GREENWAY CHAMBERS

WHO CAN BE HELD RESPONSIBLE FOR WAGE UNDERPAYMENTS IN 2020?

A COMPREHENSIVE GUIDE TO ACCESSORIAL LIABILITY AND THE *FAIR WORK ACT*

AN UPDATED PAPER PREPARED FOR PRESENTATION AT A UTS SHORT COURSE TITLED EMPLOYMENT LAW: DEALING WITH SENIOR EXECUTIVES

ON 11 MARCH 2020

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WHO CAN BE HELD RESPONSIBLE FOR WAGE UNDERPAYMENTS IN 2020?

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EMPLOYER HAS UNDERPAID – WHO ELSE CAN BE HELD RESPONSIBLE?

1. The *Fair Work Act 2009* (Cth) imposes on national system employers[2] various obligations, including to pay most employees at least the minimum amounts required by a relevant modern award (s45) or an applicable enterprise agreement (s50).

2. A proven failure to make such a payment provides the basis for a Court[3] to impose a civil penalty on the employer: see Part 4-1. Such a contravention is regarded as "*quasi-criminal*".[4] It is a strict liability provision: the applicant for such an order[5] does not need to prove the employer intended to underpay the employee. The Court can also order that the employer compensate those affected by the contravention, typically by requiring payment of the underpayments plus interest.[6]

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[1] This paper was first written for a seminar jointly presented by The Law Society of Tasmania and the Law Council of Australia's Industrial Law Committee on 12 May 2017 in Hobart, and has been substantially updated a number of times since then, including for this seminar. Some parts of this paper are based on a longer paper I co-wrote with Larissa Andelman of the NSW Bar titled 'Accessorial Liability under the Fair Work Act' presented to the 2014 Australian Labour Law Association Conference on 14 November 2014. In particular, my summary of the law of penalty privilege draws on the work Larissa did for that paper.

[2] In practice employers of all employees in Australia except State Government employees in NSW, Queensland, WA, SA and Tasmania, Local Government employees in NSW, Queensland and SA, and employees of non-constitutional corporations in WA.

[3] The Federal Court, Federal Circuit Court or "an eligible State or Territory Court" as defined in s12.

[4] *ABCC v Parker* [2017] FCA 564 at [58].

[5] Such proceedings can be brought by the regulator, the Fair Work Ombudsman, or by the employee affected or by an employee association: s539(2), item 2.

[6] Sections 545 and 547.

3. The legislature has determined as a matter of public policy that there ought to be a capacity to also penalise persons who were *involved in* the same contravention.[7]

4. This provision is commonly utilised. The regulator, the Fair Work Ombudsman (FWO), reported that it sought penalties against accessories in 94% of cases in 2015/16 and its approach does not appear to have changed. Similarly, it is common for unions and individual applicants alleging underpayment to seek orders not only against the employer, but also against one or more individuals as accessories.

5. The FWO's *Compliance and Enforcement Policy*[8] identifies a range of public interest factors that it considers before deciding to commence litigation against accessories, including the nature and seriousness of the alleged contraventions and the impact litigation would have on general and specific deterrence. Other applicants make claims against accessories for a variety of reasons. Sometimes they are made because the employer no longer exists, or out of a concern about the financial capacity of the employer to meet the claim, given the potential, for example, for the common $2 company to be liquidated. Particularly for large claims it may done to increase the potential settlement 'pot' by increasing the number of insured parties. And sometimes it appears to be a tactical decision intended to increase pressure or make a point by seeking to have individuals thought to be responsible 'pay' (even though their employer will usually indemnify them). For the reasons expressed in this paper, adding a claim against an accessory is not something that should be done lightly.

6. This paper examines the nature of the accessorial liability provision in the Fair Work Act and the orders that can be made under it. In particular it examines whether the following can be held to be liable as an accessory to the employer:

   a. Directors;

   b. Principal contractors;

   c. Franchisors;

   d. HR managers; and

   e. Lawyers, accountants and other external advisers.[9]

ACCESSORIAL LIABILITY – WHAT IS IT?

7. Section 550 provides:

> **550 Involvement in contravention treated in same way as actual contravention**
>
> (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

[7] Section 550.
[8] Published July 2019 and current at the time of this paper.
[9] The FWO's *Compliance and Enforcement Policy* lists each of these categories, and also "companies and people involved in supply chains involving the procurement of labour" and "a holding company of a subsidiary employing entity or its directors": p10.

> (2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced the contravention, whether by threats or promises or otherwise; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
>
> (d) has conspired with others to effect the contravention.

8. Provisions in almost identical terms are found in other federal legislation, including:

   a. *Corporations Act*, s79; and

   b. *Competition and Consumer Act*, s75B.

9. Importantly, in contrast to what is required to be proved against the employer, s550 is not a strict liability provision. A person is *involved in* a contravention of a civil penalty provision if, and only if, the person has been in any way, by act or omission, directly or indirectly, *knowingly concerned* in or party to the contravention.

WHAT MUST BE PROVED TO ESTABLISH A PERSON IS AN ACCESSORY

10. For a person to fall within the reach of s550 that person "*must associate himself or herself with the contravening conduct*", a test that has been otherwise expressed as requiring the alleged accessory to be shown to have been "*linked in purpose with the perpetrators*".[10] An allegation of such conduct has been said to be a "*serious allegation akin to a pleading of dishonesty*".[11]

11. Broadly two matters must be established.

12. **First**, the person must have engaged in conduct which "*implicates or involves*" them in the contravention "*such that there is a 'practical connection' between that person and the contravention*".[12] Mere knowledge of the unlawful conduct is not enough. There must be some conduct that amounts to a "*practical connection*" between the person and the contravention.[13] Such conduct can be a failure to act (an omission).[14]

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[10] *FWO v Devine Marine Group Pty Ltd* [2014] FCA 1365 at [178] cited by the Full Court in *FWO v Hu* (2019) 289 IR 240 at [15]; *ABCC v Parker* [2017] FCA 564 at [122], citing *FWO v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37 at [253], which in turn quoted *CFMEU v Clarke* (2007) 164 IR 299 at [26].

[11] *Whitby v ZG Operations Australia Pty Ltd (No 2)* [2019] FCA 201 at [29]; *Australian Rail, Tram and Bus Industry Union v Railtrain Pty Ltd* [2019] FCA 1740 at [12] citing *Stefanovski v Digital Central Australia (Assets) Pty Ltd* [2018] FCAFC 31 at [70].

[12] *ABCC v Parker* [2017] FCA 564 at [122] citing *FWO v Grouped Property Services* [2016] FCA 1034 at [950]. The test comes from *Ashbury v Reid* [1961] WAR 49.

