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Why Australian Business Should Take Notice of Supply Chains

Introduction and overview

My name is Janine Webster and I am the Chief Counsel at the Fair Work Ombudsman. Many of you may already be familiar with who I am and what my role is. For those who are less familiar, if I was at a barbecue I would explain it like this: I lead a team of lawyers, all across Australia, who put before the Court litigations on behalf of the Commonwealth in respect to workplace laws.

Today I want to have a conversation with you about the Fair Work Ombudsman and the work we do, but also put forward a specific proposition. The proposition is this: irrespective of whether or not a business employs someone directly, irrespective of whether or not they're a contractor or hold some other form of relationship, the business has a responsibility to ensure workers are receiving proper wages and other entitlements under the *Fair Work Act*.

This is not a new concept. It's a concept that many of you would be familiar with through OH&S obligations. It's widely understood that irrespective of whether or not someone is engaged by you directly, you have an obligation when they come into your workplace to make sure they are safe. This is a concept that we've been looking at very closely at the

Fair Work Ombudsman in terms of the *Fair Work Act*, and it's what I want to talk to you about today.

Before I start, I ask that you think about those workers who are low skilled, at the bottom of the supply chain. For example, most businesses have a cleaner, and many businesses have security guards too. I want to be really clear that I'm not saying it's not legitimate to contract out. In fact there are many appropriate and proper reasons why businesses should and do contract out. Please don't think that's the proposition being put forward, because it's not. Rather, what I'm saying is that business potentially has a legal obligation that should not be ignored in respect to how these workers are treated. And there is another issue here as well, and that's the reputational risk associated with these people not being treated in accordance with the law.

The role of the Fair Work Ombudsman

Before we look at this in more detail, let me tell you a little bit more about the role of the Fair Work Ombudsman. The Fair Work Ombudsman is an independent statutory agency and Ms Natalie James – who we can see a picture of here – is the Fair Work Ombudsman.

We are located in each capital city in Australia, and we also have a presence in 14 regional locations as well. If you think in the broadest possible sense about what the Fair Work Ombudsman does, you could categorise our work into two areas: compliance and education.

Let me start by sharing some of the education projects we have launched over the past few years. We have a range of educational tools and resources available for business people such as yourselves, including our Infoline, free online pay tools, an Online Learning Centre, templates and factsheets.

If you look at our Annual Report for 2013-14 financial year, you will note that over half a million people contact the Fair Work Ombudsman via the Infoline each year. We find that

of our callers, around 66 per cent are employees and 31 per cent are employers. And there's also another category of people that call us, and perhaps you fall into that category. It's the people working within a business, such as a HR professional, who call our Infoline for information and advice.

Also of interest to this audience is that we increasingly see ourselves as being in the employment game. A focus that we have in the advice and assistance space is how we can keep that employment relationship together, before it falls apart. Recently we piloted what we call our Early Intervention program. What this means is when people call our Infoline, our highly trained staff will pick up when a relationship might be strained or where there is an issue, and we will help them to resolve the issue by separately considering their case and coaching them through that process. What this means is that not only is the issue resolved, but that the employment relationship is retained. After running the pilot we realised that this was a successful program, and it's become a permanent part of the work we do.

Our Annual Report also highlights some extraordinary figures in relation to our website, which we transformed last year. Last financial year we received over 11 million hits. If you put that into context, it is more than likely either yourself or someone in your workplace has used our website. We are getting an extraordinary amount of traffic, and in the context of other Commonwealth websites, it is one of the more utilised.

And there's good reason for that. There are lots of other great resources on there as well. As I mentioned before, it was transformed last year with a focus on self-help tools for both employees and employers. Our website is a very important part of our overall strategy. It's a tool that people can use to build their workplace knowledge, and develop skills and strategies that they can then apply to their own workplace. It is a focus of ours to provide employers, such as you, with the right support and information that you can use to help run your business and maintain productive relationships with staff.

We also have a new product coming online soon, and we're calling PACT¹. This is a pay and conditions tool, that is a more powerful version of the current pay tool we have online. It goes beyond wages and calculates things like penalty rates and allowances for all 122 Modern Awards.

Our website also has a tool called MyAccount, where you can go in, identify the information that applies to you and your workplace, and then save that information in your own personal account. This means that when you return, you don't have to search for the information again. You can go straight into your profile and it's there for you.

