

Australian Industry Group

2017 Annual National Policy-Influence-Reform Conference

Current Issues in the Regulation of Australian Workplaces

Good afternoon everyone.

It's a pleasure to be back speaking with the Australian Industry Group at this important annual event.

I would like to start by acknowledging the traditional owners of the land on which we meet, the Ngunnawal (nun-na-wall) people, and pay my respects to Elders both past and present.

How did we get here – the ongoing challenge of worker exploitation

Just over two weeks ago I appeared before the Senate Education and Employment Committee to talk about the Government's Protecting Vulnerable Workers Bill. Stephen Smith and Brent Ferguson also appeared, representing the views of the Australian Industry Group.

The Committee heard from a range of stakeholders, testing their various submissions about whether the measures proposed in the Bill are necessary or go far enough. As is often the case with proposals about Australia's workplace relations framework, not all stakeholders agree. But universally, the Senate heard witness after witness condemn the deliberate, systematic exploitation of vulnerable workers in Australia.

This is not surprising. Such conduct has a terrible impact on the workers and that impact can often extend to their family and friends. It's bad for Australia's reputation. It reduces wage costs for unscrupulous operators; giving them an unfair advantage over those who are doing the right thing. And, of course, it's unlawful.

These stories and the headlines they have generated are not representative of all or even most employers. And, in our experience, they are not indicative of the approach of members of employer associations such as the Australian Industry Group.

But, unfortunately, we are continuing to see very serious cases of exploitation by some operators. Operators paying migrant workers less than \$10 an hour; a fraction of Australia's minimum wage. Or who are forcing these workers to withdraw cash from ATMs to pay back some of their earnings under threat of having their visa cancelled. Operators who exploit the distinct vulnerabilities of visa workers as part of a business model.

The Fair Work Ombudsman has worked tirelessly and creatively to address such conduct and we have had many successes. We've pursued these operators to the full extent of the law, been prepared to push the boundaries of the law and we have secured close to the

maximum penalties from the courts available under the current framework. And we are using all the levers available to us, statutory and non-statutory, to their fullest extent.

But there remain challenges. Challenges presented by ‘enterprising’ operators who are determined to avoid the reach of all and any workplace regulators. And challenges that are illustrated in a number of case studies in our Senate submission.

Poor or inadequate record keeping is one of our most fundamental challenges.

Last year, the Federal Circuit Court repeated the commonly heard statement that accurate record keeping is the bedrock of compliance. This was during a matter we had taken to court involving a blueberry farmer for failing to keep adequate records.

Yet we see cases where records haven’t been kept at all. Or, worse, we are confronted with false records. Both scenarios are sometimes used as a tactic to avoid underpayments being detected or quantified.

Unless workers have meticulously kept their own records of their hours of work, it becomes very difficult to assess whether underpayments have arisen and to be able to prove the quantum to the satisfaction of a court. In such cases, my Inspectors must resort to labour intensive and creative methods of accessing other evidence from objective or neutral sources to attempt to piece together a person’s hours of work.

They’ve trawled through CCTV footage, cash register log-in records, public transport tap on and tap off records, text message exchanges and security and visitor logs.

They’ve translated employee’s personal diaries into English.

They’ve camped out the front of retail stores to personally witness when employees are entering and leaving work.

And the list goes on.

If alternative evidence is not available or reliable, or a court won’t accept the evidence, the employer will get away with it. They will be rewarded for breaking the law with bigger profits.

Let’s return to our blueberry farmer to illustrate this. The employer’s “records” constituted a hand written diary that contained the first names and the number of buckets picked by each employee. We know they were paid \$6 per bucket but we were not even able to identify the workers, let alone assess the hours they had worked and what they were owed.

The Court noted that the records kept by the employer were “*minimalistic in the extreme*” and that “*it is hard to imagine a more superficial or half-hearted attempt to comply with any standard of record keeping, let alone the statutory standard*”.

The court awarded 75% of the maximum penalties available against the company for record-keeping contraventions, totalling \$13,005. But, despite there being clear signs that

some 60 casual and mostly 417 visa workers had been underpaid, a lack of evidence meant that the FWO was unable to establish the quantum of the underpayments.