[13] *FWO v South Jin Pty Ltd* [2015] FCA 1456 at [227]-[228]; *Qantas Airways Ltd v TWU* [2011] FCA 470 at [324]-[325]; *CFMEU v Clarke* [2007] FCAFC 87 at [26].

[14] Section 550(1)(c); although the requirement to show that the alleged accessory "*engaged in some act or conduct which 'implicates or involves him or her'*" (*FWO v Devine Marine Group Pty Ltd* [2014] FCA 1365 at [178]) will be hard to prove by omission alone.

13. *FWO v Blue Impression Pty Ltd*[15] (**the *Ezy Accounting case***) provides an example of such involvement. Ezy Accounting 123 Pty Ltd, an external accountancy practice providing bookkeeping services, was held to be an accessory to a contravention by a restaurant. It was 'knowingly involved' because it processed payments to the employee in circumstances where the Court inferred its director had actual knowledge that the rates being applied were below those required by the relevant award.

14. In *Fair Work Ombudsman v Priority Matters Pty Ltd*[16] Flick J considered whether a director who was well aware that the companies he controlled had not paid employees for 10 months had been 'involved in' their non-payment contraventions. Flick J held at [124] that he was so "involved" *even if* the non-payments occurred due to circumstances beyond the control of the director and in circumstances where he had been taking reasonable steps to secure payment.

15. **Second**, to be *knowingly concerned* the person must have been an intentional participant with knowledge of the essential elements constituting the contravention.[17]

16. Constructive or imputed knowledge of the essential elements is not enough; actual knowledge is required.[18]

17. It is not necessary, however, that the person also knows that the elements amount to a contravention of a law.[19] A person may be an accessory without knowing that the conduct in which they are involved is unlawful.[20]

18. What is necessary to show a person is *knowingly concerned* in a contravention are discussed in more detail in the following sections.

ESTABLISHING ACTUAL KNOWLEDGE

19. Knowledge is often established by showing the Award requirements were brought to the person's attention, for example by an employee, a union or a FWO audit.

20. Actual knowledge can be inferred from "*exposure to the obvious*".[21]

21. A failure to make enquiries is not of itself sufficient to establish liability. Actual knowledge may however be inferred in some cases where there were suspicious circumstances and the person decided not to make enquiries.[22]

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[15] [2017] FCCA 810.
[16] [2017] FCA 833 from which special leave was refused [2017] HCASL 308.
[17] *Yorke v Lucas* (1985) 158 CLR 661 at 670; *Tytel Pty Ltd v Australian Telecommunications Commission* (1988) 11 IPR 223 at 231 cited by *Australian Rail, Tram and Bus Industry Union v Railtrain Pty Ltd* [2019] FCA 1740 at [11]; *FWO v Devine Marine Group Pty Ltd* [2014] FCA 1365 at [176] cited by the Full Court in *FWO v Hu* (2019) 289 IR 240 at [15].
[18] *Giorgianni v R* (1985) 156 CLR 473 at 506-507; *FWO v Devine Marine Group Pty Ltd* [2014] FCA 1365 at [177] cited by the Full Court in *FWO v Hu* (2019) 289 IR 240 at [15];*Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107 at [11].
[19] *Yorke v Lucas* at 667.
[20] *ACCC v Giraffe World Australia Pty Ltd (No 2)* (1999) 95 FCR 302 at [186].
[21] *Giorgianni v R* (1985) 156 CLR 473 at 507-508; *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107 at [11].
[22] *FWO v South Jin Pty Ltd* [2015] FCA 1456 at [231]-[232]; *FWO v Blue Impression Pty Ltd* [2017] FCCA 810.

22. The law recognises a principle, sometimes referred to as 'wilful blindness', where the person in truth knows the relevant fact but deliberately chooses not to have the fact confirmed.[23] However, not every deliberate failure to make enquiry will support the inference of actual knowledge.[24]

23. The difference between wilful blindness and a lack of actual knowledge due to a failure to make reasonable inquiries has been expressed as follows:

> A thing may be troublesome to learn, and knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. On the other hand, a person is said not to know because he does not want to know, where the substance of a thing is borne in upon his mind with a conviction the full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that whereas ignorance is safe, 'tiz folly to be wise, but there he is wrong, for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation and disguise [Lord Sumner in *The Zamora (No 2)* [1921] 1 AC 801 at 812-813].[25]

24. In the former circumstance, the person will not have actual knowledge of the matter. In the latter circumstance, the person does have that knowledge but deliberately refrains from asking questions or seeking further information in order to maintain a state of apparent ignorance. The latter is not a circumstance of constructive or imputed knowledge, but of actual knowledge reduced to minimum by the person's wilful conduct.[26] However where the applicant cannot prove that the person made a *deliberate* decision not to find out, but rather just neglected to do so, actual knowledge will not be inferred.

25. That situation arose in a case which demonstrates how difficult it can be to establish the requisite knowledge of a person who is not a director or manager of the employer: *FWO v Hu* (**the Mushroom Farm case**).[27] The FWO attempted to establish that a mushroom farm and its sole director were 'knowingly involved' in the underpayment of its mushroom pickers who were employed by a labour hire firm. The case failed because the regulator could not prove that the farm's director (and so his company) knew certain critical facts, including that the workers were casuals and so entitled to a higher rate. The FWO proved that the director knew that the workers' hours varied (they worked 3 to 6 days a week depending on demand) and that he knew they did not get annual leave or sick leave, and led evidence that the director had seen an FWO inspector's 'PayCheck Plus' document containing a calculation of pay rates that applied a casual loading. Those matters led the Court to conclude that the director must have *suspected* that they were casual employees.[28] The director chose not to give evidence, and a *Jones v Dunkel* inference, that any evidence he would have given would not

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[23] *Pereira v Director of Public Prosecutions (Cth)* (1988) 63 ALJR 1 at 3-4; 82 ALR 217 at 220.
[24] *ASIC v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181 at [402]-[403]; *FWO v Hu (No 2)* [2018] FCA 1034 at [228-229] citing Lord Devlin in *Taylor's Central Garages (Exeter) Ltd v Roper* [1951] 2 TLR 284.
[25] Cited by White J in *FWO v South Jin Pty Ltd* [2015] FCA 1456 as part of a series of principles at [232], which in turn was quoted in *FWO v Hu* [2019] FCAFC 133 at [156].
[26] *ASIC v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181 at [403]; *FWO v South Jin Pty Ltd* [2015] FCA 1456 at [232].
[27] *FWO v Hu (No 2)* [2018] FCA 1034; which was upheld on appeal *FWO v Hu* [2019] FCAFC 133 (special leave refused).
[28] *FWO v Hu (No 2)* [2018] FCA 1034, particularly at [208] and [226].

have assisted the director, was made.[29] However those matters were still not sufficient to establish actual knowledge that the workers were casual employees: the Court at first instance found that the FWO had not proven that the director had *deliberately* failed to make enquiries.[30] On appeal the Court agreed that there were any one of a number of bases upon which an inference could have been drawn that the director knew the workers were casual employees, but ultimately found that the trial judge had made no appellable error.[31] Possibly influencing the outcome was a finding that the labour hire employer, Hu, had not designated the employees as casuals and did not know if they were or not. As such any enquiry by the mushroom farm director of the employer may have been fruitless.