We also have a great series of online courses, available in our Online Learning Centre. There is a range of courses that perhaps you and your middle managers might find relevant. Topics include hiring staff, performance management and having difficult conversations in the workplace. There are also courses for employees too, on topics such as starting a new job and holding difficult conversations with your boss.

We have templates and fact sheets as well, which are very well utilised. And I understand that one of the most utilised is our template on terminating someone's employment.

All of these resources are available for free on our website and I encourage you to go online and see what's available. The one thing I would suggest to keep on mind, especially in the context of being here speaking with Australian Industry Group (AiG), is that the information on our website is not tailored to specific circumstances. It's high level advice, and depending on the circumstances, you may want or need something more tailored. If that's the case, AiG is certainly one such resource we would highly recommend you tap into.

¹ Pay and Conditions Tool

Our work in the compliance space

So now let's talk about the compliance space. I'm going to use our operating model to explain our evolution in respect to the way we go about our business. We receive about 25,000 complaints each year, and that's been fairly consistent over a long period of time. It used to be that we would try to investigate each and every one of those complaints, however, increasingly what we are doing is moving towards a model where we categorise the nature of the people coming to us and their complaint, and we assess whether or not they could resolve the dispute themselves at a workplace level.

In situations where vulnerable workers are involved, we will continue to investigate and involve ourselves to stamp out this kind of behaviour. But in situations where the dispute can be worked out between the employer and employee, via a conversation or access to information, we will pursue that path where we can. You can see from this graph what an impact this has had upon the number of matters we investigate. We have come to understand that there is a range of resolution methods we can apply, such as mediation, or equipping people with information they can use to resolve the dispute themselves. Investigations and litigations, while they certainly hold weight and have a place in our work, are not the only means to resolution.

The mediation service we provide enables employers and employees to resolve disputes between themselves in a way that doesn't sour the relationship; in fact it enables the employment relationship to continue in many cases. During the last financial year, only 21 per cent of all matters that came to us were resolved through the very formal compliance mechanism of an investigation.

In order to achieve this evolution in our approach to dispute resolution, we needed to promote our educational tools and resources to support employers and employees to resolve these matters between themselves. So you can see how important it is to have an integrated approach to our work, and this is the way the Agency is now moving. We

are focussing our resources where they are most needed, and where they make the greatest impact on the community.

Litigation as deterrence

Since 2006 we have invested in a program of litigation, and certainly it's the case that people could ask the question, 'Why would you do that?' When one considers the amount of money that the Commonwealth spends in respect of litigation and you compare that to how much the Commonwealth receives in terms of penalties and money that goes back to the employees through that process, the two of them don't quite add up. In fact you'll see that we actually spend a little bit more on that process than what we get out of those orders.

What is not calculated in that equation is the deterrence impact. And so whilst it's very important in respect to deterring individuals, the real bang for our buck and the importance of that work relates not to those individual matters, but the broader impact it has. It means that when people hear the Fair Work Ombudsman is coming knocking, they're aware of previous activity, the potential outcomes that could ensue, and as a consequence they decide to engage with us to resolve the matter.

Let me give you a little bit of insight in respect to how that might work in practice. Many of you might be familiar with what is commonly referred to as the "Scab Flyer" matter, which relates to proceedings that were brought about by the FWO against a Mr William Tracey and the Maritime Union of Australia in Western Australia. It was a matter involving some industrial action, and many of you are probably familiar with the century-old practice of unions placing posters around a site where industrial action is taking place to name and shame individuals who have chosen not to participate in that industrial action.

Indeed, that's what happened in this particular matter. It was a couple of years ago that the conduct occurred and at the time there was no decision in Australian law which had looked at this issue closely. There were two sides to this picture. One was around free

speech, and this very old practice which unions have participated in, and on the other hand, there was freedom of association issues, coercion and concerns about adverse action in respect to those individuals.

As part of our litigation program, the Fair Work Ombudsman decided to take that matter on, and to have that proposition tested in the Courts. Late last year a decision was handed down in the Fair Work Ombudsman's favour. By handing that decision down the Court brought clarity to that issue, answering the age-old question of whether or not it was adverse action, or if it was an offence to freedom of association principles versus free speech.

