

‘Industry Led Compliance is the Best Way Forward’

Address to 2017 Asia Pacific Fuel Industry Forum by Natalie James, Fair Work Ombudsman

Hosted by the Australasian Convenience and Petroleum Marketers Association

14 September 2017, Melbourne, Victoria

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

I would like to respectfully acknowledge the traditional owners of the land on which we meet today, the people of the Kulin Nations, and pay my respects to Elders past and present and emerging.

I would also like to extend that respect to Aboriginal and Torres Strait Islander People present today.

The Fair Work Ombudsman is Australia’s national workplace relations regulator. It’s our job to provide advice and guidance to employers and employees alike about workplace laws, and to intervene and take appropriate action in cases where the laws are not being complied with.

When your board considers your risk matrix, I wonder what colour workplace relations is allocated?

Given you transport and supply a flammable and toxic product, it might be that Safety, Environment and Fuel Quality Standard laws are more highly ranked in your consideration around risk, not to mention Competition, Consumer Protection and Tax laws. All these regulations that apply to the distribution and sale of an essential product that keeps an entire country moving – getting us to our jobs, schools and homes, and keeping the economy ticking over.

You also operate in a highly price sensitive market where consumers might drive across town for the sake of saving a few cents a litre. When it comes to watercooler talk, the price of fuel is second only to the weather.

You have a lot of risks to manage, and it may be those arising in the workplace relations area aren’t the ones that have been keeping you up at night.

However, the fact that I’m here today, addressing this forum for the first time, alongside representatives from some of these other regulators, indicates that workplace issues have taken on an increasing significance for your sector. Especially, when one considers how the retail nature of your sector has evolved in the last decade.

Just last week, the Parliament passed new laws¹ that should give you further cause to focus on this area. The Parliament has reflected community concern about the systemic exploitation of vulnerable workers, lifting penalties for serious contraventions to over half a million dollars and in certain circumstances extending franchisor liability for the underpayment of workers.

You may also have seen the headlines associating some well-known fuel retailing brands with the underpayment of vulnerable workers in the last few years.

¹ The *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* passed both houses of Parliament on 5 September 2017 but has not yet received Royal Assent.

If workplace relations compliance is still sitting at green on your risk matrix, and you've not done any recent due diligence in your business, through audits in your network for example, or some other form of checking, you may wish to take a second look.

How sure are you that the workers taking the cash at your 24 hour outlets, usually working on their own, are being paid correctly?

There are over 30,000 people employed in the fuel retailing industry.²

Last year, the Fair Work Ombudsman received just over 100 requests for assistance from this industry. At first glance, this might not seem like a large number. But there is more to the story than a simple comparison of numbers.

To begin with, the industry itself is relatively small when you consider that there are over 12 million employees in Australia.³ But more importantly, it is necessary to consider the profile of your workforce and some of those headlines that we've seen. Once you enter that level of granularity, the alarm bells begin to go off.

Last year, about 20% of workers from the fuel retailing industry that came to us for assistance were on a visa, usually a student or working holiday visa. Given temporary visa workers are only about 6% of our labour market, they are disproportionately represented.

Approximately a quarter were 25 years of age or younger – despite forming just 15% of the national workforce. Again, these workers over-represented in your industry.

This makes them red on the Fair Work Ombudsman's risk matrix. Because we often find that these people are vulnerable workers. English may not be their first language, this may be their first job, and so they probably have little knowledge of workplace laws and fear seeking the Government's help when things go wrong. Their primary concern is often their visa status as opposed to their minimum rate of pay.

For a number of years now, the number of visa holders coming to the Fair Work Ombudsman for help has been increasing. Last year they represented 18% of all those who requested our assistance – up from 13% the previous year. That is almost 1 in 5. They were involved in nearly half of all the matters we put into court – the most serious cases that we see that warrant the most serious enforcement action.

Similarly, young workers feature strongly in our work – representing over a quarter of those coming to us for help and also nearly half of our court actions.

These are precisely the sort of workers the Government's new *Protecting Vulnerable Workers Bill 2017* is designed to protect – by providing the Fair Work Ombudsman with better tools to respond to the exploitation of workers.

When we see vulnerable workers coming to us for help, we do look closer, because unfortunately these examples tend not to be isolated incidents or an error, but indications of a broader pattern of non-compliance. Acknowledging that in spite of our best efforts, vulnerable workers do not always come to us for help, the Fair Work Ombudsman digs deeper.

² Australian Bureau of Statistics, Labour Force Survey, Australia, June 2017.

³ Australian Bureau of Statistics, Labour Force Survey, Australia, June 2017.

The Fair Work Ombudsman doesn't simply respond to the allegations of non-compliance we receive from employees.

