

“Supporting Compliance in Far North Queensland – Reflections from the Fair Work Ombudsman”

Breakfast with the Fair Work Ombudsman, Natalie James hosted by Australian Human Resources Institute (AHRI) Cairns Network and the Cairns Business Women’s Club

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Introduction

Good morning everyone. Thank you for inviting me to speak to you today here in Cairns.

I would like to begin by acknowledging the traditional custodians of the land we are meeting on today, the Yirrganydji and Gimuy Walabarra Yidinji People. I pay my respects to their elders past, present and emerging and extend that respect to other Aboriginal and Torres Strait Islanders who are present.

The Fair Work Ombudsman’s role is to provide advice, assistance and education to employers and their employees across Australia to help them understand their rights and obligations under Commonwealth workplace laws. We know that the community relies on our advice, and for those who do not have access to paid professional advice, our free service is critical.

We have 21 offices all around the country, including 5 in Queensland including one here in Cairns. Some of you may have already met our team of local inspectors.

What we know about Queensland

Queensland plays a significant role in Australia’s employment landscape. With around 2.4 million employees and more than 164,000 employing businesses, Queensland represents around 20% of the national workforce.¹ That makes Queensland the 3rd highest employing state in Australia.²

As local advisers, you are helping these businesses do the right thing by their employees – these businesses rely heavily on help from professionals such as you.

However, Queensland comes in even higher when it comes to the number of formal disputes it generates to the Fair Work Ombudsman. It accounts for a disproportionately high one quarter of all the

¹ 19.7% of employed persons: Australian Bureau of Statistics 2017, Labour Force, Australia, Mar 2017, ‘Table 12. Labour force status by Sex, State and Territory - Trend, Seasonally adjusted and Original, March 2017, data cube: Excel spreadsheet cat. no. 6202.0, viewed 5 May 2017, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6202.0Mar%202017?OpenDocument>> and 19.3% of employing businesses: Australian Bureau of Statistics 2017, Counts of Australian Businesses, including Entries and Exits, Jun 2012 to Jun 2016, ‘Table 1: Businesses by Main State by Industry Class by Employment Size Ranges, June 2016, data cube: Excel spreadsheet cat. no. 8165.0, viewed 5 May 2017, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8165.0Jun%202012%20to%20Jun%202016?OpenDocument>>.

² Ibid, see footnote 1.

disputes we received last calendar year. In fact, it tops the list when we consider the volume of disputes as a proportion of employed persons in a state or territory.

Cairns as a region is also over represented. Although it ranks as Queensland's 12th highest employing region, it comes in 4th for the number of dispute forms completed by the FWO in Queensland last year.³

Workplace disputes can arise for a range of reasons – and hopefully none of these disputes has involved one of your clients. But if it has, and we know mistakes can happen, I'm sure you steered them through and encouraged them to fix any problems and resolve any issues promptly.

It's possible that your clients might have come into contact with recently for another reason. We recently carried out a campaign in Far North Queensland.

What we know about Cairns and Far North Qld - Far North QLD Campaign results

This campaign involved audits of 266 businesses, from Cairns to Innisfail and as far south as Mission Beach and Cardwell. We looked at a whole range of issues; from whether employees were being paid correctly to whether employers were issuing a payslip containing all of the right information.

What we found was that two in three businesses were complying with all of their obligations – paying their workers correctly and presented perfect employment records and payslips.

If we drill into that one third that were not entirely getting it right, 64% of the errors related to rates of pay – underpaying base hourly rates, penalty rates or overtime rates. The remainder of the errors related to payslips and record keeping – with payslips being the largest part of this segment at 29%. These errors range from the minor and unintended through to more serious oversights.

You no doubt would have provided advice to clients from time to time about how to address such problems when they have arisen, and perhaps more importantly, to ensure they have systems in place to prevent problems from arising in the first place.

The range of circumstances we encountered in our audits is reflected in the range of outcomes. Most of the employers cooperated with us and corrected their errors – over \$142, 000 was recovered from 38 businesses for 136 employees.

But in some cases, we did issue Infringement Notices – on the spot fines for more significant record keeping failings, and a Compliance Notice and an Enforceable Undertaking.

³ Australian Bureau of Statistics, 2017, *Labour force, Australia, Detailed*, Datacube RM1, Labour force status by Age, Labour market region (ASGS) and Sex, time series spreadsheet, cat. no. 6291.0.55.001, viewed 3 July 2017, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6291.0.55.001May%202017?OpenDocument>

Larger businesses generally had a higher compliance rate (77%) than smaller businesses (64%); which is not unusual considering their greater access to specialised professional advice from advisors such as you.