To demonstrate the deterrence impact, let me share a phone call with you that we received from the National Union of Workers after this decision was handed down. The purpose of the phone call was to indicate that they wished to self-disclose an instance of one of their organisers having conducted or been engaged in very similar conduct.

So because we knew about the matter early, we were able to engage closely with the union to resolve the issue. This matter involved some four employees who resigned their union membership. They felt as though they had a conflict with management in the context of a vote being taken about whether or not industrial action would occur at Sigma Pharmaceuticals. The organiser took their resignation letters and placed a stamp on them that said "Scab" and then placed them on her Facebook page where others could see.

What we were able to secure through that self-disclosure process was an Enforceable Undertaking with a number of elements to it. Importantly what the union indicated was that they would write to each of the employees expressing their sincere regret. They also placed a notice in *The Australian* and undertook that each of their officials would receive training in respect of this kind of conduct, as well as making a \$2,000 donation to Job Watch.

Our litigation profile

So I'm using this one as an example, but there are many matters we see that because of the action we've taken previously, people change their behaviour and start to do things differently. Let's look at our litigation program for a moment. Last year we had approximately 37 matters put before the Court and we obtained penalties of over \$3 million and back payments of over \$500,000.

Each and every one of those dollars and penalties that are handed down has a different story that sits behind them. So far this year we've filed approximately 32 matters and 22 of those matters have included accessories. This takes me back to my point about contracting out, and some of the risks associated with that. Of the accessories, we have had Directors, HR Managers, managers of companies, and others in the supply chain as well.

I also want to point out the Fair Work Ombudsman's success rate with our litigations, which is over 95 per cent. I would say that is pretty extraordinary. I've got a graph here that talks of the litigation by type which has occurred this year, and you'll see that the vast majority of our litigations relate to wage and conditions matters. This is expected given that the vast majority of complaints we receive are related to wages.

We've also got a range of other matters that we litigate in respect to as well. The other one that I want to highlight with you is around compliance notices. The Fair Work Ombudsman is a proportionate litigator. We would prefer that all of our matters are resolved outside of the Court process and by issuing a compliance notice, which is effectively saying "pay up or a fine will be imposed". We would hope that employers would engage with that process and resolve the matter there and then.

In our experience, in order for those notices to be effective we need to follow up. And in circumstances when employers do not comply with the notice, we must, and we do, take those matters to Court and seek not only enforcement in respect of the underlying

request or requirement, but also the imposition of a penalty as well. That forms a fairly large proportion of what we do.

Why Australian business should take notice of supply chains

So, let's return to my proposition and look at why businesses should take notice of what is happening in their supply chain. I indicated earlier that we have put some 32 matters before the Court this year, and 22 of those involve accessories. Under the *Fair Work Act* there's a Section 550, and basically what it provides for is that a party – and that can be a human party or it can be a corporate entity – who is involved in a contravention can be treated the same as the person who actually committed the contravention.

This provision is not uncommon, it's a concept of involvement, and it is part of both common law and criminal law as well. More and more we are looking to see who was involved in a contravention as well as the employer, in order to join them together and to have the imposition of penalties made against them as well.

There are two types of supply chain situations that we deal with, and that I want to talk about today. There are arm's length arrangements and contrived corporate structures.

Arm's length arrangements are situations where companies are contracting out a job or function. A classic example would be trolley collectors. For example, Coles at this point in time – although I understand that will change in the future – don't want to manage the people pushing their trolleys, so therefore they contract that out.

Then there is the other type that we see from time to time, which we call contrived corporate structures. What this looks like is that there will be a company that receives the revenue generated by that business, and then separate companies are set up with the purpose of employing the individuals that supply the labour to the business. The ones that we're most interested in are the cases where the tap, in terms of the revenue, will be turned off from the business into those companies that employ the individuals, leaving those employees in a situation where they are not getting paid. I'll come back to this and talk about what we're doing in this space.

Coles enforceable undertaking

I want to talk to you firstly about an arm's length matter – that you might already be familiar with – and that's the Coles matter. You'll see the slide here says "Coles Enforceable Undertaking". Ultimately we made the decision to withdraw two matters against Coles in the Federal Court of Australia, which was a difficult decision for our Agency to make.