26. It has been held in a different context that a respondent who fails to make enquiries and learn the truth will still be liable where it can be shown that an ordinary, decent person with knowledge of the same facts would have known what they were doing was improper. In *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Limited*[32] the Full Court held that the test is not one to be applied from the point of view of the "morally obtuse". The Court noted at [106] that proof of actual knowledge is required, but said:

> If circumstances are such as to indicate to an ordinary, decent person that the relevant facts exist, that may be open as an evidential conclusion.

DOES IT NEED TO BE SHOWN THAT THE ACCESSORY KNEW ABOUT EACH PARTICULAR EMPLOYEE'S UNDERPAYMENT, OR ONLY ABOUT THE SYSTEM THAT LED TO IT?

27. In *Fair Work Ombudsman v Grouped Property Services Pty Ltd*[33] Katzmann J held that knowledge that an employee was underpaid on an occasion was not sufficient to prove knowledge of like underpayments to other employees on different occasions. However, her Honour also held that where an alleged accessory is aware of a system producing certain outcomes, which produce contraventions, it is unnecessary to show the accessory knew the details of each particular instance to establish accessorial liability. For example, knowledge of sham contracting arrangements that give rise to underpayments on weekends means that the alleged accessory was knowingly concerned in all weekend underpayments. As such, it was not necessary to show the accessory knew the identity of a particular employee who worked on a weekend to establish that the person was an accessory to the underpayment of that employee.

28. O'Sullivan J in the *Ezy Accounting case* placed reliance on the decision in *Grouped Property Services* at [85], finding that Ezy was liable as an accessory in part because its director was aware of its client's continuing contravening payment system.

29. Rangiah J in the *Mushroom Farm case*, expressed the following cautious view:

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[29] Ibid at [227].
[30] Ibid at [231].
[31] *FWO v Hu* [2019] FCAFC 133 at [44].
[32] [2017] FCAFC 74 at [99]-[106]. The decision was appealed to the High Court, which dismissed the appeal and upheld a cross-appeal increasing the quantum of compensation ordered: *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43.
[33] [2016] FCA 1034 at [957]-[958].

> …where the accessory has knowledge of a system of non-compliance, proof of actual knowledge of each individual instance of non-compliance may not be necessary. In that situation, proof of the accessory's knowledge of the system of non-compliance may be sufficient means of establishing the accessory's liability …[34]

30. As yet there is no appellate level authority on this subject. The decision in *Grouped Property Services* must be treated with some caution as the accessory was not represented, and the matter was heard *ex parte*, and the conclusion of Rangiah J in the *Mushroom Farm case* was ultimately *obiter*. There is accordingly still a question as to whether, before a person can be shown to be 'knowingly involved' in the underpayment of a particular employee, it must be proved that she or he knew of the existence of the employee, the hours they were working, their duties, and the amounts they were in fact being paid.[35]

31. In some cases actual knowledge of those facts may be able to be otherwise established where it can be shown that the alleged accessory knew that persons were being employed to do particular work, that the system being applied would lead to underpayments, and deliberately failed to make enquiries as to the exact identity of the employees and hours of work (ie wilful blindness, discussed above). O'Sullivan J in the *Ezy Accounting case* reached such a conclusion at [91] and [98], finding that the director's failure to make simple inquiries, when he knew that the system of underpayments was continuing, meant he could be taken to be aware of the essential facts that established the primary contravention including: the identity of the employee; his duties; and his hours of work.

DOES THE ACCESSORY NEED TO HAVE KNOWN THE AWARD RATE?

32. Assume a Modern Award requires a retail worker to be paid $20/hour for work on Saturdays and a director of Company A is unaware of the existence of that obligation but does know that:

    a. an employee of Company A who does retail duties, including on Saturday, is paid $19.50/hour for all hours worked; and

    b. at a second location a retail worker employed by Company B (a subcontractor to Company A) on Saturdays is being paid $10 per hour.

33. In both cases the relevant employer has contravened s45, but in either case will the director of Company A also be liable (assuming the director was involved in some way, for example by authorising the wage payments)?

34. The alleged accessory must be shown to have actual knowledge of the payments being made, or at least (applying *Grouped Property Services*) the system that generated payments for particular employees.

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[34] *FWO v Hu (No 2)* [2018] FCA 1034 at [213] citing *Australian Communications and Media Authority v Mobilegate Ltd A Company Incorporated in Hong Kong (No 8)* [2010] FCA 1197 at [172].
[35] See the authorities considered later the paper, including *Potter v FWO*.

35. As discussed below, the alleged accessory must also be shown to have had actual knowledge of one of the following (the law is currently unsettled):

    a. that a particular award existed and that the payments being made were below rates set by that award; or merely

    b. the amounts being paid, which as a matter of fact were below the amount prescribed by an award (without knowing of the legally prescribed minimum).

36. In my view there may be a middle ground, namely that the alleged accessory is shown to have had actual knowledge that there is a minimum standard, without knowing the award name or exact award rate, and that the payments being made were less than that minimum standard.

The different views

37. As noted above, ignorance of the law is no defence. There is no need to prove the purported accessory knew the level of payment contravened the Act. On the other hand, to be 'knowingly involved' one would think the applicant does need to prove that the accessory knew the facts that establish that the employer's conduct was not an innocent act.

38. There are different views as to how the application of those two principles apply to the question of whether an applicant needs to prove that the alleged accessory knew about the existence of the relevant award and its provisions.

39. In *Potter v FWO*[36] Cowdroy J considered an appeal from a decision of a Federal Magistrate that turned in part on whether a particular industrial instrument (a clerical NAPSA) akin to an award applied. Mrs Potter had been told by the FWO that AWA's had not been properly lodged and as such the clerical NAPSA applied. She disputed that. FWO subsequently took proceedings and she was held at first instance to be an accessory to underpayments under the clerical NAPSA. The appeal centred on whether the Magistrate was correct to conclude the clerical NAPSA applied. FWO submitted that it did not need to prove that Mrs Potter knew that the clerical NAPSA applied, it was sufficient to prove she knew that the payments made were below those set by the clerical NAPSA. It was in those circumstances that Cowdroy J held at [81]:

> The Court finds that, to be an accessory to the underpayment contraventions, Mrs Potter must have known the Clerical NAPSA applied to the Employees. It is not difficult to imagine a situation in which directors of a company honestly but mistakenly arrange for the company's employees to be paid under an incorrect award. There would be no doubt that the company had underpaid its employees, and by virtue of that fact, contravened the FW Act. If the position were as the FWO submits however, the directors would be liable as accessories to those contraventions simply because they knew how much the employees were being paid and because they had knowledge of the existence of the applicable award, even though they honestly believed that such award did not apply.

