Natalie James – Address to AIRAANZ Conference 7 February 2018

Trolleys, Taskers and Algorithms: challenges for Today's regulators in Tomorrow's Labour Market

Thank you for inviting me to speak today.

Before I begin, I would like to acknowledge the Kaurna people who are the traditional custodians of the land on which we meet today. I would also like to pay respect to their Elders both past and present and extend that respect to any Aboriginal and Torres Strait Islanders here today.

Introduction

In recent months some people have asserted the workplace relations system is broken.

That wage theft is out of control.

That enterprise bargaining is dead.

Some have said that wage theft should be criminalised – that the pecuniary penalties awarded by the courts are inadequate.

Aspects of the Fair Work Ombudsman's regulatory approach have been questioned. It's been suggested we give employers too many chances. That more cases should be taken to court.

It's worth noting that the Fair Work Ombudsman currently has 110 matters before the courts. We are keeping the Judges pretty busy.

However, some Judges have questioned whether the matters we have brought before them should have ended up in court. While we've seen higher and higher penalties being handed out overall[1], on occasion a Judge might suggest a matter would have been better resolved without court action.[2]

Such is the life of a regulator. It is appropriate for the community and experts to scrutinise how public institutions fulfil their remit. It's our job to remain neutral and impartial, to consider and respond to feedback and to aim to get the balance right.

My Inspectors apply modern regulatory practice which is based on a risk management approach designed to match actions and consequence to the nature of the conduct and to ensure we use our resources to maximise our impact. We consider a range of factors when we decide how to resolve a dispute. We have a suite of enforcement tools – the most serious and high profile being court action.

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[1] *See for example: Fair Work Ombudsman v MAI Pty Ltd [2016] FCCA 1481 (where total penalties of $408,348 were awarded against the respondents); Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2) [2017] FCA 557 (where total penalties of $447,300 were awarded against the respondents); Fair Work Ombudsman v Rubee Enterprises Pty Ltd [2016] FCCA 3456 (where total penalties of $532,91 were awarded against the respondents); Fair Work Ombudsman v Mhoney Pty Ltd [2017] FCCA 811 (where total penalties of $660,020 were awarded against the respondents).*

[2] See for example: *Fair Work Ombudsman v Pioneer Personnel Pty Ltd* [2017] FCCA 3223; *Fair Work Ombudsman v Priority Matters Pty Ltd & Ors* [2016] FCCA 1474 (on appeal the judgment was set aside and the proceedings remitted for rehearing: *Fair Work Ombudsman v Priority Matters Pty Ltd* [2017] FCA 833).

But the Parliament has also bestowed upon Inspectors other tools: Infringement Notices for record keeping breaches, Compliance Notices requiring underpayments to be corrected and Enforceable Undertakings – a longstanding feature of many Australian regulatory frameworks.

Indeed, we recover most underpayments without using formal action.[3] When we utilise formal enforcement outcomes we aim to deploy them consistently and fairly, in accordance with our Compliance and Enforcement Policy.[4] We apply the same principles whether investigating a business or a union in relation to a breach of the law.

We work within the legal framework established by the Parliament that created us and within the resources allocated to us by the Parliament. By all means we push the boundaries – with our use of accessorial liability, freezing and winding up orders to ensure respondents pay up[5], and in one current case, contempt of court.[6]

I am part of the system. Indeed, I had a hand in framing it in my previous role in the Department. It would be controversial for someone in my position to assert that it is broken…or indeed, to proffer the alternative opinion.

But I can share my observations after almost five years as the custodian of the Fair Work Ombudsman.

New ways to work – the intersection

The platform economy promises a range of opportunities for consumers, workers and businesses.

In their essay titled '*Technology, the Digital Economy and the Challenge for Market Regulation*', Gahan, Healy and Nicholson note how these new technologies have created new avenues for matching labour demand with supply. We now see peer-to-peer marketplaces for jobs and services and a gig economy where jobs are discrete.[7]

While these businesses are mere toddlers trotting around in our centenarian industrial relations system with their algorithms and their aps, these models have had high uptake and have quickly become established in the labour market and in our lives.

Whether you welcome them as an opportunity for entrepreneurialism or deride them as a source of exploitation, they are challenging our century old industrial relations system.

Online delivery services such as Uber Eats, Menulog, Foodora and Deliveroo offer abundant convenience to hungry, time-poor people.