We went a long way through the process of litigation which, as you know, is very time consuming and also very expensive. The difficulty was that Coles came to us with a proposal for an Enforceable Undertaking which for us represented exactly what we wanted the whole of the industry to do. We thought that if all participants in this industry agreed to this, we wouldn't have to worry about the wages of trolley collectors in Australia any longer, and that's a big step in the right direction.

So we made a decision to withdraw the matters against Coles during the course of the proceedings and we did that because Coles, beyond admitting legal liability, said that they also had a moral and ethical responsibility.

Let's quickly take a look at the trolley collecting industry in more detail. This is an industry that attracts a lot of workers who are quite vulnerable. Very often they don't have an education beyond year 10, and for many English is their second language. They're generally male, and often people who have newly migrated to Australia. It's not very attractive work. It's done in the middle of summer and the middle of winter – it doesn't matter if it's raining or 40 degrees.

In this industry we often see cases where there is a long line of entities between the company that is receiving the labour and the actual worker. Sometimes there will be a contractor or subcontractor, and sometimes two or three more subcontractors in that supply chain as well.

Australian Bureau of Statistics data indicates that approximately 1500 people work in this sector, and at the Fair Work Ombudsman we've received over 500 complaints from the sector. We have also taken eleven matters to Court.

And when we've taken matters to Court it has not just been the person who is identified as being the direct employer, but also those who are engaged throughout the supply chain. This was the case with Coles. We went all the way to the top of the supply chain and sought to have penalties applied against Coles using Section 550 of the *Fair Work Act*. In effect, what we said to the Court was that we want you to examine the extent to which Coles was involved, and whether or not they are involved in such a way, they could be considered to be liable under Section 550.

As I indicated earlier, it was a hard decision to withdraw the matters against Coles, but we made it for a couple of reasons. They came to us with an offer that was too good to ignore. Beyond admitting legal liability, they also said they had a moral and ethical responsibility to those workers too. They agreed to pay back over \$200,000 to the employees who had been underpaid, and to also establish a \$500,000 holding fund where if other trolley collectors came forward who were working within their business, and said they had been underpaid, Coles would provide back payments to them as well.

They also committed to undertaking training, as well as setting up a hotline so that other individuals can make quick contact with the company if they are being underpaid. So for us, the Coles story is a good one. And I can say that as a consequence of this story, I don't believe the taxpayer will ever have to pay for another investigation in respect to a Coles trolley collector. When you think about impact, that's a very significant one. And you can probably understand why we accepted the Enforceable Undertaking in this case.

Jay Group Litigation

I have another case to share with you, which again demonstrates the way in which FWO is looking up the supply chain. This matter is Jay Group, and it relates to 12 trolley collectors working at Costco in Lidcombe, New South Wales. The business had just

opened and the trolley collectors who were engaged for the opening were not paid at all. Because it was only a single week of work, the amount of money owed to these workers was less than \$20,000, which is relatively small in comparison to other cases we see. But, because of the nature of the behaviour, the fine imposed by the Court meant that for every one dollar that was underpaid, there was a seven dollar fine.

Jay Group, the employer, received a significant fine, but so too did the individuals involved in the matter, including a Supervisor and a person in the role of General Operations Manager. We would have joined the next contractor up the line except they had already gone into liquidation. However, we did join the Director of that company to the underpayments – Nick Exidis. Mr Exidis is someone who is known to our organisation, and who we have had proceedings against in the past.

On every occasion we will see how far up the supply chain we can go, and whether we can go all the way to the top. And we will continue to do that.

Contrived corporate structures

I have mentioned another type of supply chain, and those are contrived corporate structures, and I want to talk in more detail about what those might look like and provide some examples. As a general proposition, if the Fair Work Ombudsman thinks these kind of arrangements are contrived, and have been set up for the purpose of avoiding paying individuals their rightful entitlement, we will progress the matter to Court.

What you might have in these kinds of arrangements is a head company, and rather than employing staff directly, you'll have other companies that have been set up to employ individuals through those companies. And those sub-entities might not be capitalised.

