

Leadership in the workplace is looking 'above the line'

Natalie James to the Australia-Israel Chamber of Commerce SME Executive

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Thank you everyone for being here today. I'm very pleased to be able to talk to this group about leadership in the workplace and I'd like to start by acknowledging the traditional owners of the land on which we're meeting today, the Gadigal people of the Eora Nation, and pay my respects to their Elders past and present. So who is the Fair Work Ombudsman? We are Australia's national workplace relations regulator. We provide education and advice and assistance to people throughout the country on all employment matters. It's our job also to impartially enforce workplace laws.

But in addition to this, it's part of our legislative remit to support productive and cooperative workplace relations to help businesses make good and lawful choices in their workplaces. A significant part of this is the duty that we have to provide reliable information and advice. We take more than half a million phone calls every year, more than 11 million visits to our website and around 24,000 requests for assistance each year. These requests usually come from people who want our help to resolve a dispute that has arisen in their workplace.

And what is it that people come to us about? Well the number one thing is wages. What should I pay my staff? What am I entitled to be paid? This most fundamental and basic question occupies most of our time and it is the number one thing that people come to us for help around. This is a reflection of the complexity of the system. For employers who are grappling with the basics, this is the thing that they call us about.

Many of them are small businesses, overwhelmed perhaps by the range of regulatory

obligations confronting them. They are struggling to do the right thing. These employers are what I would describe as working 'on the line' of compliance. They generally mean well. They want to comply. They want to do the right thing. They probably need help to get the basics right and they certainly want to stay out of trouble.

So what do we do to help these people? Well for a start we have our Small Business Helpline. This is a priority advisory service. When small businesses choose this option on our Fair Work Infoline, they will probably wait for around five minutes for expert advice. The Small Business Helpline has taken over half a million calls since its launch in December 2013. We also have an online pay tool, our newly released PACT, Pay and Conditions Tool, which enables you to calculate all the different rates of pay in a mobile friendly unit. You'll get a reference number and you can save the results and send them to yourself if you like. You can also save them in your own space in your own account on our website.

Another thing we do to help these businesses who are struggling to be 'on the line' is we respond sensibly and proportionately if it happens that they do get into trouble, if problems do arise in their workplace. If employers have misunderstood their obligations, we start with information and advice and we encourage self-resolution. A conversation in the workplace between the employer and the employee, we find, can resolve many of the problems if that conversation is taken with the benefit of good advice and good will. This ensures that things get sorted out before they escalate and hopefully means that the parties retain their employment relationship.

If a formal request for assistance is made to us, then the first thing we do is consider the capability of the employer and the employee. Are there particular vulnerabilities at play here, for example? Is the business a small business, and do they have access to HR advice? What's their background? One in four of the requests for assistance we receive are from a person under the age of 25. One in ten is a visa holder. These employees are particularly vulnerable and we may need to take extra steps to make sure that they're able to get help to resolve the matter that has arisen in the workplace.

And we resolve most of these issues informally, for example, through mediation over the telephone. There is generally no need for a formal investigation. The way we go about managing the 24,000 or so requests for assistance every year is set out in our recently released Compliance and Enforcement Policy, and that also explains the sorts of cases where we do reach for our formal compliance tools such as enforceable undertakings and litigations.

And litigation – legal action – is reserved for the most serious of matters. People deliberately working ‘below the line’ are people who may be knowingly underpaying often vulnerable workers. When we encounter someone who refuses to engage with us to enable us to fix the problem, we pay particular attention to that. It's something that we don't take very kindly to and it's often an indicator that we're dealing with a business that is engaging in deliberate conduct, perhaps even exploiting vulnerable workers as part of their business model to obtain an unfair competitive advantage by cutting labour costs unlawfully. And perhaps this is in a highly competitive labour market, perhaps one that relies heavily on low skilled workers who are more likely to be vulnerable.

We make no apologies for actively promoting the outcomes of our enforcement activity. This sends a clear signal that there are real and costly consequences for people who deliberately fail to comply with workplace laws, and who deliberately work ‘below the line’. Now I assume that most of you in this room are not deliberately working below this line. At the very least I would expect that you're aiming to be ‘on the line’ otherwise I doubt you would be here listening to me today. But are you sure you're hitting the mark? You can fall ‘below the line’ without even realising it. Even larger businesses with systems – good systems in place – can fall foul of small mistakes.

