

“Leadership, responsibility, liability”
Australian Hotels Association NSW Legal and Industrial Conference 2016
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Good morning everyone.

Thank you for inviting me to speak to you today. I am pleased to be here speaking to you all for what is my second time at an AHA Conference

I would like to begin by acknowledging the Eora (yura) people who are the Traditional Custodians of this land upon which we meet.

I would also like to pay respect to the elders past and present of the Eora nation and extend that respect to other Aboriginal and Torres Strait Islanders who are present.

Today, I’m going to speak to you about: Leadership, Responsibility and Liability: how in showing the first, exercising the second, you can avoid finding yourself in difficulties with respect to the third!

Leadership

The AHA is an industry leader. It has always adopted a collaborative approach to working with the FWO.

We’ve been working together on improving compliance within the industry for a number of years now.

Our partnership was formalised by signing a MoU with the AHA in December 2010, our second in 2014 – and we’ll be looking to renew our arrangement in the New Year.

The MoU between the FWO and the AHA is our public commitment to working collaboratively to achieve compliance in the sector and create a framework for the open exchange of information that will benefit one another in the work we do.

This relationship means that we work in partnership with the AHA on initiatives such as our National Hospitality Campaign where we can leverage your industry knowledge and experience to inform our activities across the sector.

Last time I was here, we were in the middle of this National 3 year campaign. We commenced it to understand why the hospitality industry generated the highest number of complaints of any single industry.

We'd already released the first wave of our campaign, which focussed largely on your sector: Pubs, Tavern, Bars and Accommodation. Since then we have released the outcomes for the second wave - Restaurants, Café's and Catering and the third wave - Takeaway Foods.

In the first wave found that almost 70 per cent of pubs, taverns, bars and accommodation businesses audited were meeting their workplace responsibilities. This is, relatively speaking, a good result. It's above our average compliance rate which last year was 61 per cent.

The results of the second and third waves of the campaign, covering restaurants, cafes and takeaway foods, were not as positive.

Just 42 per cent of restaurants and cafes were fully meeting their responsibilities, and even more concerning, only 33 per cent of takeaway food businesses were fully meeting theirs - that's the opposite of the results in accommodation.

Overall, these outcomes produced a compliance rate for the hospitality industry of 48 per cent.

This is a worrying outcome for the industry. It does not engender confidence of customers and staff to hear that fewer than one in every two hospitality businesses aren't complying with workplace laws. Almost four in every ten were underpaying workers.

We appreciate that many of these businesses are small businesses facing a number of pressures. But those businesses that are doing the right thing are at a disadvantage. This is because four in every ten of their competitors is unlawfully reducing the costs of doing business through underpaying their workers.

The FWO is looking to work with the sector to turn these compliance rates around.

In early December this year, we'll be sitting down directly with fast food small businesses to work through the challenges they face in understanding and complying with workplace laws. We want to know what they find difficult and importantly, how we can help. This won't be a talk-fest; this is about jointly identifying problems and co-designing solutions with employers in a subsector that is clearly having significant issues.

Following the workshop, we'll also be working with stakeholders, like yourselves, to understand your perspective on the fast food subsector, and to look for opportunities to partner to make it easier for fast food businesses.

And we are also looking to what we can learn from the more compliant parts of the sector, such as that represented by the AHA, to build a culture of compliance throughout hospitality.

There are a number of other ways in which you can show leadership in building a culture of compliance with workplace laws - that I will come to a little later.

But first, we will tackle the question of liability.

Liability

You don't need me to tell you that as an employer you are responsible for making sure you are paying your employees correctly.

But it doesn't necessarily end there.

Section 550 of the Fair Work Act extends liability for breaches of workplace laws to other persons or entities who were 'involved' in the contraventions. The accessorial liability provisions mean that individuals and entities outside of the direct employee-employer relationship may be held legally responsible and be subject to court orders.

We've always been active in utilising these provisions to ensure that someone is held to account for breaches of workplace laws – especially when confronted with corporate entities thrown into liquidation when we start asking questions, or whose financial stability is not assured.

Last year, 92 per cent of the cases we put into court included an accessory as a respondent.

And while people may have heard that Company Directors and employees may be found liable, we've been utilising it more broadly: with respect to advisers – Accountants, for example. And companies involved in the labour supply chain – who may not be the direct employer but are benefiting from the labour.