I want to talk to you about a litigation called Eastern Colour, which was run up in Queensland. This was a matter where individuals were engaged – one was a forklift

driver, for example – on a farm that grew apples. These employees were engaged by the business, but then one day they turned up to work to find that they were no longer engaged by that business. Instead there were two new companies set up, and from then on they were to be engaged by those two new companies. They also learnt that they would be engaged by 'company A' for the first 40 hours, and for any subsequent hours they will be engaged by 'company B'. Can anyone think of why a company might set up a structure like that? The answer is to avoid overtime obligations. And that's exactly what the Court found.

The Fair Work Ombudsman took this matter forward and ran the argument that this was a complete sham – that these individuals had in fact never become engaged by these two new entities. And instead they remained engaged by the head company, which had sufficient assets to pay their staff. In this case the Court found in our favour.

We also did something similar in a matter called Ramsay Food Processing Pty Ltd, which involved an abattoir business in Grafton, New South Wales. In this case the individual running the company would claim, in terms of entitlements such as redundancies, that the people on site were employed by companies that had insufficient assets to pay these entitlements. Meanwhile, the business was doing quite well, and did have assets and money to cover these expenses. Mr Ramsay's luck ran out when the Fair Work Ombudsman took this matter on. And the way that we pursued it was to name this as a sham, and ask the Courts to make findings that the actual holding company was the real employer. Again, we were successful in those proceedings.

So in the context of thinking about supply chain accountability, and ways that one might get around the direct employment relationship, we would caution against these kinds of practices if they're set up specifically for the purposes of avoiding employee obligations.

What you can do

So what can you do? In my opinion there are some really simple things that you can take away and implement within your own business to avoid potential liability. First and

foremost, when you engage a contractor in your business you should be checking their compliance history. I will point out again that the Fair Work Ombudsman is not saying that contracting is not a legitimate business decision. It is entirely legitimate, and suitable for a whole range of reasons.

What I'm saying is that you need to make sure you have your checks and balances in place, so that your reputation is not damaged by the actions of a contractor you engage. You should also ensure you understand their workplace relations systems and practices. Are they going to be employing people directly, or are they going to be using subcontractors? Are they going to be engaging those people as employees or contractors? These are all questions you should be asking.

It's really important that you contractually require workplace relations obligations to be complied with, but beyond that, that you audit rigorously. Let's return to the Coles example for a moment. I have no doubt that they intended or hoped that obligations under workplace laws would have been complied with. But without auditing rigorously you're not necessarily going to know that until things go awry.

The last point is to partner with your contractor on workplace relations. It may well be that you have more sophisticated systems in place, and greater capacities in terms of being able to draw upon resources, such as AiG. So there's an opportunity for you to partner with them, and to share that knowledge and know-how.

Reputational impact

In case you are still wondering why you should invest in thoroughly understanding your own supply chains, let me remind you of the story of the Sherrin football. Sherrin is a very well-known brand, particularly for those of you that are in AFL country, as it is the official football of the AFL. In late September 2012, just before the Grand Final of that football season, a headline appeared in the paper and read as follows: "Sherrin child labour disgusting Demetriou says".

Can you imagine being Sherrin's Managing Director and waking up to this news?

Effectively, what had happened here was that Sherrin hadn't been keeping an eye on its sub-contracting practices, and a young boy a few weeks earlier had found a needle in one of the balls. This sent one of *The Age* journalists over to find out a little bit more about their procurement practices in India.

What they discovered was that these balls were being produced for as little as 12 cents an hour by underage children, predominantly females as young as 10, who were being pulled out from school in order to make these balls for our Australian kids to kick around. So half a million balls were recalled around Australia, which apparently cost around one million dollars. I'm very confident that this whole episode cost Sherrin a lot more than one million dollars.

This is again a narrative not unlike the one that unions have created in respect of the naming and shaming. Here is a positive brand name that had been building a narrative over 100 years, and in one fell swoop it's gone. So if for no other reason, I think it's important to be aware of the reputational impact a situation like this can have on your business.

Conclusion

Thank you for listening to me today. At the Fair Work Ombudsman we are trying to achieve 100 per cent compliance, and that means creating a culture of compliance across all Australian businesses.

I hope to have convinced you today that you too should be looking for 100 per cent compliance within your organisation and within your supply chains as well. If we can partner, and work towards that together, I think that we will go a long way towards achieving compliance across a number of industries.

Thank you very much for listening to me today. If you have any questions, I am more than happy to take them.