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[3] 94 percent of requests for assistance were resolved without the use of compliance activities last financial year. See Fair Work Ombudsman and Registered Organisations Commission Entity 2016-17 Annual Report, 14. Accessible here: https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports

[4] Compliance and enforcement policy

[5] See for example: *Fair Work Ombudsman v E.A Fuller & Sons Pty Ltd* [2013] FCCA 5.

[6] *Fair Work Ombudsman v Leigh Alan Jorgensen*, file no: BRG1032/2017.

[7] Peter Gahan, Joshua Healy and Daniel Nicholson, 'Technology, the Digital Economy and the Challenge for Labour Market Regulation' in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions* (The Federation Press, 2017).

While they open up new customers for some, others claim they are eating away at their profit margins and stealing their customers.[8]

For workers, they offer the opportunity to be their own boss and work when they want, or earn some extra cash, on top of other jobs or when they are between jobs.

But …. What about superannuation? What happens if they crash the car or fall off that bike? Or have a slow week?

For me a recent personal experience gave me pause to consider the opportunities a little differently.

Over the New Year break I moved house – and after five years my previous home required a thorough end of lease clean. It was the sort of clean that I couldn't get done on my own despite all the elbow grease and good intentions in the world.

So I started doing research to find a cleaner. Companies were generally quoting a total amount for the job…based on my description, sight unseen. Those who quoted an hourly rate were around $30 per hour.

While these workers may have been contractors, I wanted them to receive the equivalent of award rates. That was my choice, and based on the information I had… with all my knowledge of this industry and the vulnerable workers in it, I had to wonder, how much would the cleaners themselves get?

I asked one operator, but he wouldn't answer my very direct question, instead seeking to reassure me that the quote was 'for the job' no matter how long it took.

I looked on the FWO's Pay and Conditions Tool to confirm the base rates applicable under the *Cleaning Services Award*: $24.41 per hour for a casual and $19.53 per hour for a permanent employee.

Making allowances for superannuation and the cost of products and equipment … which they were providing … $30 might be enough … but what cut was the company taking? I wasn't confident the workers would receive the equivalent of award rates after the company's take was deducted.

Ironically, perhaps, for me I felt the option of procuring workers directly would make it more likely they would receive fair payment, and that I could assess that amount to be fair, rather than going through an established company.

So, I put an ad up on Airtasker.[9] In what was reported to be a 'world first' Airtasker made an agreement with Unions NSW last year about the pay and safety of those providing work through its technology.

I selected higher quotes and bypassed the intermediaries who would otherwise take a cut.

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[8] The Age article - Restaurants have a new frenemy and it's eating their profits, accessed 18 January 2018.

[9] Last year Airtasker agreed with Unions NSW to provide above comparative award rates, and to continue to work to ensure best practice workplace health and safety standards. See: SMH article - Airtasker and unions make landmark agreement to improve pay rates and conditions, accessed 1 February 2018.

The two of them arrived with their equipment and daughter in tow. I suggested the best spot for coffee nearby. When they told me it took a bit longer than they expected, I paid them extra. We did this 'outside the system' but I noticed that Airtasker now allows you to give bonuses within the app.

By engaging directly with the people who would be doing the work, and by doing my research, I felt I had done a fair deal.

But it involved a bit of effort on my part. And I'm sufficiently in the know to work out what questions to ask and get the right information about award rates.

It made me sympathise with businesses we have dealt with who have thrown their hands up saying: "I pay the going rate for my office cleaners…or security guards" – and protest they can't be certain what the workers, not their own employees, are actually paid.

It also made me appreciate the value of our new contracting and supply chain guidance material on our website.

New ways to work & old law to apply

There are obvious questions to ponder, like how do these models intersect with the law? Does our award system apply? If not, should it? Or more fundamentally, are the workers even covered by the statutory framework, founded on the century old principles of the common law contract of employment? What's behind the effort to which some go, to take themselves outside of that system? Questions of fairness, economics and law are all thrown around.

For the Fair Work Ombudsman, we apply the law under this framework as we are currently doing with respect to a number of platform economy models. Some of this work has been publicly reported.

These matters may present the opportunity to test before a court whether these work arrangements comply with our workplace laws. While there has been much theorising, there hasn't been much judicial consideration of these issues. Until….

Just before Christmas, the Fair Work Commission handed down a decision concerning Uber.[10] It found the applicant was not an employee able to obtain a remedy for unfair dismissal under the Fair Work Act.