We use a range of intelligence, including anonymous tip offs, to target sectors or regions where we sense there are dynamics at play that allow widespread or systemic non-compliance.

Data and intelligence from a range of sources help us target operations and may cause us to initiate a broader Inquiry into a sector or business, based on a risk profile that tells us something isn't right. In recent times, our Inquiries have exposed underpayment of workers, often migrant workers, in circumstances where their unfamiliarity with our laws and fears about their visa have been ruthlessly exploited.

Despite last year only receiving about 100 requests for help from your sector, this is an industry where we are finding that one problem seems to indicate bigger, more concerning issues. Consider some of the examples already on the public record.

Our investigations into the 7-Eleven network identified significant wage underpayments of a workforce which had a large number of student visa holders. We also discovered widespread falsification of employment records and stand over tactics used to pressure employees to pay wages back to the boss in cash.⁴

Many employees were afraid to speak to us; receiving threats they'd be reported to the Department of Immigration and Border Protection if they cooperated in our investigations.

Just in case you're thinking it was only their convenience stores, we saw the same conduct occurring at fuel retailing sites and have taken court action in one such case.⁵

To date, 7-Eleven has assessed over 3,500 claims and re-paid over \$150 million dollars to workers and they haven't finished yet.⁶

And if you were thinking 7-Eleven was a one off, then along came Caltex. This business recently reported it has established a \$20 million fund to repay underpaid workers engaged by its franchisees, and that it's conducting internal audits across its network. Unlike 7-Eleven, who entered into a formal Proactive Compliance Deed with the Fair Work Ombudsman setting out arrangements for restitution of workers, Caltex has not worked with us in developing its fund. It has not engaged with the regulator with respect to the criteria or conditions that apply to making payments to employees or reporting on which individuals or entities have been involved in breaches of the law. These self-initiated actions follow ongoing investigations by the Fair Work Ombudsman in response to concerns about worker underpayment in the Caltex service network.

In late 2016, we visited 25 Caltex sites across Australia and reviewed the employment records for nearly 200 workers. Reinforcing the data about the profile of your workforce, over a quarter of the workers

⁴ For further information, see the FWO's Inquiry Report '[Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network](#)'.

⁵ Last year, a court found that a 7-Eleven franchisee had underpaid two console operators nearly \$50,000 and falsified its employment records. The court penalised the company and its owner over \$200,000. See FWO's media release of 2 May 2016: [Record Penalties Against 7-Eleven Operator](#).

⁶ As at 5 September 2017, 7-Eleven has determined 3,660 claims paid \$150,497,385, see: [7-Eleven Wage Repayment Program](#).

whose records we examined were under the age of 24 years of age, and over 50% held a visa with work rights.

As we continue to assess the findings of those site visits, I can report similar themes are emerging to 7-Eleven. Once again we have concerns about false and misleading records within a well-known franchise, and one of the difficulties we have faced is that many of the employees are not willing to come forward and provide evidence.

The actions of Caltex to identify and rectify underpayments and the way in which they going about doing this are not just a matter for the company and the stock exchange. The Fair Work Act sets penalties for breaches of the law and it is up to the regulator, the Fair Work Ombudsman, to consider whether court or some other form of enforcement action should be taken. There is public interest in ensuring appropriate consequences flow to those individuals and entities involved in serious and deliberate breaches of the law, especially where they impact on vulnerable workers.

I expect to be issuing a report on our compliance activity involving Caltex in the next few months. All I can say at this stage is don't be surprised if I am reporting on certain enforcement actions we have felt compelled to take in the public interest.

United Petroleum is another high profile brand whose network we investigated, following media reports in September 2015 that employees were being paid as low as \$10 an hour. These reports were consistent with our own intelligence.

Following our compliance activity, we reported publicly that Fair Work Inspectors had reviewed the time and wage records of 11 of their retail fuel sites. Over 75% of the workers were on a visa, and many of the employers themselves were from non-English speaking backgrounds.

Overall, we found that 40% of the businesses were non-compliant and uncovered \$20,550 in underpayments over a six month period.

In our public report we not only disclosed the findings of our activity but invited United Petroleum to enter into a compliance partnership with us, in order to better identify and address the drivers of non-compliance in its service network.⁷

While United Petroleum is yet to accept this offer, we have unfortunately had to open up new investigations involving the network in Tasmania following more recent allegations of systemic non-compliance.

Again, the themes of 7-Eleven and Caltex surface – as the owners of sites (often migrants themselves) report that employing workers at below Award rates is the only way they can remain profitable.

The message is clear for those in head office – we know the market is acutely price sensitive for all players – with the passage of the *Protecting Vulnerable Workers Bill*, it is essential franchisors consider the dynamics in your business and whether aspects of the operating model are facilitating non-compliance. Suffice it to say, to turn a blind eye to these questions is not only 'reckless' it may now be unlawful.