[36] [2014] FCA 187.

40. In *FWO v Devine Marine Group Ltd*[37] White J cited the passage above from *Potter* and also comments made Besanko J in *FWO v Al Hilfi*,[38] and concluded at [187]:

> Without knowledge that an Award is applicable, it is difficult to see how a finding could be made that the accessory had intentionally participated in the contravention: see *Yorke v Lucas* at 670.

41. Besanko J summarised these views in *FWO v Complete Windscreens (SA) Pty Ltd*.[39]

42. Katzmann J came to a different view in *Fair Work Ombudsman v Grouped Property Services Pty Ltd*,[40] although the conclusion was *obiter* since her Honour went on to find the manager had actual knowledge of the relevant awards and their application. Her Honour said at [1019]:

> The Ombudsman submits that the test set by *Potter* is too high. I am inclined to agree. Where the contravention is a failure to pay award rates, an accessory must know what rates are being paid but need not know that the rates which were paid were below the rates prescribed by the applicable award. As White J acknowledged in *South Jin* at [229], "[a]n accessory does not have to appreciate that the conduct involved is unlawful"

43. A further *obiter* view expressed by Flick J in *ABCC v Parker*[41] supports the view that the approach in *Potter* was wrong. Indeed, his Honour's short (and strictly unnecessary) comments go beyond the view expressed by Katzmann J in *Grouped Property Services*. At [127] Flick J summarised the competing views expressed in the earlier decisions and then at [128] put his own view:

> [127] Where the contravention in question is a contravention of a term of an enterprise agreement, there is some divergence in the authorities as to those matters of which an accessory must have knowledge. One line of authority tends to suggest that an accessory must have knowledge that the enterprise agreement applies: cf. *Potter v Fair Work Ombudsman* [2014] FCA 187 at [80] to [81] per Cowdroy J. Perhaps with an insistence upon a greater degree of knowledge, in *Fair Work Ombudsman v Al Hilfi* [2012] FCA 1166 at [44] Besanko J observed on the facts of that case that there was a good deal of force in the argument that it was necessary to establish that the accessory had knowledge that an award applied to particular employees, that the work being performed gave rise to those entitlements and that the employees were not paid those entitlements. The other line of authority tends to suggest that the approach in *Potter* sets the bar too high: *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034 at [1019]. Katzmann J there expressed an *obiter* view that where "*the contravention is a failure to pay award rates, an accessory must know what rates are being paid but need not know that the rates which were paid were below the rates prescribed by the applicable award*".
>
> [128] Either approach, with respect, exposes a difficulty. Where the contravention in question is a contravention of s50, that section does not require the person contravening a term of an enterprise agreement

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[37] [2014] FCA 1365; See too Cameron J in *Fair Work Ombudsman v Raying Holding (No 2*) [2017] FCCA 2148. While that decision was handed down in September 2017 it does not mention the decisions in *Grouped Property Services* and *Parker*, possibly because it was argued before those decisions were handed down.
[38] [2012] FCA 1166.
[39] [2016] FCA 621 at [309].
[40] [2016] FCA 1034.
[41] [2017] FCA 564.

> to have any knowledge of the existence of an enterprise agreement and does not require knowledge of the term being contravened or the fact that the act of contravention is in fact contravening conduct. If the "*elements*" of s50 do not encompass those matters, it is – with respect – difficult to see why an accessory need have any greater knowledge. For a person to contravene s50, it is sufficient to prove that conduct took place which was in fact a contravention of a term of an enterprise agreement. For the purposes of accessorial liability, all that need be proved is that the accessory had knowledge of the conduct.

44. It would appear that for Flick J it would be sufficient to merely prove that the accessory was aware of the system of payments (for example, a low flat hourly rate). Presumably it would be unnecessary to establish that the accessory knew that those rates were below the minimum prescribed. That however would mean an accessory might be liable without knowing that the conduct was in any way culpable, which does seem at odds with the notion that the allegation is a serious one akin to dishonesty.

45. Most recently, in the *Mushroom Farm case*, Rangiah J held to similar effect that it was not necessary to prove knowledge of the existence of the award. In that case the FWO had relied on *Gore v ASIC*,[42] where the Full Court had held that knowledge of the legal provisions that rendered the principal contravener's conduct unlawful was not necessary. Rangiah J considered that principle not to be relevant, as a modern award is not itself a law.[43] Rangiah J nevertheless concluded that knowledge of the existence of the award did not need to be proved, since knowledge of the existence of the award was not an essential element of the contravention by the employer.[44] Nor did the FWO need to prove knowledge of the particular rate of pay prescribed by the award. These conclusions were *obiter* since Rangiah J held that the director of the mushroom farm did in fact know of the existence of the relevant award and the award rate.

46. In summary, the law on this subject has not been considered at an appellate level and is still to be settled. In my view it is necessary to show that the accessory knew more than particular rates were being paid. It will be necessary to also show that the person knew that those rates were inconsistent with a minimum standard. The lower the sum being paid the more likely, in my view, that a court would infer the person knew the rates were below the minimum standard, such that the failure to ask the question as to what exactly is that minimum standard would not prevent a successful application. Hence, in the example set out at the beginning of this section of the paper, it seems much more likely that the director of Company A will be liable for being involved in the second situation where the employee is getting $10/hr, than the first where the employee is getting paid only just below the award rate of pay.

WHAT MUST BE PLEADED

47. Two recent decisions emphasise that an allegation that a person is an accessory to a contravention of the FW Act should not be lightly made.

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[42] (2017) 249 FCR 167.
[43] *FWO v Hu (No 2)* [2018] FCA 1034 at [164].
[44] *FWO v Hu (No 2)* [2018] FCA 1034 at [166].

48. Both cases involved allegations that workers were employees and entitled to various payments pursuant to an industrial instrument and the FW Act.