Some of the employers had committed common errors:

- like failing to pass on an annual wage review increase, like the one that has just taken the minimum wage to \$18,29 per hour; or
- not including the employee's superannuation fund on the payslips; or
- failing to seek the advice they need to put the right systems in place or do even the most basic checking to ensure they are complying.

In one case the relatively recent purchaser of a restaurant had continued to pay his staff the same rates as the previous owner. This individual had no prior experience operating a business and was not familiar with Australia's workplace laws. It hadn't occurred to him to check or update the pay rates.

Unfortunately, our audit uncovered underpayments of more than \$54,000 to 28 employees, the result of increases to the minimum wage which had not been passed on.

This restaurateur agreed to enter into an Enforceable Undertaking in which he committed to:

- make good the outstanding wages;
- engage an accountant to enhance his systems; and
- educate himself about his employees' award entitlements.

Throughout this campaign, the overwhelming majority of the employers with errors were quick to rectify any underpayments and reassess their processes to ensure future compliance.

We know businesses are working their way through a complex system of workplace instruments and laws. And you are helping them do that and we thank you for it – the community benefits as well as your clients and their employees when employers are doing the right thing. And employers who are doing the right thing are undermined by those who are not and who are gaining an unfair competitive advantage by undercutting lawful minimum rates of pay.

But these results are a reminder for employers and their advisers to actively manage their compliance with work laws to ensure they are paying the right rates, keeping up to date with the law and keeping appropriate records.

I'd be interested to know if any of you heard about our campaign or had a firsthand experience with us. I'd welcome any feedback from you on what you found useful and any particular areas you think could be a focus for the FWO in the future.

How the FWO operates

If you do find yourselves engaging with us – either through a campaign or perhaps in connection with a specific dispute– it is useful to have a sense of how we go about resolving those matters.

We take a graduated approach to dealing with disputes. Of the 25,000 or so requests for assistance we received last year, the majority - around 86% - were resolved with minimal FWO intervention, primarily through our education and dispute resolution processes.

Our primary weapon in resolving disputes is conversations - not whisking people off to court - but rather, our staff speaking with the parties, understanding the issues that they are facing in their particular matter, and then providing them with practical information and tools. That includes easy-to-use templates, best-practice guides, pay calculators and online-learning modules – all on our website at www.fairwork.gov.au.

In our experience, the earlier we can get the right information into the hands of the individuals, the quicker they can take action and the more likely the employment relationship will remain intact. We don't want to just 'fix the problem'; we want to leave parties better informed about the rules that apply to them, so they are better equipped to get it right in the future.

But what about the rest of the matters we deal with?

We of course do find ourselves reaching for those formal enforcement tools in certain matters: those matters involving the most serious breaches of the law that we encounter - where we find deliberate exploitation of vulnerable workers. And while they are the minority – we treat those matters as a priority.

It's in those matters that the FWO leverage all of the tools available to us, including section 550 of the FW Act to bring to account individuals, such as directors, managers and advisors, who have played a significant and culpable role in serious contraventions of workplace laws. You may well have read about our use of accessorial liability in a range of different scenarios.

It is always worthwhile to examine the language of the provision. It draws on commonly understood and widely used concepts that those 'involved in' a breach of the law should also be held to account. It acknowledges that often a number of parties may have played a role. And it helps us ensure that underpayments to vulnerable workers can be recovered, even where a corporate employer may not have sufficient assets to cover the value of those underpayments.

We pursued accessories in 92% of matters we took to court in 2015-16. To date, the FWO has litigated over 300 matters that have involved an accessory beyond the actual employing entity.

Directors of companies are the main cohort of accessories that have been pursued— 339 of them since 2009 - but a range of other individuals and entities have also been found liable as accessories. For example, entirely separate entities up the supply chain who have benefited from the labour provided have been accessories in underpayment matters.

When we find exploited workers we look up the supply chain and ask: what part has the business benefiting from the labour had to play in what has occurred? This is a risk for any business procuring workers through third parties, especially low skilled workers, such as security guards and cleaners.

In these industries there's often pressure to keep prices low – competitive procurement processes that focus solely on price have contributed to non-compliance in these industries. Because sometimes the prices quoted are so low that they not sufficient to enable the operators to make a profit as well as the workers receive their minimum pay. And in our experience, it's the workers, not the contractors, who will lose out.