The decision applied the law to this particular relationship and found that for the purpose of these laws, the relationship was not one of employment. It did not make a finding about Uber's business model. That's not how questions of law in this area are framed or answered.

The decision does however contain some fascinating observations which I'm sure others at this Conference will discuss in detail.

From a practical point of view, I have to say I agree with Vice President Gostencnik's comments about the challenges in applying the range of indicia as if it were a checklist.[11]

The test can't be applied mechanically; the situation needs to be assessed holistically.

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[10] *Kaseris v Raiser Pacific V.O.F.* [2017] FWC 6610 (*'Kaseris'*).
[11] *Kaseris* [2017] FWC 6610, [66].

Consideration must be given to the particular circumstances, and not all factors will be as important or of equal weight.[12]

My Inspectors have to balance these indicia on a day-to-day basis. But they are not Judges or Commissioners. They can't give definitive answers. And nor can I. Only a tribunal or court can do that.

It prompts the question – is this working for us? Is it right that the only way to be sure about whether a young person on a bike delivering food should be getting minimum wage rates is for someone to find a way to get their particular set of facts to court?

And why hasn't our system evolved, for example, like the British system from which it sprung, to more comprehensively deal with new forms of work?[13]

The FWO's role – the fissuring of workplaces

Franchising, contracting, labour hire – none of these models are new and they are all quite legitimate forms of business.

The Fair Work Ombudsman does not set out to pass value judgments on the nature of business operations, stifle innovation or the entrepreneurial spirit.

But our experience is the most vulnerable workers end up in the most exploitative scenarios. And these cases usually involve some sort of 'fissuring' in the relationships between those doing the work and those benefiting from the labour.[14]

Those benefiting from the labour are usually profitable enterprises, but sadly, the direct employers are often unable or unwilling to pay up when we investigate underpayments that have occurred.

Vulnerable workers in these parts of the labour market are usually young, and/or often present in Australia on a visa.

Young workers typically make up just over a quarter of people making complaints to us and there have been signs over the past 18 months that this is increasing.[15] Yet they comprise only 16% of the workforce.[16]

The over-representation of visa holders in our disputes has also been on the increase with visa holders accounting for nearly one fifth of disputes last year[17] despite this group only accounting for an estimated 5-6% of the workforce.[18]

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[12] *Jian Shen Cai v Michael Anthony Do Rozario* [2011] FWAFB 8307, [5]; cited in *Kaseris* [2017] FWC 6610, [51].
[13] See for example the *Employment Rights Act 1996* (UK) c 18, s 230(3).
[14] David Weil, *The Fissured Workplace* (Harvard University Press, 2014).
[15] FWO internal data source, obtained 19 January 2018.
[16] Young worker disputes are calculated from formal dispute lodgements completed for workers aged 15-25yrs. % of Employed persons are derived from ABS labour force cat 6202, table 1/table 13. Calculated by: employed persons aged 15-24yrs/total employed persons.
[17] FWO internal data source, obtained 19 January 2018.
[18] Visa holder disputes are calculated from formal dispute lodgements completed for visa workers. Employed persons are derived from ABS labour force cat 6202, table 1. Number of visa workers sourced from Home Affairs temporary entrants - selected visas of 'Students', 's457 working', 'working holiday' (as at June within

But these cohorts are even more over-represented in cases of serious exploitation. Take for example, our work with 7-Eleven, where young workers accounted for 39% of complaints that we dealt with and visa holders accounted for 51%.[19]

In the poultry processing sector in NSW, where we looked at the Baiada Group along with the entities Baiada contracted with to supply labour[20], we saw that 79% of complaints involved visa holders.[21]

This is where it is vital for a regulator such as the FWO to be strategic in focus and the deployment of resources. Merely responding to the requests for assistance coming through the door and resolving those individual disputes does not solve the most complex, structural drivers of non-compliance. As the Australian workplace transforms, so too must its regulator.

There are a number of parts of our operating model that respond to this. Our investment in deeper 'Inquiries' is designed to understand and offer recommendations to systemic problems.

Our Inquiries into 7-Eleven, Baiada, four and five-star hotels, major supermarkets, and the working holiday visa program helped shine a light on the correlation between worker vulnerability and unacceptable workplace practices.

Since our interventions there have been significant reductions in complaints received about 7-Eleven and Baiada. We hope this is sustained and shows that the partnerships entered into by those businesses with the Fair Work Ombudsman are working.

