

“Reasonable Steps: the Regulator’s Perspective”

Address by the Fair Work Ombudsman, Natalie James, to the Franchise Management Forum hosted by the Franchise Advisory Centre.

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Introduction

Before I begin, I would like to acknowledge the Turrbal 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.

Here we are some two years on from the launch of the Government’s policy to protect vulnerable workers in the 2016 election.

A policy which contained a suite of critical reforms to enable the Fair Work Ombudsman to more effectively combat worker exploitation. The reforms were a response to the community’s outrage and frustration at high profile cases involving callous and calculated underpayment of workers.

The staff of the Fair Work Ombudsman shared the community’s outrage and frustration.

Some of those cases involved well known franchise brands. Brands about which the Fair Work Ombudsman had longstanding concerns, had investigated, and had, in many cases been keeping our Inspectors busy for a number of years.

Taking up complaints with individual outlets, often finding insufficient funds to pay the workers and sometimes, franchisees themselves under significant financial pressure was not addressing the root cause of the problem. The underlying problem invariably extended beyond individual outlets.

All businesses, large and small, must familiarise themselves with and comply with the law. But there’s no doubt that a common observation of Inspectors was that the behaviour of franchisees was heavily influenced by settings within their respective franchise network and by the dynamics in the part of the labour market in which it operated.

We found franchisees with minimal business experience, an insufficient understanding of the law and a sense that, in their business network, indifference to those laws or even fraudulent actions to circumvent them was seen as ‘the way’ in which to succeed.

The systems and culture in which they were operating failed to reinforce that compliance with work laws was an essential ingredient on the menu of expectations of the franchisor.

And so that is why I am here today, talking about the new franchisor liability laws. Laws which specifically hold franchisors to account for wage underpayments in their business. Laws which require franchisors to use their influence or control to take reasonable steps to create systems and cultural settings designed to prevent non-compliance with work laws. Laws which were passed by the Parliament last year and have applied since October 2017.

The message is clear for franchisors – you cannot ignore dynamics in your business and the extent to which your operating model is driving the behaviour of your franchisees when it comes to compliance with workplace laws.

To turn a blind eye to these questions is not only ‘reckless’ it may now be unlawful.

While the awards and pay rates within them are not new, direct franchisor liability for meeting those obligations represents an extension of the regulatory framework.

It is the Fair Work Ombudsman’s job to provide advice to franchisors, franchisees and workers about these new rules.

To that end we have worked with the franchise community, in partnership with experts like FranchiseEd, to develop our new *Guide to promoting workplace compliance in your franchise network*. I am pleased to announce that we are releasing that guide today.

The guidance is informed by the clear purpose of these new rules as articulated during their passage by the Parliament. We have also taken on board feedback from the sector and considered the very diverse nature of franchises operating in Australia.

One of the clearest messages to come out of the franchise community is around rightsizing.

The law itself recognises this diversity by providing that a franchise will not be liable for underpayments where it can show it has taken ‘reasonable steps’ to prevent this from occurring.

The term ‘reasonable’ by its very nature requires that the particular business and its circumstances determine the expectations and the sorts of actions required. To provide us all with some guidance, the Act specifically lists the sorts of factors relevant to determining what is ‘reasonable’:

- The size and resources of the franchisor – that is, the larger and more resources the network has, the more it is expected to do
- The ability for the franchisor to influence or control what the franchisee actually got wrong – not just operational control, but also any financial and management influence that franchisor might have over the network
- Whether procedures for handling complaints about issues like underpayments are in place

- What steps you take as a franchisor, to encourage, support or train franchisees about complying with workplace laws; and
- What arrangements were in place to monitor and assess the franchisee’s compliance with wage, payment of record-keeping obligations in relation to employees?

Our expectations and our approach to regulation will of course be informed by the diversity of the franchise sector. The characteristics and situation of a business has always been a factor the Fair Work Ombudsman considers in determining our regulatory response to non-compliance – as is clearly set out in our Compliance and Enforcement policy.

Some franchisors are further down the path of best practice when it comes to work laws than others. We’ve sought to draw on their experience and reflect that in our guidance to you.

The Guide sets out practical steps you can take in four key areas, including a smorgasbord of suggestions within each step to help you decide what your business needs to do to manage your workplace compliance risks now and into the future.

We have included case studies to illustrate how these steps might be brought together in different situations.

Set expectations

The first step, is to set expectations.

In any system, the tone is set from the top. All your words, deeds and formal documents need to be unequivocal: workplace compliance is a compulsory requirement of your business. It does not come behind the quality of the service or product or the marketing plan.

Make your expectations clear to current and potential franchisees, include terms in your franchise agreements around workplace compliance, monitoring activities and consequences of non-compliance.

It is always wise to encourage potential franchisees to seek advice about labour costs during their due diligence. For example, do you ensure they appreciate the hours of operation you expect and the costs associated with hiring workers for different shifts?

Educate and train

Next, it’s important to educate and train your franchisees.

Your induction processes are a great opportunity to help new franchisees understand rules that will apply to their franchise. You can introduce them to some of our free services, like our authenticated online My Account service, Pay Calculator, our recently launched Small Business Showcase, the Fair

Work Infoline and Online Learning Centre – not to mention our extensive range of templates for things like rosters and pay slips.

It's also important to help them access tailored advice – that's a service you might provide yourself, or you could recommend employer associations or employment advisers who can provide help to deal with specific issues.

You would know better than me what your franchisees need – people who come to buy a franchise do so with a range of experience in business and in Australian workplaces. You need to consider the capability and sophistication of your franchisees in managing your risks and deciding how to go about providing franchisee support.

