistance where something has gone wrong in the workplace.

In 2015-16 we helped customers resolve nearly 30,000 workplace relations matters and the vast majority, 94 per cent, were resolved without the need for any type of enforcement action. Often, resolving the issue is as simple as providing the parties with the right information and supporting them to settle the issues between themselves.

Most employers we encounter don't set out to exploit their employees. They come awry because of a lack of understanding of workplace laws as they navigate what can, at times, be a complex system. Most people want to do the right thing and don't need to be taken to court to address a problem that has arisen.

Most people who come to us don't end up a precedent in a court case. But today we will spend more time talking about those who do.

Mostly, these are individuals and entities who do not want to do the right thing.

I can't recall a case that we have put into court in recent times that did not involve deliberate breaches of the law. Usually they also involve vulnerable workers and a respondent who we have warned before but who hasn't been willing to work with us.

These matters involve the most serious conduct that we encounter, which is why they are given the most serious treatment.

Today Janine Webster and I are going to talk how we are pushing the boundaries of the existing law. We think, in the public interest, and as the community expects us to.

We look to leverage laws across the statute books, in the Fair Work Act and elsewhere, and other tools, such as appropriate use of the media, to ensure there are visible consequences for those who deliberately exploit the vulnerable.

And in a sign that our actions are aligned with community expectations....and perhaps that the law has fallen a little behind, we have seen the Government announce changes to the law to enhance our capacity to protect vulnerable workers.

Take something simple like record keeping. We know that small businesses are burdened with a range of Government regulation and acknowledge that keeping employment records feels like more red tape for many employers. We take a common sense approach to how we enforce these laws. Most employers who have made an error are trying to do the right thing but haven't appreciated the level of detail they need to retain or they've got some detail like the superannuation fund wrong.

Where parties cooperate with us this is easily fixed, often informally.

But we also see cases where employers hide behind the fact that there are no employment records, or false records, making it near impossible to assess, to the satisfaction of a court, what a worker was entitled to. This was one of the challenges of the 7-Eleven cases, where the records on their face appeared to be impeccable...they just weren't recording the real number of hours employees had worked.

Indeed, 24 of the 50 cases we put into court last year – nearly half of all our matters – involved record keeping breaches. And 16 of them – nearly a third of that 50 –involved allegations of false or misleading records. Right now we have 18 such cases before the courts.

And the maximum penalties the Fair Work Act applies to these individuals are low - \$3600 per breach.

It wouldn't take long for a business to save much more than that in unpaid wages.

In a recent case, Oz Staff Career Pty Ltd, we had a fully contested matter where an employer had falsified records to cover up \$130,000 of deductions from Melbourne cleaners' pay packets. The company had been put into liquidation. So we were left to pursue action against the Director, who was known to us, and his Human Resources manager as accessories.

While the court handed out penalties around \$15,000, this was a long way short of the value of the deductions.

Hence we are very pleased to see the Government committing to lift the maximum penalties for falsifying records. Because keeping records is not just red tape, it is the bedrock of compliance with workplace laws. Without records and pay slips an employee is effectively disempowered from asserting their workplace rights. And the community has said that it will not stand for that sort of behaviour.

And while some very serious matters involve record keeping breaches, most concerns in this area are not resolved by litigations. Last year, we issued 573 Infringement Notices – on the spot fines. Many more were resolved without the need for any formal enforcement.

We apply the appropriate tool for the situation.

There's another tool that we've been deploying more and more in the more serious cases we find.

As you would know, section 550 of the Fair Work Act extends responsibility for contraventions to others who were 'involved' in the contraventions. This means that we have the scope to hold individuals and entities outside of the direct employee-employer relationship to account, where they have been involved in contraventions of workplace laws.

Accessorial liability isn't new. It was used by the Fair Work Ombudsman's predecessor and at the Fair Work Ombudsman we have been using section 550 and section 728 of the Workplace Relations Act since our inception in 2009.

We are finding it to be a tool we regularly reach for – last year, over 90% of the cases we put into court included an accessory as a respondent. Where we can prove to a court that a person has been materially involved in a breach of workplace laws, it is our view they should be held to account.

And we've been expanding on the traditional application of section 550, applying this tool beyond those within an employing entity, such as company Directors. In particular, we consider who is

influencing the settings, in a supply chain or network, and the extent they are culpable for the outcomes.

And it all started with trolleys.

You probably know the story of Coles trolley collectors.

In 2012 we commenced legal proceedings against two sub-contractors operating at several Coles sites. We alleged that these sub-contractors had underpaid 10 trolley collectors over \$200,000; paying them less than \$7 an hour for their work.

We named Coles Supermarkets Australia as a respondent to the litigation because we believed that Coles knew the trolley collectors were being underpaid and failed to take any effective action to require its trolley service providers to comply with workplace laws.

With such a large and established company benefiting from the labour of these workers, we felt that it was in the public interest that Coles be held to account. This was an intervention that the company initially resisted, adopting a posture that is familiar to us and not without foundation. They were not the employer and it was not, they asserted, their responsibility to ensure these workers were paid correctly.

The legal proceedings continued through 2013 and in 2014, under enormous pressure from the media and the Australian community, Coles stepped up to accept moral and ethical responsibility for workers in its supply chain, by entering into an Enforceable Undertaking with us.

Coles agreed to backpay its contractor's employees, conduct broad-ranging compliance audits, re-train its relevant people and ultimately bring much of its trolley collection services in-house.

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.

In our view, this case was an important step towards large businesses, like Coles, taking responsibility for their supply chains.

But we were pretty sure we hadn't reached the boundary of accessorial liability just yet.

Company Directors, 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.

We have up until recently confined the orders we sought against accessories to seeking penalties. We had not sought to recover back-pay from an accessory.