These approaches are part of our Supply Chain Strategy. Through this strategy, we work with government as well as the community and social partners to change behaviour in sectors or businesses where non-compliance has become the norm. We've been implementing our Supply Chain Strategy in a number of major Inquiries over the past few years.

Another response to the fissuring of work has been our Compliance Partnerships – providing a mechanism for non-employing entities to formally and transparently take responsibility for their entire business, not just their direct employees, and to strengthen compliance throughout their business.

We have also seen a legislative response to the exploitation of vulnerable workers – with the passage of the Protecting Vulnerable Workers Act.[22] The new laws are designed to ensure the regulator has the tools required to deal with those who seek to deliberately exploit vulnerable workers, hide behind inadequate records, or the corporate veil.

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corresponding FY (13/14, 14/15, 15/16), 2016-17 figures are as at Dec 16 (June 2017 yet to be released). % of Employed persons calculated: Number of temporary entrants/total employed persons.

[19] FWO internal data source, obtained 19 January 2018. Average figures for the 2013-14, 2014-15, 2015-16, 2016-17 financial years.

[20] See the Baiada Inquiry Report at https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports. The Baiada Group refers to Baiada Poultry Pty Limited (ACN 002925948) and Bartter Enterprises Pty Limited (ACN 087485943). As at October 2013, information disclosed that the Baiada Group had agreements to source labour with the following six principal contractors: B & E Poultry Holdings Pty Ltd (ACN 137 454 678), Mushland Pty Ltd (ACN 139 033 686), JL Poultry Pty Ltd (ACN 159 101 309), VNJ Foods Pty Ltd (ACN 146 980 574), Evergreenlee Pty Ltd (ACN 129 340 709), and Pham Poultry (AUS) Pty Ltd (ACN 158 702 295).

[21] FWO internal data source, obtained 19 January 2018. Average figures for the 2013-14, 2014-15, 2015-16, 2016-17 financial years.

[22] *Fair Work (Protecting Vulnerable Workers) Act 2017* (Cth).

The Act expands my evidence gathering options and increases penalties, including for record keeping breaches. And for the first time we have laws that extend responsibility for entitlements beyond the direct employer to a third party with high influence over the relationship – the franchisor. This provides a legislative mechanism for the sort of outcome we leveraged via our Compliance Partnership with 7-Eleven.

Trolleys

One of the first sectors that we knew demanded a different approach was the trolley collection sector. While not a disruptive technology or (as yet) part of the platform economy, it recently relied heavily on outsourced labour.

It's defined by low-skilled, labour-intensive work, where labour is often supplied through procurement or outsourcing arrangements. It's highly competitive and the profit margins with respect to the labour component are often low.

These workers are vulnerable.

There are 2,132 trolley collectors Australia wide. Approximately 60% were born in Australia, while 40% were born overseas. The majority are aged between 15 and 24 years.[23]

Some of the most serious examples of underpayment we saw were occurring in this industry.

Between 2013 and 2017, in the trolley sector, 38% of people we assisted were young and 36% held visas.[24]

Since 2006 we have commenced 17 litigations[25], often against repeat offenders. We have secured just over $800,000 in employee entitlements for approximately 300 employees through litigation alone, and a further $800,000 has been ordered in the form of pecuniary penalties.

However, to date, through a combination of companies entering liquidation and respondents disappearing overseas, only just over $300,000 of those penalties have actually been paid.[26]

We were frustrated that we were taking employers to court[27] and being awarded penalties that went unpaid.

Our work saw us map convoluted supply chains that all too often involved the usual suspects and the misuse of the corporate form to sidestep liability. Taking the bottom-feeders to court wasn't changing things and it wasn't seeing workers get their wages.

In 2012, we lifted our focus. We took court action against all layers of Coles' Adelaide supply chain, including alleging Coles to be accessory to breaches of workplace laws by its contractors providing its

[23] 2016 Census data, Australian Bureau of Statistics.
[24] FWO internal data source, obtained 19 January 2018. Average figures for the 2013-14, 2014-15, 2015-16, 2016-17 financial years.
[25] 1 has been discontinued (Green World); figure includes liability, penalty and wind-up actions.
[26] FWO internal data source, obtained 25 January 2018.
[27] FWO media release - South Jin

trolley collection services.[28] Coles contracted with one of two Starlink companies[29] who then subcontracted to Mr Al Hilfi and Mr Al Basry.