The judge in this case noted the lack of records made it *“impossible to calculate the precise quantum of the underpayments and, thus, to investigate the Respondent’s compliance with minimum entitlements under the Award.”*

The comparatively low penalties that currently apply for record keeping contraventions arguably create a perverse incentive. An incentive to not keep accurate records to conceal underpayment of wages.

And unfortunately, we are seeing more and more examples of blatant record keeping breaches in our most serious of cases – the matters we take to court. Matters where the inadequate records have hindered our capacity to assess and rectify underpayment of wages.

This is not every employer. It is not even most employers. But, these cases have a significant impact on the workers involved. Not to mention the broader impact on those businesses who are playing by the rules

When your competitors are not playing by the rules, it is demoralising and financially damaging. Quite simply, it is ‘not’ Fair Work.

How will the Bill help?

It is cases like these which have informed the development of the Protecting Vulnerable Workers Bill.

Despite our best efforts, strong enforcement results and widespread condemnation of such conduct, we continue to see some operators take advantage of vulnerable workers.

These kinds of operators are unlikely to be sitting in this room. And they’re unlikely to be Australian Industry Group members. In fact, our work consistently shows better compliance with workplace laws by those businesses that are members of employer organisations.

We know the workplace relations system can be complex and most employers are trying to do the right thing. This underpins the Fair Work Ombudsman’s longstanding approach that focuses on supporting businesses to get it right.

This approach is borne out in our data, which shows that the overwhelming majority of workplace relations matters we help to resolve each year are settled through dispute resolution processes; without us reaching for our compliance tools or even initiating a formal investigation.

In 2015/16, we used our legislated enforcement tools in only 6% of the almost 30 000 matters we helped to resolve.

Most employers want to understand and fix problems when they arise and they are happy to engage with us to do so. But operators that set up a model based on exploitation of workers aren't interested in engaging with us to help them get it right. If non-compliance is worth the risk then some operators will always take that risk, particularly in industries and markets where the level of competition is high and profit margins are tight.

If we truly want to stop this conduct, these operators need to believe that they will be caught. And that, when they are, the consequences will significantly outweigh the benefits of breaching the law. This means the penalties need to be set at an appropriate level. And the Fair Work Ombudsman needs to have the power to fully investigate cases of non-compliance so that rogue employers can't simply avoid tough penalties by refusing to engage.

No one single measure will stop the exploitation of vulnerable workers overnight. But the package of measures outlined in the Bill together would make a significant difference to our capacity to address this exploitative conduct where it occurs.

The Bill proposes a system that would enable higher penalties to be imposed for more serious conduct. This is a simple and effective way of reserving 'higher consequences' for cases where they are warranted. Cases where we can demonstrate to a court that the contravening conduct was deliberate and part of a pattern.

The Bill also proposes to give the Fair Work Ombudsman access to the stronger evidence gathering powers needed to fully investigate serious breaches of workplace laws. These proposed powers are based on the evidence gathering powers that have long been available to other regulators, such as the ACCC and ASIC, and there would be important safeguards and immunities in place to protect those who are the subject of these powers.

While members of employer organisations generally engage with us to fix problems when they arise, this is not the case with all parties we deal with. My Inspectors are regularly declined requests for records of interview by a range of possible witnesses – employers, key personnel within businesses who might help us shed light on what has gone on, and yes, vulnerable workers concerned about the consequences of talking to a regulator, especially when they are on a visa.

The FWO will continue to enforce proportionately

I appreciate that the idea of a regulator with enhanced powers and penalties is not something a lot of people get excited about. Similarly, few would welcome extra speed cameras and police presence on their drive to work, or higher speeding fines. But they are appalled at the thought of another vehicle speeding at 200km/h on the wrong side of the road.

Employers that target and underpay vulnerable workers are like these reckless drivers. They are the minority, but a dangerous minority. And it is with respect to those operators that the Fair Work Ombudsman would seek to apply higher penalties and to utilise the new evidence gathering powers.

The new provisions would give the FWO greater leverage to combat exploitative practices by operators who are doing the wrong thing by their employees and are also gaining an unfair business advantage by illegally reducing their labour costs.

The Fair Work Ombudsman will continue to enforce the Fair Work framework in a way that is fair, reasonable and proportionate. We will continue to take a graduated approach. We have nothing to gain in using formal powers where we can resolve things cooperatively or access the information we need without resorting to them.

This is our preference and current approach with respect to Notices to Produce documents under the existing laws.