49. In *Whitby v ZG Operations Australia Pty Ltd*[45] Thorley J dismissed the case against the corporate respondent finding that the applicants, delivery truck drivers, were not employees but independent contractors. His Honour dismissed an associated claim against the Supply Chain Manager, Mr Dixon, which was based on the assertion that he knew they were employees.[46] Mr Dixon then sought costs, which required him to establish that the claim against him had been instituted "*without reasonable cause*": FW Act, s 570. In the subsequent decision awarding costs, Thorley J held that there had been "*no real prospect*" of establishing that Mr Dixon knew that the applicants were in truth employees.[47] He based that conclusion in part on the inadequacy of the pleading, which had not asserted such knowledge, finding that if there had been an attempt to plead properly a claim against Mr Dixon it would have been apparent that there was no reasonable case against him.

50. Thorley J said it is one thing to assert that a person arranged work in a particular manner despite having been told or advised by a person with sufficient expertise that the parties concerned were in fact employees. It is another to assert that a person knew the arrangements constituted employment arrangements simply because they knew what the parties did.[48] His honour listed the key facts relied upon to attempt to establish that the drivers were in fact employees (as well as facts that pointed the other way) and then said:

> These matters do not lead inexorably or even obviously to a conclusion that the applicants were employees, less still that Mr Dixon knew that, in truth, they were employees.[49]

51. Noting that a pleading asserting that a person is 'knowingly involved' in a contravention is a serious one, akin to dishonesty,[50] Thorley J set out what needs to be pleaded:

    a. an express identification of the essential elements of the contravention;

    b. an express pleading that the person had knowledge of each of those elements; along with

    c. the material facts said to establish that knowledge or from which such knowledge is to be inferred; and

    d. the material facts said to constitute the relevant acts or omissions which are relied upon to establish any practical connection or link to the contraventions.[51]

52. Similar questions arose in the context of a strike out application in *ARTBIU v Railtrain Pty Ltd*.[52] The union alleged that the corporation had breached FW Act ss 323 and 325

[45] [2018] FCA 1934.
[46] Ibid at [236].
[47] *Whitby v ZG Operations Australia Pty Ltd (No 2)* [2019] FCA 201 at [36].
[48] Ibid at [32].
[49] Ibid at [33].
[50] Ibid at [29]
[51] Ibid at [29].
[52] [2019] FCA 1740.

(obliging payments to employees to be paid in full, at least monthly and preventing an employer unreasonably requiring an employee to pay another person out of their remuneration) based on allegations that persons engaged subject to completing training were in fact employees during their training period. It further alleged that three individuals, two managers and one authorised representative, had been 'involved' in the alleged contraventions. Flick J struck out those parts of the pleadings that made claims against the three alleged accessories on the basis that there was no allegation that they knew that the workers were employees whilst they were being trained. His honour rejected an argument that it was sufficient to prove they were involved in the engagement of the workers, holding that since it was an "essential element" of the claim that the workers were employees then it must be pleaded that the accessories knew that fact.[53]

53. The question of adequacy of pleadings is less likely to arise in cases where there is no issue that the workers were employees. It is even less likely to arise in respect of managers and directors of the employer who were 'involved' in the engagement and payment of those employees. However in cases which turn on the question of whether the workers were in fact employees, or cases (like the *Mushroom Farm case*) against persons working for a third party, it will be harder to establish a claim against accessories.

AGGREGATION OF KNOWLEDGE

54. When the alleged accessory is a corporation it is necessary to show that the corporation had the requisite knowledge.

55. Pursuant to s793 where a corporation has engaged in conduct it is deemed to have the knowledge of the officer, employee or agent who engaged in that conduct on behalf of the corporation.[54]

56. In cases where employees of the corporation knew each of the necessary facts (eg the identity of the employee, the hours worked, the pay rates, the Award rate), but no single employee had *all* the requisite knowledge, can the knowledge of the different employees be aggregated?

57. The capacity to prove knowledge of a company by aggregating of the knowledge of more than one employee or director is quite limited in light of the Full Court's decision in *Commonwealth Bank of Australia v Kojic*.[55] The trial judge had found that the Bank 'knew' a series of facts, not all known by any single employee, but each known by at least one employee, which taken together meant that the Bank's decision to facilitate a property purchase had been unconscionable, contrary to the *Trade Practices Act 1974* (Cth). The trial judge did so on the basis that the knowledge was obtained as part of the one transaction, applying *Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)*[56] and its interpretation of *Krakowski v Eurolynx Properties Limited*.[57] The Full Court in *Kojic* rejected the notion that facts can be aggregated whenever they

[53] Ibid at [33].
[54] *FWO v Hu (No 2)* [2018] FCA 1034 at [171].
[55] [2016] FCAFC 186.
[56] (2012) 44 WAR 1.
[57] (1995) 183 CLR 563.

are obtained as part of a single transaction. Allsop CJ suggested that perhaps facts can be aggregated if the employees or officers had both a duty to communicate and the opportunity to do so.[58] However, where it is necessary to prove unlawful intent no aggregation is possible; where no employee knew enough to know what the company was doing was unlawful then the company cannot be found to have had the necessary intent.[59]

58. Noting that authority, O'Sullivan J in the *Ezy Accounting case* did not aggregate the knowledge of the bookkeeper employed by Ezy Accounting (who knew the identity of the employee, the hours worked and the wage rate being paid) with the sole director of the firm (who knew the Award rate). Rather the Judge determined that the director 'knew' that the restaurant's system of payments had not changed following the FWO audit, and, having shut his eyes and failed to make simple inquiries, could be said to have 'known' that the system of underpayments gave rise to a particular employee being underpaid.

FRANCHISORS AND HOLDING COMPANIES

59. The *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* introduced Division 4A of Part 4-1 of the Act on 17 September 2017, making franchisors and holding companies responsible for underpayments by franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions (or contraventions of the same or similar character) and failed to take reasonable steps to prevent them.[60] It applies to contraventions occurring after 29 October 2017.[61]

60. The Explanatory Memorandum describes the change as follows:

> It is enough that the responsible franchisor entity could reasonably be expected to have known the contravention would occur, or that a contravention of the same or a similar character was likely to occur.
>
> Mere suspicion is not enough – there must objectively be reasonable grounds to hold the belief.
>
> For example, a responsible franchisor entity may be aware of a series of complaints about alleged underpayments, or may be aware of a system of non-compliance that is likely to result in the franchisee entity's employees being underpaid or otherwise deprived of their entitlements under the Fair Work Act.
>
> There is no need to prove the responsible franchisor entity knew exactly who was being underpaid, and on what basis.

61. Franchisors however will not be liable where they took "reasonable steps" to prevent contraventions by the employers. In deciding if steps were reasonable, a court would consider a number of factors, namely:

    a. size and resources of franchisor;

    b. extent had ability to influence or control;

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[58] At [66].
[59] Allsop CJ at [67]; Edelman J (with whom Allsop CJ and Besanko J agreed) at [112]-[113].
[60] Section 558B.
[61] Item 19 of Schedule 1 to the *Fair Work Act*.

c. action that was taken;

d. arrangements (if any) to monitor employer compliance;

e. arrangements (if any) to receive and address underpayment complaints; and

f. extent to which there were arrangements in place to encourage Award compliance.