Our position was that Coles had the capacity to direct and/or influence the conduct of Mr Al Hilfi and Mr Al Basry in relation to the wages and conditions of their employees, and that it was not putting enough funds into the supply chain to allow for the workers to be paid their lawful minimum rates of pay.

While this matter was under way, reform gained momentum in 2014 when a national trolley collection contractor entered into a Proactive Compliance Deed with the FWO.[30] United Trolley Collectors engages subcontractors to provide trolley collection services. It held a contract with Coles to service some 700 plus sites.[31]

UTC stepped up and took responsibility for the employees in its supply chain and made measurable commitments to ensure that its subcontractors were fully compliant with the law.[32]

In October 2014, Coles followed suit via an Enforceable Undertaking and accepted it had an 'ethical and moral responsibility' for its supply chain.[33]

Within 28 days of signing the EU, Coles returned just over $220,000 in underpayments to its contractors' trolley collectors.

Long term, sustainable commitments were made to ensure integrity across the supply chain.

Litigation outcomes take much longer, often years and years, and can lack the flexibility to resolve underlying structural drivers of non-compliance.[34]

Coles has also set about directly employing most of its trolley collectors. The Fair Work Ombudsman did not prescribe this course of action – it was a business decision by the company.

We have today released the third report under this Enforceable Undertaking and it contains good results which build on those from the preceding reports.[35]

The 'solutions' we apply to real people in the real world

Finally, in October last year, Woolworths entered into a Proactive Compliance Deed which contains similar commitments as the Coles EU.[36]

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[28] FWO media release - Al Hilfi prosecution; and FWO media release - Al Basry prosecution;
[29] Starlink International Group Pty Ltd (in liquidation), Starlink Operations Group Pty Ltd (in liquidation)
[30] https://www.fairwork.gov.au/about-us/news-and-media-releases/2014-media-releases/august-2014/20140829-trolley-collectors
[31] In 2016 Coles had 787 supermarkets, 865 liquor stores, 89 hotels and 690 convenience outlets across Australia. Source: Coles Year in Review 2016: file:///C:/Users/jd3116/Downloads/Coles_Year_in_Review_2016.pdf
[32] PCD term of operation: 13 May 2014 – 13 May 2017List of PCDs
[33] FWO media release - Coles EU; Coles EU clause R.(b)
[34] See for example *Fair Work Ombudsman v Atkins Freight Services Pty Ltd* [2017] FCA 1134.
[35] FWO media release - Coles EU 3rd annual report
[36] [36] FWO media release - Woolworths PCD Woolworths PCD clause O.(b)

Woolworths' commitment[37] came after the 2016 publication of our Inquiry report into its trolley collection supply chain. It had similar issues to Coles, reinforcing that this was a sector-wide problem. We had to shine a light into some pretty dark places to get them on board. But the outcome set a new benchmark in supply chain responsibility.

We use all levers available to us, including the media and public pressure to effect change. And change has occurred – based on our continued work in the sector and the reduced complaint numbers since our interventions.

We are continuing to make supply chain compliance a priority.

We now have comprehensive guides on our website to help businesses that engage vulnerable workers, like in cleaning and security, take practical steps to make fair choices and manage risk in their supply chains.[38]

We will take note of businesses that apply best practice to ensure workers aren't being exploited.

But, if businesses close their eyes to what is going on, and we find workers are being exploited, then know we will be asking the question – who contributed to what's happened here? And when we ask these questions, others – community groups, unions and the media will be asking them too.

We are involved in innovative projects like the Cleaning Accountability Framework which seeks to improve labour and cleaning standards in Australia.

And we will continue to use legal levers like the accessorial liability provisions in the Fair Work Act creatively, looking outside of the 'traditional' workplace at people who play a critical role in what people get paid.[39]

We are also looking closely at how, and to whom, we will apply the Protecting Vulnerable Workers franchising and serious contravention provisions.

Conclusion

It's clear the public won't tolerate the kind of exploitation seen with 7-Eleven, Baiada and the trolley sector.

And neither will we.

In terms of how the FWO will regulate within the existing framework, I will leave you to ponder what Deputy President Gostencnik said at the conclusion of the Uber decision:

> *… Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.*[40]

[37] FWO inquiry - Trolley collection services procurement by Woolworths Limited
[38] Contracting labour and supply chains
[39] *FWO v Blue Impression Pty Ltd* [2017] FCCA 810; *Fair Work Ombudsman v Kjoo Pty Ltd* [2017] FCCA 3160.
[40] *Kaseris* [2017] FWC 6610, [66].