⁷ For further information, see FWO's Activity Report ['United Petroleum Retail Fuel Retail Outlets: Summary of compliance activity outcomes'](#).

Let me explain, how might these examples have played out if the new laws were in place? Would the outcome have been different with the new higher penalties? What would have the actions of head-offices been, were they potentially liable under the new franchising provisions? And what sort of additional evidence may have emerged if we could have required key management personnel or outlet operators to attend an examination, and answer questions about what they know?

Given these examples, and the new laws, what should you as industry leaders be doing right now? Are you certain that everything is as it should be when it comes to compliance with workplace laws in your operation?

Whether you are part of a large operation providing fuel across several sites, or running a single outlet, the principles for ensuring compliance are the same. You can take some basic steps to test whether workers are being paid correctly.

Those responsible for paying workers should check out our website at fairwork.gov.au. We have a range of tools to assist you to make sure people get the right advice, and know what rules apply.

In fact, last year over 5 million people checked our Pay and Conditions Calculator - PACT - and over 16 million people checked our website. Are you one of them?

Our suite of online tools together provides a complete set of information and support for single outlets or larger operations alike.

Our online wage tool – PACT – allows users to calculate pay rates in modern awards, leave entitlements and notice requirements, by answering a few simple questions. This is the most basic form of checking workplace obligations, and it's always up to date.

We have a number of freely available guides and templates. This includes advice on employer pay-slip and time-and-wage records obligations.

Through our online authenticated space My Account users can stay up to date with workplace relations information, including signing up to automatic email alerts to changes in awards and pay rates. If you are supporting others to comply it is the perfect way to ensure they remain up to date and have a pathway into the Fair Work Ombudsman to get the right advice – we commonly require people to sign up as part of our Compliance Partnerships and EUs.

On 4 May 2017 we released our Labour Supply Chain guidance - four new practical guides to help businesses monitor and manage their contract arrangements to make sure every single worker in their contracting networks is being paid fairly and appropriately. They were developed in consultation with experts and stakeholders, such as the Franchising Council of Australia.

If you are operating a larger business, which includes a number of outlets run by third parties, such as a franchise or commission agent model, you may wish to consider a partnership with my agency. A compliance partnership is an agreement with us that includes a set of practices that are tailored to your business. They provide a framework for you to provide outlets with the right combination of support and accountability to ensure they are equipped to get compliance with work laws right. Entering into a Compliance Partnership demonstrates to us and the community that you are serious about compliance with workplace laws.

We have entered into Compliance Partnerships with a range of franchises, some of which came to us after problems were identified, like 7-Eleven, and others which wanted to get ahead of the game and put in place practices to prevent underpayments arising in the first place.

And we will be working with the business sector to support you to get it right. We will be holding a round-table with industry next month to discuss the new franchising laws. Our priority in this early stage is to ensure that you understand and can apply these provisions when they commence in about 6 weeks' time. We have invited representatives from Australasian Convenience and Petroleum Marketers Association to the round-table, and I am sure the outcomes will be fed back to members.

In the meantime, you may be wondering what is going to be happening at the "pointy end"; what impact will the new laws have on our approach to enforcement?

We will enforce the new laws in the same way as we approach all our work, in a balanced, evidence-led manner that considers the circumstances of the case.

We don't 'prosecute' oversights or errors made when an employer has made a reasonable effort to get it right. What you read about in the papers is about the worst behaviour we see, warranting the most serious response. It does not reflect most employers' conduct. Most employers are making an effort to navigate our complex system and seeking advice, hopefully from someone qualified to give it about their workplace obligations.

But for those who are doing the wrong thing, and quite deliberately seeking to maximise their profits at the cost of their workers and their competitors, we will not hesitate to apply the full set of tools in our toolbox, including the new powers and penalties granted to us by the Parliament.

As industry leaders, you are in a position to support people getting the information they need to get it right – and to ensure every branded outlet is complying with the law and no business is getting an unfair advantage by ripping off their workers.

It is in your interest that the brand behind your business is perceived in the best light possible. You don't want to run the risk that news of worker exploitation occurring in your business is jamming up your twitter feed and becoming the latest watercooler conversation.

So I encourage you to consider where workplace relations regulation is sitting on your organisation's risk matrix, and to talk to your employer organisation and my agency about how we can work together to ensure workers are paid correctly.

When compliance with laws becomes an industry wide effort, it allows for all those in the fuel retail sector to operate on a level playing field.

I look forward to partnering with industry to get the right information into the hands of workers and business to build a culture of compliance with workplace laws.