PENALTY PRIVILEGE

62. Proceedings for penalty against natural persons can be more difficult to establish because of the concept of penalty privilege.

63. The history of penalty privilege is of ancient authority. In *TPA v Abbco Iceworks*[62] the privilege was held to apply to "criminal prosecution, or to any particular penalties, as maintenance, champerty, simony, or subornation of perjury", citing Daniell's Chancery Practice 1871 and *R v Associated Northern Collieries*,[63] who accepted that penalty privilege applied to obviate the obligation to provide discovery, affirming: "no person is compellable to answer any question which has a tendency to expose him to criminal charge, penalty or forfeiture."

64. In short, natural persons (but not corporations) have the right not to produce material or make admissions, to the extent that right is not abrogated by statute.[64] Accordingly they cannot be directed to file outlines of evidence in advance of the hearing,[65] but can be directed to provide notice of objections to the applicant's evidence.[66]

65. Section 712B of the *Fair Work Act* abrogates privilege in regard to the production of documents to the FWO, but the use of that material in respect of the individual is limited by s713(2).

66. Questions remain about how the penalty privilege applies to a requirement to file a defence and the timing and manner by which evidence is to be filed.[67] An individual may be required to file a defence but not to verify it, nor to make admissions.[68] While a person is not required to plead in a defence to matters that might incriminate them, the better view is that they are not relieved from referring to facts and conduct said to have constituted the exculpatory conduct in their defence. Further, the defence should include reference to an intention to invoke statutory defences or a positive defence. It also appears a person may file an amended defence after the applicant closes its case.[69]

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[62] (1994) 52 FCR 96 at [115].
[63] (1910) 11 CLR 738 per Issacs J.
[64] *Rich v ASIC* (2004) 220 CLR 129 at [140].
[65] *Australian Competition and Consumer Commission v FFE Building Services Ltd* (2003) 130 FCR 37.
[66] *ASIC v Whitebox Trading Pty Ltd (No 3)* [2017] FCA 429.
[67] *Macdonald v Australian Securities and Investments Commission* (2007) 73 NSWLR 612; *A & L Silveri Pty Ltd v Construction, Forestry, Mining and Energy Union & Ors* [2005] FCA 1658; *Hadgkiss v Construction, Forestry, Mining and Energy Union & Ors* (2005) 146 IR 106 at 111-112.
[68] *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* [2014] FCA 1032.
[69] *ASIC v Mining Projects* [2008] FCA 952.

67. There is also uncertainty as to whether the privilege permits natural persons to elect not to file evidence yet still call evidence after the applicant's case has closed. At a federal level it has been held that a respondent can lead evidence from those who did not file evidence in accordance with directions.[70] The Supreme Court of Victoria took the opposite course in *Sidebottom v Commissioner of Taxation (Cth)*.[71]

68. Questions of penalty privilege and whether to invoke it is complicated in cases where a corporation (often the employer of the individual) is also a respondent. The corporation, of course, has no such privilege and so will not be relieved of the obligation to file a full defence and evidence. It is common for individuals in such cases not to be separately represented and to waive privilege by putting on a defence and evidence jointly with the corporate respondent. Thought, however, needs to be given as to whether that is always appropriate, and if not whether the individual should be separately represented. Thought also needs to be given as to whether, in the proceeding, evidence against one respondent is to be admitted as evidence against all respondents.

CASE EXAMPLES – PRINCIPAL CONTRACTORS

FWO v Al Hilfi [2016] FCA 193 and Coles Supermarkets

69. The FWO has been concerned to encourage corporations at the top of a supply chain take responsibility to ensure that workers further down that chain are paid minimum rates. This case involved an employee engaged by a sub-sub-contractor of Coles to collect trolleys at a Coles supermarket. It was suggested that the value of the contract meant it was all but impossible to have the hours required worked and paid at minimum award rates. The FWO alleged Coles HR knew the Award rates, that its relevant corporate section knew the value of the contract, and that its local store managers knew the hours that were being worked by the workers and their identities. While casting some doubt on the strength of the case the Judge determined on an interlocutory basis not to strike out the claim. The proceedings were subsequently resolved without going to final hearing.

70. The case identified the questions that would need to be determined at final hearing if Coles was to be held liable for the rates paid by its sub-contractor, including:

    a. Did Coles know that the contractor was paying below award rates?

    b. Was Coles a participant in the underpayments?

    c. Could knowledge be inferred from value of contract?

    d. Did Coles need to know the identity of particular employees, the particular hours they were working and the amounts they were in fact paid?

[70] *Australian Competition and Consumer Commission v J McPhee & Sons (Australia) Pty Ltd* (1997) 77 FCR 217; *Australian Competition and Consumer Commission v FFE Building Services Ltd* (2003) 130 FCR 37.
[71] [2003] 173 FLR 335.

e. Could knowledge of hours worked held by the manager of supermarket be aggregated with knowledge of amounts being paid to contractor to show the workers must be being underpaid?

CASE EXAMPLES – HR MANAGERS

FWO v Centennial Financial Services Ltd [2010] 245 FLR 242

71. This case involving sham contracting. Employees were given contracts to sign designating them thereafter contractors. The Director of the company had devised the scheme. The HR manager had presented it to the employees. He said he was just following directions. He was held to be liable as an accessory, since he knew the essential facts and was an active participant in the conduct.

Dir of FWBII v Baulderstone Pty Ltd (No 2) [2014] FCCA 721

72. An employee was required to resign his position and take another because he was not a member of a union. The company was found to have breached Part 3-1 (adverse action). The HR manager had participated in the meeting where the employee was told he had to resign his position and start in a new position. At issue was whether she had known that the substantial and operative reason for that conduct was that the employee was not a member of the CFMEU. It was held that she did have that knowledge and so was found to be an accessory to the unlawful conduct.

Cerin v ACI Operations Pty Ltd [2015] FCCA 2762

73. This case concerned a failure by the employer to pay notice on termination. The HR manager had not made the decision, and was relatively junior. He implemented the decision by issuing the letter of termination and authorised the termination payment (without an amount in lieu of notice). That was sufficient to be found to be liable as an accessory.

FWO v Oz Staff Career Services Pty Ltd [2016] FCCA 105

74. In this case the HR manager had taken no active step, yet was still held to be liable as an accessory. The case involved cleaners who unlawfully had an “administration fee” and meals deducted from their wages. The Federal Magistrate held the HR Manager was ‘involved’ since he was aware of deductions and had done nothing to correct the situation: at [150].