This is an approach we have adopted because we have been seeing that, in some highly competitive parts of the labour market, vulnerable workers at the bottom of these arrangements being exploited, often deliberately, as a business model.

I'm talking about low skill work in labour intensive labour markets that often feature highly competitive procurement arrangements.

There is pressure to keep prices low. Sometimes so low they are well below minimum lawful wages.

And your industry is likely to be operating in some of these markets. Think cleaning. Or security. And you may think "I'm not in the business of cleaning or security!" In fact, you may well have deliberately and quite legitimately stepped out of directly employing people to provide those services. Through outsourcing or labour hire arrangements.

But you may still be at risk of liability with respect to those workers.

Just this year, we achieved our first order from a court that required an accessory – in that case the former company director – to personally back-pay employee entitlements.

In the case of Step Ahead, an entity employing security guards had deliberately underpaid eight employees, with the knowledge of its director Owen Jennings. Following a FWO initiated litigation, Mr. Jennings had to pay almost \$23,000 in lost wages out of his own back pocket, and he was personally ordered to pay a penalty of more than \$51,000.

Up until this point, FWO had limited our orders against accessories. We had only sought penalties. Not anymore – in this case, for a range of reasons including the fact that the company was no longer operating, we pursued and obtained orders that the accessory was directly liable to make good the underpayments.

Do you use security services? What arrangements do you have in place with respect to those services? Are you sure the security guards, working all hours to keep your customers and premises safe, are receiving their lawful entitlements?

It is now a normal part of our work when we find exploited workers to look up the supply chain and ask: what part has the business benefiting from the labour had to play in what has occurred?

Housekeeping Inquiry

Another sector where we see vulnerable workers at the bottom of complex supply chains is cleaning.

Earlier this year, we released our report on our Inquiry into the housekeeping services of 4 and 5 star hotels. In this Inquiry, we looked at the responsibility of hotel property owners engaging cleaning companies.

Those working in the cleaning industry can be vulnerable to exploitation and the industry has been a priority for the FWO.

We'd received reports of housekeepers being paid per room cleaned, instead of an hourly rate – which can often be a sign that employees aren't receiving minimum award rates and may be wrongly classified as independent contractors.

Our Inquiry involved a review of a sample of hotel sites from within the Starwood Hotels and Resorts Worldwide, The Accor Group and Oaks Hotels and Resorts in Melbourne, Sydney and Brisbane.

My Inspectors discovered the housekeepers were generally being paid under the wrong award. They were being paid under the Hospitality Award, when they should have been paid under the Cleaning Services Award.

I've said before that the award system has its complexities, and it's understandable that operators that aren't familiar with the award system and operate within hospitality might make this error. But advice is available – for free on our website – and in this case, the error meant these businesses weren't even starting with the right set of rules.

And the workers were not receiving their full entitlements.

Cleaning contractors had failed to maintain proper time and wage records and rosters did not include start and finish times, making it difficult to distinguish between ordinary time and overtime.

Some sub-contractors were making unauthorised deductions from the wages of their employees for lost equipment or failure to complete six months' continuous service.

We also found that principal cleaning contractors tendered for work based on this "rate per room" model - a model heavily influenced by the cyclical nature of the industry and the need for hotels to swiftly adjust their labour supply based on occupancy levels.

In some cases, the hotels penalised their principal contractors if they deemed that the quality of service provided was below an expected standard.

This model may have been convenient from a business perspective, but the dynamics it created caused inevitable tensions with the payment of hourly award rates and allowances, and the result was that dozens of housekeepers had been underpaid.

Some of these breaches flowed more from a low level of understanding of workplace laws.

We were pleased that businesses in the Accor and Starwood chains that made these mistakes were fully cooperative and quick to amend their practices.

And we've recommended that businesses undertake training to ensure they know what they're doing from now on.

Oaks and Housekeepers Pty Ltd Investigation

Our investigation of Oaks was less clear cut. Oaks and its subsidiary entity Housekeepers Pty Ltd established an independent contracting labour supply model.

In essence, the model involved Oaks sourcing its cleaners from its wholly owned subsidiary entity Housekeepers Pty Ltd. Housekeepers Pty Ltd engaged these individuals as "independent subcontractors", as though each of them were running their own small business. In fact each of

the affected individuals was a migrant visa holder and quite clearly did not know the difference between an employee and a contractor.