For example, we recently dealt with a very large company that provides aged care services across four states in this country. This company, Aged Care Services Australia, had carried out a review of its payroll system and discovered that overtime payments were not being paid correctly. The company was paying employees for the hours worked but the appropriate

loadings and penalty rates weren't being paid for the overtime hours. Over a period of about six years, this affected 4,850 current and former employees to the tune of \$4.8m. That was a pretty big mistake flowing from something really quite simple – failure to put proper systems in place.

It had to disclose this publicly on the stock exchange. The company voluntarily reported the situation to us and they did so promptly. They cooperated with our inspectors. And so the upshot of all this was an enforceable undertaking. This is an agreement with the company that is enforceable in a court of law, that they will take a number of steps including updating their governance and reporting systems and installing a new electronic time and attendance system. So you can see keeping up to date is important, otherwise you might find yourself falling below that line.

Another example where we see people accidentally trip up is around the time of the minimum wage review. We find many employers are paying rates of pay that were right once but as no doubt all of you know, every year the Fair Work Commission (the tribunal, our sister regulator) reviews minimum wages. This happened just a couple of weeks ago. The Fair Work Commission increased minimum wages by 2.5 per cent, up from \$16.87 an hour to \$17.29 an hour. This might not seem like much of a shortfall to underpay someone, but extrapolated over an entire workforce the underpayment may be significant. It adds up and you can see how a small oversight could lead to a large dollar gap. So it pays to check and to keep up to date and to audit your processes regularly.

And don't just assume that because what you're doing is the same as others in your market or industry, that that means that you're okay. To give you another example, let's look at interns. You may think you're giving a young person an opportunity or some valuable work experience perhaps. Unpaid work arrangements in some industries are common and they can be okay provided they have been brokered as part of a proper educational training course requirement. But it may be that you're simply not paying someone who's in an employment relationship with you.

We have taken such matters to court. The recent case of Crocmedia involved underpayments of \$22,000 and a penalty of almost the same amount. This involved two young people who had worked for six and 12 months respectively as volunteers for a radio station producing radio programs. It's pretty clear that the company was getting value out of these individuals. They weren't just 'work experience kids' doing a couple of weeks to get short term experience. It was for the company's benefit and they paid the price.

We have a number of online resources that can help you with this and many other issues, to help you stay 'on the line'. But what about working above this line? We spend a lot of time dealing with people who are 'below' or 'on the line' but isn't there value in doing more than the minimum, in what we call, working 'above the line'? We certainly say yes and that that sort of leadership pays dividends. Part of our role is to encourage productive workplaces. 'Best practice' or 'employer of choice' or a 'leader in your industry', whatever language you want to use to describe it, it results in more productive businesses.

These are workplaces that attract and retain high performing staff, that have lower turnover, higher attendance and higher employee engagement. So what do these workplaces look like? Well they're often workplaces that engage with workers, that offer flexible work arrangements, that trust and empower their employees, that are able to have honest conversations in the workplace including about tricky issues like performance. They will usually invest in staff and have a diverse workplace. They help employees manage their work alongside their other life responsibilities.

Gender diversity is something that's received a lot of attention lately and it just makes good business sense. When you have the Business Council of Australia¹ telling us so, it's probably worth listening to. Their recent report about increasing the number of women in senior executive positions did get a lot of attention and its major selling point was that you need to tap into the entire talent pool that's available to you, not just 50 per cent of it. It set out a

¹ *Increasing the Number of Women in Senior Executive Positions, November 2013*

program through which companies can actively look to engage and promote senior women, to overcome the unconscious bias that might exist in their workplace, and to consider the approach that they're taking to recruitment, training, performance management, reward and recognition.

Similarly, EY recently produced a report called *Untapped opportunity: The role of women in unlocking Australia's productivity potential*. It found that women on flexible work arrangements are among our most productive workers. They waste less time on a per hour basis apparently. These are all things worth considering if you're interested in taking your workplace 'above the line' – and we can also help you do this.

We have a number of resources. For example, our Best Practice Guides set out best practice tips on things like work and family and workplace flexibility. We have an Online Learning Centre with interactive modules that you can participate in in a reasonably short period of time that set out a number of different scenarios that you might be grappling with in your workplace. Our 'Difficult Conversations' module is one of our most popular and we find that it is relevant in a number of situations. We also have modules on hiring staff and managing underperformance.