The record keeping problems that make the headlines, like the blueberry farmer mentioned earlier or the nine 7-Eleven outlets we have thus far taken to court, are extreme examples of deliberate conduct designed to disguise exploitation of workers.

But we know that this is not the way most employers conduct their business. We know that many and indeed most record keeping oversights are accidental and can be minor in their impact.

My Inspectors know the difference between an administrative error and a deliberate attempt to cover up systemic underpayment of wages. And this is reflected in the way in which we currently resolve matters. Before we get to taking someone to court, we look at a range of options to address the problem with due reference to the circumstances.

To illustrate, let's take a look at record keeping findings of our 4,539 campaign audits carried out last year across a range of industries and regions.

933, or 21%, of these audits identified record keeping contraventions, which reinforces the fact that most employers are doing the right thing.

Of that 21%, the overwhelming majority were resolved without any formal enforcement action. In most cases, Fair Work Inspectors helped the employer understand what information needs to be recorded and rectify the deficiencies.

Where record keeping breaches are found, Fair Work Inspectors can issue an Infringement Notice, which is an on-the-spot fine of up to \$540 for an individual and \$2700 for a corporation.

Infringement notices were issued in only 13% of the cases where record keeping contraventions were found. Of the 933 matters where record keeping breaches were identified, only 1 matter proceeded to litigation.

We're here to help

Should the proposed amendments to the Fair Work Act become law, an important focus for the Fair Work Ombudsman will be providing information to employers to ensure they are aware of, and understand, any new obligations that apply to them.

We would engage with those who would be subject to the laws and we would be transparent about the principles we apply when exercising evidence gathering powers.

We recognise that the franchise sector in particular would need to adjust to the new obligations and would need support to do so. The Fair Work Ombudsman has already been engaging with stakeholders, including the Franchise Council of Australia and a number of large franchisors.

We will look to engage more broadly with the sector moving forward to ensure it has the guidance and support it needs to comply with both existing workplace laws and any new franchise specific laws that might be introduced.

I have been saying for a long time that responsible businesses should step up and take moral and ethical responsibility for their labour supply chains and networks.

A number of large franchisors have already responded to the call. McDonald's was the first brand to make a public and proactive commitment to compliance. Others, like 7-Eleven, stepped up after serious and widespread problems were exposed.

Both these organisations, and others, have entered into compliance partnerships with the Fair Work Ombudsman, through which they have committed to work cooperatively with us to ensure their systems and processes support compliance.

Of course a formal arrangement such as this may not suit all businesses. The Fair Work Ombudsman provides a variety of mechanisms through which businesses can enhance their compliance with workplace laws, and through which they can engage with us to seek our guidance.

We have a huge range of resources publically available on our website and are constantly updating these resources to ensure they are accurate and relevant.

Continuing with my record keeping example, our website contains detailed information about what records need to be made and how long they need to be kept for. There's a record keeping factsheet and there are templates that you can use to record employee leave, working hours and wages.

We will also shortly be releasing a whole new set of resources to assist businesses to manage compliance within their labour supply chains.

The resources will be in the form of best practice guides and have been developed with the help of key stakeholders and businesses representatives, including representatives of the Australian Industry Group.

I would like to personally thank Australian Industry Group and other stakeholders who participated in the Fair Work Ombudsman consultations and workshops during the development of these new resources.

Concluding remarks

The FWO remains committed to taking a proportionate approach to compliance. We will continue to focus on assisting businesses to comply with workplace laws. We will continue to engage, to develop resources and to provide reliable advice.

We will continue to work cooperatively with organisations to help them ensure compliance within their individual business, as well as in their broader networks.

I said in my evidence to the Senate Inquiry that I firmly believe the settings must change if exploitation of vulnerable workers is to be eradicated in our country. If something doesn't change, the script will not change and we will continue to see stories of exploitation on the front page of our newspapers.

But my Agency cannot stamp out exploitation on our own. We need to continue to work in partnership with stakeholders across the Australian community, including organisations like Australian Industry Group who are working to promote compliance throughout their member network and people like you, who are working hard to ensure you understand your obligations as an employer.

We all need to promote a culture of compliance in Australia. To preserve our reputation as a good and fair place to work, to protect the most vulnerable people in our community and to ensure there is a level playing field for all Australian businesses.

I look forward to continuing to work in partnership with the Australian Industry Group to meet these challenges.