CASE EXAMPLES – EXTERNAL ADVISORS

Advisors: *FWO v Jooine (Investment) Pty Ltd* [2013] FCCA 2144

75. An employer and its manager were held to have engaged in sham contracting, paying a cleaner a flat rate below the award. The FWO did not proceed against the advisors who had drawn up a lengthy contract and had provided advice as to how the

arrangement should be portrayed to avoid the worker being seen as an employee. Lloyd-Jones J nevertheless commented on the role of the advisor, saying at [100]:

> … the penalty made in this matter should be a strong and specific deterrent to Mr Lee and to others who seek to pursue this type of contacting versus employment structure. **The deterrent should also extend to the advisors who have facilitated the orchestration of these scams, to prevent their further proliferation of such advice and facilitation.** From a limited examination of the contract material and associated documentation, it appears to have been prepared by someone who was familiar with employment law within this country and with a deliberate intention to circumvent the legislative framework that has been put in place to protect vulnerable individuals from exploitation in a labour environment. It would seem unlikely that Mr Lee could have obtained this document and modified it for his own purposes and understanding to avoid the structures of labour law currently in operation.

Accountants: *FWO v Blue Impression Pty Ltd* [2017] FCCA 810 (the Ezy Accounting case)

76. This case was discussed earlier. The accounting firm that prepared the pay calculations was held to be liable as an accessory for the failure by its client to pay the correct amounts to its employees. That was despite evidence that it had paid what the employer had told it to pay and the lack of any evidence that the accounting firm had been asked to advise as to the correct payments. Its 'involvement' was preparing pay instructions. Its 'knowledge' was obtained from its involvement in a previous FWO audit of the same client and its failure to adjust the amounts (that its client told it to pay) thereafter. The fact that the director of the firm did not know the identity of the workers being underpaid nor the hours being worked was determined not to be determinative. It was inferred from the circumstances that he knew (and pursuant to s 793 the company therefore knew) that the system of payment had not changed following the audit, and so he knew that employees were still being underpaid.

Lawyers: *Ryan v Primesafe* [2015] FCA 8 at [81]-[84]

77. A claim had been made against an employer and its external solicitor arising from a redundancy. It had been alleged that the termination of employment amounted to adverse action contrary to Part 3-1 because it had been for an unlawful discriminatory ground, namely the employee's age.

78. The claim against the lawyer was based on an assertion that the conduct had been taken based on his advice and that he had in some way 'managed' the dismissal. His advice was presumably privileged. An attempt to avoid having to give particulars of the claim against the solicitor before documents had been obtained was unsuccessful. There being no evidence that the lawyer had done more than give legal advice, the case against him was discontinued. The solicitor for the applicant was then ordered to pay the respondent solicitor's costs pursuant to s570, on the basis that it had been unreasonable to maintain proceedings against him. Mortimer J, however, in an *obiter* comment, identified the potential for a legal adviser to be found to be an accessory where it can be shown that the adviser knew that the conduct was unlawful and had not advised against it at [83]:

> Adapting that example to the present facts, if, knowing Primesafe proposed to terminate the applicant's employment for what was obviously a prohibited

> reason (such as age), [the lawyer] Mr Humphery-Smith did not advise against such a course, or in fact supported such a course and failed to alert his client to the unlawfulness of the proposed course of conduct because he wished to ensure Primesafe remained a client (or because he considered the applicant was too old for the job), then there might be some basis for an allegation pursuant to s550. Alternatively, if Mr Humphery-Smith made the decision to terminate the applicant's employment instead of it being made by the responsible individuals within Primesafe, again there might be a basis for an allegation within the terms of s550.

CASE EXAMPLES - FRANCHISORS

79. The following cases pre-date the introduction of Division 4A to Part 4-1 of the Act (indeed, presage its creation).

7-Eleven

80. Following audits showing extensive and wide-spread underpayments by 7-Eleven franchisees the FWO published a report in April 2016 that considered the potential liability of the head franchisor.

81. That report identified the difficulties under current legislation to prove actual knowledge of the franchisor, noting that its franchisees had taken extensive and active steps to cover up underpayments.

82. The report noted that individuals within 7-Eleven and providers of pay-roll services may have had access to some relevant information, however proving the necessary knowledge was not straight-forward. The report pointed out that anecdotal and hearsay evidence of what the franchisor may or should have known at various points of time would not be sufficient. That is, on the law before the introduction of Division 4A to Part 4-1 a case could not be established on the basis that the franchisor 'should have known'.

FWO v Yogurberry World Square Pty Ltd [2016] FCA 1290

83. The FWO obtained penalties against a master franchisor and two related companies, the first of which employed the workers and the second conducted payroll services. Questions of liability were not explored, as the companies accepted liability.

United Voice v MDBR123 Pty Ltd [2014] FCA 1344

84. A child care worker was dismissed for reasons including that she was engaged in industrial activities on behalf of a union. It was held the franchisor was liable as an accessory as its principal had advised the franchisee to dismiss the employee for the unlawful reason.

PENALTIES

85. For underpayment claims the maximum penalty for each standard contravention of ss44 (breach of the National Employment Standards), 45 (breach of award) and 50

(breach of an enterprise agreement) is $12,600 for an individual and $63,000 for a company, for contraventions occurring after 1 July 2017.

86. Following the enactment of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*, a contravention of those sections which amounts to a "*serious contravention*" occurring after 17 September 2017[72] gives rise to a maximum penalty ten times higher: $126,000 for an individual and $630,000 for a corporation.

87. To be a "*serious contravention*" a person must be shown: (a) to have knowingly contravened the provision; and (b) the conduct must be part of a systematic pattern of conduct relating to one or more persons.[73] In respect of a corporation the first limb will be satisfied if the corporation "*expressly, tacitly or implied authorised the contravention*".[74] In other words, the conduct was not inadvertent.

88. An accessory to a contravention by a principal will only be penalised at the higher maximum applicable to a "serious contravention" if:

    a. the principal's contravention was a "serious contravention"; and

    b. "*the involved person knew that the principal's contravention was a serious contravention*".[75]

89. The precise meaning of the latter expression is open to debate. The Supplementary Explanatory Memorandum states that the test will be met where the accessory was "*knowingly involved in contraventions by the principal, which they knew to be both deliberate and systematic at the time they occurred*".