Our view was that, on the evidence available to us, these 'subcontractors' were in reality employees of Housekeepers Pty Ltd, entitled to everything that flows from an employment relationship.

After the FWO stepped in Housekeepers Pty Ltd resolved those underpayments – \$13,000 to 16 employees.

When the FWO checked back in a few months later, we found to our great disappointment that Housekeepers Pty Ltd and Oaks had continued to purport to engage these workers as contractors.

We don't start an investigation with the intention to take a business to court. In fact, last year, 94 per cent of the matters that came to us were resolved without any need to engage our compliance methodology at all. But if we find serious issues and a business that won't work with us to fix the problems – we find that we must reach for our enforcement tools to resolve the situation.

So, we prepared to initiate proceedings in the federal courts. When faced with this prospect Housekeepers Pty Ltd and Oaks finally agreed to step up and enter into an enforceable undertaking with the FWO, acknowledging:

- their moral and ethical responsibility to ensure everyone in their supply chain is complying with workplace laws; and
- that the operating model they used had led to the situation where these workers could be exploited.

Housekeepers Pty Ltd agreed to back-pay workers at all Oaks hotels around Australia from 1 August 2015 and to organise training for directors about workforce engagement.

We are pleased at how responsive Housekeepers Pty Ltd has been to all reporting and monitoring requirements under the EU. We acknowledge the change of approach and we commend it.

They have provided time and wage records showing they are now engaging their housekeepers as employees and paying them the appropriate award wages.

Since the Inquiry report was released, Housekeepers Pty Ltd has conducted its own self audit which has resulted in another 1502 workers being back-paid a further \$1.9 million in unpaid wages and super. This is a great result for everyone.

Our Report acts as a reminder to hotel chains big and small to ensure pricing schedules and tender documentation are framed with reference to award obligations and entitlements at all levels of the supply chain.

It is also a reminder to make sure you know your obligations; being informed is the easiest way to know you're doing things right.

And while this case involved related entities, supply chain liability isn't limited to such cases. We have taken a number of cases against accessories who are the beneficiaries of labour in supply chains and networks:

- against all tiers of contractors providing trolley collection services to major supermarkets through procurement arrangements; and
- against head franchises with respect to breaches of an outlet where we had evidence of broader non-compliance.

Once again, this Inquiry has clearly highlighted the need for lead businesses in Australia to consider the steps they can take to enhance compliance with workplace laws in their labour supply chain.

Responsibility

So how can you take responsibility – and assure yourself that workers whose labour you are benefiting from are paid correctly?

Consider what governance you have in place around your labour supply arrangements. Especially with respect to vulnerable workers; such as cleaners and security personnel.

Do you engage them directly, or have you outsourced the services?

If you've outsourced, how many layers of contracting are there?

Is the contract price set at the right level to allow business to turn a profit as well as the workers receiving their minimum entitlements?

In our experience, subcontracting arrangements can proliferate in supply chains unless you do something to manage the number of tiers of contracting. And the more subcontractors, the greater the risk that money intended for workers' pockets ends up in the hands of middle operators.

Limiting the number of levels of subcontracting is a good start, and ensuring that you know who the subcontractors are.

The company at the top of the supply chain, or the centre of a franchising network, often has the capacity to control the settings, and importantly, is determining how much money is going into the supply chain or network.

It's not about removing the responsibility of the direct employer – it's about making sure that those at the top aren't unfairly benefiting or turning a blind eye to the impacts on the workers at the bottom.

We are developing material that will assist businesses who want to take responsibility for their supply chain which will be available on our website.

New options to demonstrate you are willing to step up and take responsibility are emerging all the time.

One of the initiatives that the FWO is supporting in that regard is the Cleaning Accountability Framework.

Cleaning Accountability Framework

We've been working with a number of stakeholders in the cleaning industry to develop a national supply chain certification scheme called the Cleaning Accountability Framework – often referred to as 'CAF'.

The idea of the CAF certification scheme was developed from within the cleaning industry itself. The 'race to the bottom' mentality in the industry had led to poor quality cleaning outcomes, unsustainable business models, irresponsible contracting and employment practises and unreasonably low contract prices.

The FWO was approached a few years ago to become involved in the development of CAF.

CAF recognises that in order to put the industry on a more sustainable footing, all those involved in the cleaning supply chain have to work together.

A property can become CAF certified once all participants in the cleaning services supply chain meet the compliance requirements.