Not anymore.

The first person to experience our new approach was Mr Owen Jennings, the former director of now wound-up Gold Coast security operation, Step Ahead Security Services.

The case saw Mr Jennings pay a hefty penalty of \$51,400 after he was found to be involved in the underpayment of eight security guards by the employing entity for which he was responsible.

But of even greater significance, he was also ordered to personally repay the eight employees almost \$23,000 in lost wages, in what was (for the FWO) a precedent-setting decision.

This case involved the classic criteria we look for when deciding whether to take action against an accessory.

Firstly, the matter involved vulnerable employees.

Secondly, Mr Jennings tried to exploit the legal framework to avoid paying employees their entitlements. We considered it was appropriate to hold Mr Jennings personally liable when he wound-up the company after we initiated proceedings against it. While the employees were left without the payments that they were owed, Mr Jennings was involved in a new company doing

exactly the same work, with the same workers, operating from the same address. His son was the director of the new company, and Mr Jennings was a 'consultant' to that company.

Thirdly, Mr Jennings also had an extensive history of non-compliance and his conduct was clearly deliberate. He had been known to us for over a decade through his previous security companies and had previously deregistered a company when we started investigating. The public interest demands that Mr Jennings should not be in a position to repeat this conduct in the future.

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 the first respondent's employees.*

Our action against Mr Jennings shows that we will seek to cut off the escape route of winding up a company if the purpose behind that action is to avoid having to back-pay workers.

And it opens the door for us to seek orders to make a range of accessories personally liable in the future – directors, contractors, franchisors and human resources managers included.

And rest assured, we also refer these sorts of examples to the Australian Securities and Investments Commission. You have to ask whether individuals such as Mr Jennings, who blatantly seek to avoid their legal obligations in this manner, should be entitled to continue to act as a Director and benefit from the protection of the corporate veil.

And hot off the press, in a decision just a couple of days ago the Federal Court has found for the first time that a master franchise was an accessory to breaches of workplace law by one of its franchisees.

You may have read in the media that we had brought a case seeking a range of orders against a frozen yogurt outlet, Yogurberry, in the World Square shopping centre in Sydney's CBD.

We alleged that four Korean backpackers were underpaid a total of \$17,827. We took the direct employer to court. But we also sought orders against accessories through the franchise network – the head company and master franchisor, the payroll company and a manager of the head company – for their alleged involvement in the underpayment of subclass 417 visa holders at the World Square outlet in Sydney.

We didn't just seek penalties or orders for back pay. In fact, we went well beyond that by asking the court to place some strong obligations on the head company – requiring a professional external audit of all of the stores throughout the entire retail chain and requiring head office to commission workplace relations training for their managers.

We sought these orders because, in our view, the underpayment problems were more widespread than just the World Square outlet. And in our view, the public interest demanded that we look not only to rectify past wrongs, but intervene in a way that would bring about future compliance.

And we got the outcome we were looking for.

The Court handed down penalties of \$146,000, nearly half of which were imposed on accessories, including the master franchisor. Not only that, but the court has imposed an order for a national audit of the Yogurberry chain.

This is the first time the Fair Work Ombudsman has secured penalties against a master franchisor for being an accessory to the exploitative practices of one its associated companies.

Perhaps even more significantly, the national audit across the Yogurberry chain requires the master franchisor to take extensive steps to ensure future compliance and will deliver real outcomes for workers that might otherwise have been exploited.

We hope that this decision encourages franchises and other networks to consider whether they have done enough to ensure their businesses are complying with workplace laws. Noting that, even if you don't think there is a high risk of ending up a respondent in our matters, you may nevertheless find yourself on the front pages of one of our national papers if you fail to meet the community's expectations in this regard.

As always, the Fair Work Ombudsman is prepared to work with any business wanting to know how to tackle this issue, acknowledging that the direct employers themselves must not be allowed off the hook if they are engaging in exploitative conduct.

We already have other proceedings underway where we have alleged that large businesses were involved in the underpayment of employees in their supply chain. In one case that may be of interest to this Melbourne audience, we have alleged that ISS Group, a multi-national corporation with operations in more than 45 countries, was an accessory to the underpayment of cleaners at the MCG during the 2014 preliminary final between Port Adelaide and Hawthorn.

The cleaners were employed by contractors of ISS Group. ISS Group is a respondent in this case because we believe its senior managers did not act, despite having knowledge that the cleaners were being paid insufficient hourly rates to meet Modern Award entitlements.

Section 550 has proven to be a vital tool in our toolbox. We have reached for this tool to ensure the framework delivers remedies in cases of deliberate and systemic exploitation of vulnerable workers. We acknowledge that some may see this as an expansionist approach for regulator. But the community expects that the law will have an effective response to some of the serious stories we have seen in our court cases in and the newspapers in recent times.

I would be failing in my duty if I did not look for a way to intervene in such matters, or failed to leverage the current laws to the fullest extent. To any who may be concerned about our approach with respect to those involved with businesses that are underpaying or exploiting their employees I would say – there's an easy way to avoid this. Don't involve yourself in a breach of the law. If you find yourself in this situation, as an adviser for example, then you need to seriously consider stepping out of that scenario and coming to us and telling us about it. If a mistake does happen or a problem is unearthed – we are always willing to work with businesses who want to do the right thing and get the settings in their organisation right.

We welcome the Government's election commitments to enhance the laws with respect to vulnerable workers. These changes will give us new and enhanced tools that we will use in a proportionate and balanced way.

Never has it been clearer that workplace compliance is everybody's business. We will continue to use all the tools at our disposal to prevent the deliberate and systemic exploitation of workers, including continuing to see how far section 550 of the Fair Work Act can go.