Finally, we also offer Compliance Partnerships. This is the opportunity to publicly demonstrate that you are willing to go above and beyond to ensure that you're meeting your obligations. The Coffee Club is one of a string of well-known brands under a parent company that recently entered into a Compliance Partnership with us. In fact, this partnership covers some 36 entities including franchisees. It's a two-year agreement under which the company is taking a range of steps including to review its systems and processes, to ensure they promote compliance, to conduct self-audits and to introduce workplace relations training. They are taking responsibility for their franchisees and their brands. This sends good signals to your employees, your suppliers and your customers and your potential employees and of course to us, which is not unimportant if you find yourself in trouble later down the track.

Working 'above the line' protects your reputation. Do you contract out labour? Security? Cleaning perhaps? This is a very common and completely legitimate option. But are those workers being paid correctly? You might ask, "Is this my business? Haven't I contracted out the responsibilities when it comes to that?" But if they're on your premises and working to your benefit, then you might find that irrespective of the legal arrangements in place, people hold you responsible. Your customers and suppliers and the public morally, and even perhaps legally, especially if these workers are vulnerable.

We saw this just last week with the release of our report into our Inquiry into labour procurement arrangements of the Baiada Group in New South Wales. Baiada is a company that is responsible for poultry processing. It covers some 20 per cent of this market and supplies chicken to dinner tables, thousands of dinner tables around the country, via Coles, Woolworths, KFC, Aldi and others. They're responsible for the Lilydale and Steggles brand. We found a complex web of entities providing labour to Baiada, labour largely made up of vulnerable visa holders who were not being paid correct rates of pay.

Many of these labour hire entities did not cooperate with our Inquiry and we still have many avenues of inquiry to pursue. We are yet to prove legal responsibility by Baiada with respect to the actions of many of its contractors. But as the social and traditional media response last week showed, Baiada are being held to account by the public. And we saw even before the release of our Inquiry when Aussie Farmers Direct cancelled their contract for Lilydale Chicken after other negative media arose about their workplace practices. They weren't convinced by Baiada's assurances. And frankly, neither were we.

We look forward to engaging with Baiada about how we can work with them to build compliant practices in their procurement arrangements. But as you see here, you don't need to be legally responsible for your reputation to suffer. And you may be legally responsible because under the legislation, if you knew or you should have known about negligent workplace practices amongst your supply chain, you may well be found liable under s.550 of the *Fair Work Act*.

This is an accessorial liability provision. Effectively if you knew or you should have known, then you may too have been found to have breached the Act. Directors of companies, managers, supervisors, advisers such as accountants could all be accessories. And sometimes the business that was receiving the services might also be found to be an accessory. We took action against Coles with respect to trolley collectors. Not its own employees but employees that had been hired by one of its contractors. That matter resolved itself through an Enforceable Undertaking in which Coles conceded that it had ethical responsibility for the workplace practices of these contractors. It has now moved to directly employ its trolley collectors.

We have a very recent example involving some security firms where we have taken to court – not just the direct employer of the security workers, but the contractor above them in the chain. We assert that this contractor was not paying enough to cover just the wages of the workers. In 39 penalty decisions that were handed down last financial year 30 of them involved penalties against an accessory. So if you want to position yourself ‘above the line’ as a leader in building compliance with workplace laws, you might want to start by taking steps to give yourself confidence about your supply chain and the workplace practices within it. Ask questions.

Recently as part of our National Harvest Trail activities, we talked to the grower of fruit and vegetables in Mildura. We'd received some intelligence that the workers who were picking the fruit for this grower weren't being paid their lawful entitlements. We suggested to him that he might want to ask his contractor some questions, questions around the visa status of the workers picking his fruit, the rates of pay and whether payslips were being given. After a meeting with them, he called us back and declared that he had “sacked them all” and returned to sourcing his labour directly.

Our Harvest Trail campaign is all about engaging communities, organisations and growers and informing them of what is going on and some of the practice amongst those who are

providing them labour. By letting them know what's going on, we enable them to make good and lawful choices about how they source their labour. And so you might do something similar such as check your contractor's compliance history. Ensure they understand their workplace relations obligations. Will subcontracting be allowed and what obligations will continue down the chain? You may wish to include provisions in your contract that require any contract delivering services to you to be compliant with workplace laws. You may wish to also regularly audit these arrangements.

All of these sorts of steps enable you to position yourself as a leader, in your industry or region, and in workplace compliance. So what else might you do to work 'above the line'? Consider best practice. Consider a Compliance Partnership. We'd be happy to talk to you about any of these steps and these steps will help your business and they'll also help us. They'll help us build a culture of compliance in Australian workplaces and ensure a level playing field, where compliant businesses don't tolerate others that undercut wages in order to secure a competitive advantage.