We've had a number of successes in this scenario, with trolley collecting being a primary example. We also have a number of active matters involving cleaning companies, including companies that supplied labour to Myer and were responsible for cleaning up the mess left by the crowd at the MCG.

So it's worth asking yourselves - in your business or your clients' businesses, who is managing the procurement of this sort of work and how are they managing this risk? Because even if you are prepared to roll the dice and take the legal risk, the community and the media has not been forgiving when underpayment of vulnerable workers associated with established brands is exposed.

As well as corporate entities, we also consider the role of advisers – internal and external operating in a professional capacity –in workplace contraventions.

Advisers have a critical role. Many smaller businesses rely heavily on expert advice when it comes to work laws. Advisers have a professional responsibility to ensure they give employers the right advice and warn them of risks they identify.

To date, we have litigated four HR advisers as accessories – along with a number of general, administration and payroll managers.⁴ The excuse of 'I was just following instructions' has been rejected by the court.

How Human Resources advisers can be held to account as an accessory.

In one case, the Court agreed with our submissions that a HR Co-ordinator knew that his employer was making unauthorised deductions from the employees' wages, but chose to help the business hide those

⁴ *Fair Work Ombudsman v Ross Geri Pty Ltd & Ors* [2014] FCCA 959; *Fair Work Ombudsman v Liquid Fuel Pty Ltd & Ors* [2015] FCCA 2694 and *Fair Work Ombudsman v Jay Group Services Pty Ltd & Ors* [2014] FCCA 2869.

issues from us by producing a false set of records.⁵ That co-ordinator was penalised almost \$10,000 for his actions, and the Judge noted that *'Persons who are actively involved with misconduct of this sort need to know it will not benefit them to do so'*.

There is nothing 'grey' about falsifying records. It's fraudulent conduct with serious professional implications for an adviser.

But what would you say about the accountant processing payroll for a business who could see that the employees' rates of pay were below-award? What if I told you that he had access to previous advice from the FWO as to what the correct rates of pay were? And did not update the payroll system and continued to process pay using the unlawful rates.

In that case the Court found the accountant deliberately shut his eyes and was found liable as an accessory to that contravention.⁶

You have a choice about how you deal with situations you encounter where an employer has done the wrong thing. You can help fix it, or you can close your eyes to ongoing breaches or engage in a cover up.

We are always prepared to assist employers who identify an error, disclose it to us and work with us to fix it. But if we come across it later down the track and find underpayments have occurred, and that a professional adviser played a role in it, we will not be sympathetic.

And we will ask the question: what role has the adviser played in facilitating this breach of the law? And are they legally culpable?

Working with the FWO

We understand that errors can occur, but you are in a position to help correct them. Employers rely on your advice and are not assisted in the longer term if underpayments are compounded by your inaction.

We want to help you and your clients to get things right in the first place. So we encourage you and them to come to us for help and advice. Don't wait for someone else to raise the problem with us.

The FWO has a suite of online resources designed to help you and your clients to get things right.

- Our webpage was visited over 15 million times last financial year, and should be your first port of call for any questions about Australian workplace laws.
- Our Pay and Conditions Tool (PACT) makes it easy to ensure employees are being paid correctly, and it helped to calculate over 5 million rates of pay in the 2015-16 financial year.

⁵ *Fair Work Ombudsman v Oz Staff Career Services Pty Ltd & Ors* [2016] FCCA 105

⁶ *Fair Work Ombudsman v Blue Impressions Pty Ltd & Ors* [2017] FCCA 810

- In the first two weeks since the new rates were published, our pay calculator processed over 300,000 pay calculations.
- We have a range of resources designed to assist small businesses, including fact sheets and record keeping templates, as well as a range of online learning.
 - Nearly 4.5 million people viewed our fact sheets in 2015-16.
- Our authenticated online space My account allows you to save tailored information, such as pay rates, for future reference and keep up to date with changes to pay and conditions.
- We've also recently released four new online practical guides to help businesses monitor and manage their supply chain arrangements.

Whether you're creating payslips, calculating rates, or processing the pay, it's worth keeping in mind that while two thirds are getting it right –one third still have work to do. It's important to consider how your client's compliance with their obligations is managed.

Where they are utilising labour provided through third parties:

- Do they know arrangements are in place with respect to those workers?
- Are you and your client sure the workers on your site are receiving their lawful entitlements?

If a client is exposed, perhaps because of inadvertent mistakes, systems failings or if they are just not sure about their levels of risk, we are always happy to talk. We want to work with you to support compliant, productive and inclusive workplaces, and to build a culture of compliance throughout Australia.