In a practical sense, if your business is certified under CAF – it gives an assurance to the businesses itself and any who engage them that they are following the rules.

We're hoping that the widespread adoption of the framework will result in a reduction of underpayments in the cleaning industry.

And help create a culture of compliance within the industry.

This framework will continue to evolve, and we hope it will be of broad application – to assist anyone engaging cleaning services, which I imagine is most businesses these days, across the range of contexts – from commercial buildings and retail spaces, to hotels and pubs.

It's the owners of these properties who are playing a key role in in the running of the CAF, as representatives of the Steering Committee. Major players like AMP Capital and ISPT Super Property, along with the FWO, union representatives and industrial associations are working together to develop a shared understanding of how issues in the industry need to be addressed.

Earlier this year some of the major players volunteered their property sites for the pre-pilot program of CAF – which was the first opportunity to test the framework on live sites.

We are hoping to launch our broader pilot program later this year where we'll be testing the standards across a range of sites – to find out how it all works in practice.

As with any kind of new system – it'll need to be supported by tools and guides for all those who use it.

We commend the AHA on its involvement in the CAF Advisory Council so far. We'll continue to look to you and your members for your industry knowledge to ensure this framework and the guidelines are practical and useful.

We want to know what works for you.

Proactive compliance Deeds

Another way of taking responsibility is being proactive in your engagement with us.

We offer compliance partnerships to employers who want to publicly demonstrate their commitment to creating compliant, productive and inclusive Australian workplaces.

It's a way to work with the FWO to ensure your business and, potentially, other businesses you deal with are complying with workplace laws.

Get out in front of any problems in your business or network.

Don't wait for someone else to go looking – like the media or one of my Inspectors.

We are happy to work with anyone who is interested in taking steps to protect their workers and their reputation.

And we can tailor the arrangements to suit any business – big or small.

Tell us about things you hear and see....

As industry leaders, who are complying with the law, you and the FWO have a number of things in common. We both want to build a culture of compliance with workplace laws – to ensure that there is a level playing field for business and that no one is gaining a competitive advantage by underpaying workers.

In this sense, compliance with workplace laws is everyone's business.

If you suspect a business is exploiting workers or if something doesn't seem right, we want you to tell us.

Back in 2014 when I last spoke at your Conference, I highlighted our interest in sharing information and intelligence – especially between the FWO and AHA and its members - so we know what you know about trends in the industry, especially non-compliant practices.

We were looking at ways to actively invite this kind of intelligence outside of initiating a formal complaint.

It may be from a worker who was afraid to come forward, an interested bystander, or someone in the industry who knows of a business exploiting workers to get a competitive advantage.

Good employers often know who the bad employers are. You are probably getting a flow of staff coming from them to you –word of mouth and reputation are critical for workers in an industry that features a fair amount of mobility and turnover.

I am pleased to say, we now have an online Anonymous Report tool which gives the opportunity to members of the community – workers, consumers, businesses, industry bodies... anyone really – to alert us to potential non-compliance without having to identify themselves.

The information we collect is analysed for trends and patterns, and integrated into other intelligence. This helps us tailor and target our education and compliance work.

We know that there is a difference between those making honest mistakes and those who are deliberately operating outside of the law.

We've had a great response to the tool so far - receiving over 4000 reports since its launch in April 2016.

So far, most of what is coming through is from employees. But in another worrying trend for the hospitality industry, over a third of the tip-offs we've received relate to the hospitality industry.

This is twice as much as the proportion of formal dispute forms we receive from the industry. It means hospitality is topping both of these polls – not a position any industry should aspire to fill.

And it suggests that workers in this industry are particularly fearful to come forward and make a formal complaint.

But we would welcome you using the channel if you have intelligence that would be of use to us in framing our work.

Conclusion

The AHA has shown itself to be an organisation that is willing to step up and work with us: to show leadership and take responsibility. And we are asking you to continue to do so.

As the more compliant part of the sector we look to you to help us leverage this culture of compliance – to build it within your sector and to encourage compliant practices throughout the hospitality industry.

All of us have an interest in building a culture of compliance with workplace laws. And we're always happy to work with you.

Let's continue to share our knowledge with each other, so we know what is going on and what we can do better to the level the playing field for business.

So thank you for your time today, and for inviting me to speak with you.

I look forward to continuing our work together, and I'd welcome any questions that you might have.