90. Each non-payment on each day to each employee is a contravention, however, pursuant to s557(1), certain contraventions, including underpayments, are to be treated as a single contravention if committed by same person and arising out a single course of conduct. Hence if five award terms are breached on multiple occasions involving multiple employees then there will be five contraventions.[76]

91. Section 557(1) is generally thought not to apply to consolidate contraventions of different terms of an award, or terms of different awards[77] and so a single course of conduct (eg paying a flat rate for all hours worked) giving rise to breaches of multiple terms will result in multiple penalties.[78]

92. In 2016 a new record fine was set of $444,100 against company and $88,810 against its director.[79] Following the tenfold increase in maximum penalties for "*serious contraventions"* that is a record that is likely to be beaten over the coming two years as

[72] Item 18 of Schedule 1 to the *Fair Work Act*.
[73] Section 557A(1). Subsection 557A(2) provides guidance to a Court when determining if the conduct was part of a systematic pattern of conduct.
[74] Section 557B
[75] Section 557A(5A).
[76] *Rocky Holdings Pty Ltd v FWO* [2014] FCAFC 62.
[77] Ibid.
[78] *FWO v v Lohr* [2018] FCA 5.
[79] *FWO v Rubee Enterprises Pty Ltd* [2016] FCCA 3456.

proceedings that arise in respect of conduct occurring after September 2017 starts to come before the Courts.

PENALTY CAN BE PAID TO APPLICANT

93. Section 546(3) provides that the Court can order that the penalty be paid to the applicant. Indeed, that is the "*usual order*". That is done:[80]

> … recognising the trouble, risk and expense of bringing proceedings which are in the public interest which advance the objects of the legislation and which benefit the wider community.

OBTAINING ORDERS FOR COMPENSATION AGAINST ACCESSORIES

94. In cases where the employer has been liquidated, or is otherwise unable to fully compensate the employees for the underpayments, it is clearly attractive to be able to seek relief against accessories.

95. In the past the FWO sought penalties but not orders for compensation against accessories. In circumstances where the employer was incapable of paying wages owed the FWO asked that any penalties be paid to the employees, providing partial compensation for the lost wages.

96. The FWO's approach was no doubt influenced by paragraph 2177 of the Explanatory Memorandum, which said:

> . . . while a penalty may be imposed on a person involved in a contravention, [s550] does not result in a person involved in a contravention being personally liable to remedy the effects of the contravention. For example, where a company has failed to pay, or has underpaid, an employee wages under a fair work instrument, the director is not personally liable to pay that amount to the employee.

97. Subsection 545(1) of the Fair Work Act provides the court with a broad power to make "any order the court considers appropriate" if the court is satisfied that a person has contravened a civil remedy provision. Subsection 545(2) confirms that such orders include an order awarding compensation. Pursuant to s550 an accessory is "taken" to have contravened a civil remedy provision. It appears to follow that upon a person being found to have been an accessory the court has power to make any order it thinks appropriate against that accessory, including an order to pay compensation.

98. Prior to 2016 there was limited authority on the issue, presumably because the FWO did not seek such relief. What authority existed appeared to assume (or at least not question) that an order for compensation could be made against an accessory.[81]

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[80] *CFMEU v BHP Coal Pty Ltd (No 5)* [2013] FCA 1384 at [26]; *United Voice v MDBR123 Pty Ltd (No 2)* [2015] FCA 76 at [24].
[81] *AFMPKIU v Beynon* [2013] FCA 390; *Scotto v Scala Bros Pty Ltd* [2014] FCCA 2374; *Sponza v Coal Face Resources Pty Ltd* [2015] FCCA 1140.

99. In 2016 the FWO altered its position[82] and in *FWO v Step Ahead Security Services Pty Ltd and Anor*[83] successfully obtained compensation orders against an accessory for the first time. Since then the FWO has sought such orders in other cases.

100. Assuming there is a power to make an order that an accessory pay compensation, it is important to note that the court retains a discretion as to whether to make such an order. There would ordinarily be no reason to make such an order in circumstances where the employer is able to make the payments. It could be contended that such an order should not be made against individuals who did not themselves stand to benefit from the contravention (eg an HR manager implementing a decision taken by management). An alternative view is that accessories should be liable for losses that they could reasonably foresee would arise from their conduct. To date there has been no reasoned decision considering the issue.

OTHER ORDERS

101. As noted, s545 provides a power to make "any order the Court thinks is appropriate".

102. In *FWO v Grouped Property Services Pty Ltd*[84] and *FWO v Yoguberry World Square Pty Ltd*[85] the Court ordered:

a. an audit of all time and wage records over a 6 month time period to be conducted at employer expense by outside expert; and

b. the auditors report to be provided to the applicant.

CONCLUSIONS

103. For those acting for an applicant, accessorial liability can be a useful adjunct, and, where the employer has no assets, essential to obtain an effective remedy. It will also be utilised by those seeking to bring about change in behaviour or culture in an industry (as the FWO now routinely does).

104. In cases of widespread and long-standing contraventions s 550 has the capacity to be used by plaintiff law firms backed by litigation funders to target the ultimate beneficially of a scheme for the benefit a 'class' who have been underpaid.

105. Careful thought, however, needs to be given before commencing proceedings against an alleged accessory. More is required than merely demonstrating that the person held a particular role within the organisation or as part of a supply chain. First, they must be shown to have themselves done an act that made them 'involved'. Demonstrating merely that they were a director of the employer, for example, will not be enough. Second, they must be shown to have known each of the essential facts that render the conduct unlawful (even if they did not know that the conduct was against the law). Absent evidence that the person had earlier been told the conduct was unlawful (such as via an FWO audit), evidence will be required to allow the court to

[82] See now p 13 of the FWO's Compliance and Enforcement Policy, July 2019.
[83] [2016] FCCA 1482.
[84] [2016] FCA 1034.
[85] [2016] FCA 1290.

infer that the individual knew the essential elements of the contravention. In some cases, such as a case that contractors were in fact employees, that may be difficult to establish.

106. The case law in this area remains at an early stage of development. There is limited appellate level authority applying the key issues in an employment context and some of the authority at first instance is inconsistent.

107. Most of the cases against accessories at first instance have involved admissions. The *Ezy Accounting case* is a notable exception. The outcome in that case might suggest that courts may be more willing than perhaps previously thought to infer the requisite knowledge where it can be shown that there were suspicious circumstances and the person did not make inquiries that would have confirmed that underpayments were occurring. The decision in the *Mushroom Farm case*, however, where the Court was not willing to find that the farm knew its pickers were entitled to the higher rates due to casual employees, despite knowing a number of facts that pointed to their status, demonstrates how difficult it can sometimes be to prove a case against an alleged accessory.

108. It is of some importance that it is not just penalties that can be obtained against an accessory. Subject to questions of discretion, it appears a court can order that an accessory also compensate the employees for the amounts underpaid. Combined with the recent tenfold increase in penalties for "serious contraventions", that could give rise to very significant relief against an accessory in cases of widespread and long-standing underpayments. It is perhaps a future case of that type that will authoritatively determine the boundaries of when an accessory can be found to be liable for underpayments of wages by an employer.

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