Many recent arrivals to Australia enthusiastically embrace running their own business as a pathway to get a start in their new life. But they may have little understanding of applicable workplace laws. It is not surprising that members of this cohort sometimes need additional assistance.

However, even I was surprised at the extent to which migrant businesses featured in our recent compliance activity involving a well known franchise brand.

As outlined in our report into the Caltex service network released in March 2018, nearly three quarters of franchisees we examined were from a non-English Speaking background (i.e. 17 out of 23). It is undeniable that this contributed to the worryingly high rate of non-compliance we found in our audits. The non-compliance rate of 76% roughly matched the proportion of migrant businesses in our sample.

If your network's profile is anything like this, you need to consider the level of support, including the option of in-language material. Here, we can help – the Fair Work Ombudsman has heavily invested in developing online material specifically for people whose first language is one other than English, along with custom designed automatic translation of our website into 40 languages.

Monitor compliance

The next step, monitoring what is going on in your network, is critical to enabling you to identify and respond to any problems quickly should they arise. This is about backing up your expectations with visible action.

The most fantastic policies, systems and training in the world will not guarantee compliance unless they are reinforced through making it clear that you check.

I acknowledge that some of you are hesitant to invite a third party into your business. The Fair Work Ombudsman has found time and time again that third party auditing is the best way to clearly signal

the importance of compliance with work laws and identify problems before they take hold. The scope and scale of such an endeavour can be tailored to your business and your risk profile.

The guidance material looks at options here and refers to some other resources on our website about self-auditing .

If this isn't for you, then you must assess and manage your risk in other ways to ensure you are able to detect and respond to breaches of the law. Encouraging employees to come direct to you, such as via employee hotlines, is one option.

As you consider these risks, I cannot emphasise enough that part of the picture is the labour market in which you are operating and profile of your workforce.

I have said again and again that certain markets are higher risk than others. I have identified the characteristics that feature repetitively in systemic non-compliance: low skill work, labour intensive sectors, high levels of vulnerable workers and tight profit margins.

If this is the market in which you are operating, and you choose not to actively check compliance through an auditing program, then you are rolling the dice and they are loaded against you.

The second surprise for me when considering our compliance activity into the Caltex service network was that a whopping 6 in every 10 of the employees whose records we examined were on a visa.

This is 10 times the proportion of visa holders working in the labour market. And over one quarter of the workers were under the age of 24 years.

With all we have seen in the media about the exploitation of young and migrant workers, no one with a profile like that, absent robust monitoring and support, should be surprised to find a troubling degree of non-compliance.

Take further action

Finally, if you find issues, you need to take further action. For the good of the brand, your staff and the community.

It's important to act quickly, fairly and decisively. If workers haven't been paid right, you need to get it fixed. Pronto. The new laws do not remove the franchisee's responsibilities and your first action should be to require they pay back any monies owed.

If it's an isolated or understandable error, you might need to provide some extra training or guidance. If it is indicative of broader problem, in that outlet or in other parts of your business, you may need to take more serious action.

Many have gone down the path of assuming they have an isolated problem- 'just one bad apple', but learning they were wrong. A difficult and costly lesson.

We are always willing to engage with those that genuinely want to take action to prevent or deal with non-compliance with work laws. We are happy to provide advice and assist you.

Consider partnership

Our experience is that we are best able to assist you get on top of workplace compliance when we are able to engage honestly and openly and in partnership. Where franchises have stepped up and taken action by entering into a compliance partnership with the Fair Work Ombudsman – these brands have recognised that investing in compliance is a smart business decision.

The likes of 7-Eleven and La Porchetta have built new ways of working with their network – ways that are supportive of their outlets, but uncompromising in the event of deliberate defiance of their clearly set out expectations.

Both these brands have invested in proactive audits which are either conducted or validated by independent third party workplace relations specialists. They have found this to be a 'small price to pay' in comparison with negative brand coverage, market cap deterioration and a whole host of legal and accounting problems with franchisees down the track.

Both these brands had to learn this after things went wrong for them.

With the new laws in operation, Compliance Partnerships shouldn't be considered merely remedial for a franchise network. They enable you to work with us to agree on a set of steps that are tailored to your business and designed to prevent non-compliance arising and taking hold.

This is a reasonable and sensible step for any franchise genuinely wishing to ensure a compliant network. And the process of agreeing to a partnership builds trust and understanding with the Fair Work Ombudsman, helping us help you to help your network.

We are in the process of reviewing our approach to Compliance Partnerships. We have been using these innovative tools for a number of years now, and they have evolved over that time, as has the environment in which they operate. We have been learning from the pioneer partnerships and invited feedback as part of our review. We have had constructive feedback from the Franchising Council of Australia and others representing franchises. The next generation of Compliance Partnerships will be coming soon.

Approach to enforcing the law

To those wanting reassurance about the Fair Work Ombudsman's approach to enforcement of these new laws, I say to you: look to our record. Look to our deeds, look to our actions. You have heard me speak of our priorities, our approach to accessorial liability. You have read about our court cases.

We are consistent in focusing our enforcement firepower on cases involving serious failures to act, vulnerable workers and high-risk sectors. Because that is the only way we can hope to turn around systemic and embedded non-compliance with work laws in some parts of our economy.

You can choose to work with us, to be a part of the solution, or to roll the dice. No one knows your business as intimately as you. We hope that, paired with your knowledge of your network and the dynamics of the market in which it operates, this new guidance will support you to assess your risks and make choices in the interests of your business going forward. Indeed, in getting this right, we have the opportunity to foster compliance with work laws throughout the franchising sector.