Who Can Be Held Responsible For Wage Underpayments?

Accessorial liability and the *Fair Work Act*

A paper prepared for The Law Society of Tasmania in conjunction with the Law Council of Australia's Industrial Law Committee

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Who Can Be Held Responsible For Wage Underpayments?

Accessorial liability and the *Fair Work Act*[1]

A paper presented to members of the Law Society of Tasmania

in Hobart on 12 May 2017

Ingmar Taylor SC
Greenway Chambers

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 in most circumstances to pay its 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. It is a strict liability provision: the applicant for such an order[4] does not need to prove the employer intended to underpay the employee. The Court can also order that the employer back-pay the amount owing plus interest: ss*545*, *547*.

[1] 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, I wish to acknowledge that 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] 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.

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: s550.

4. This provision is increasingly utilised. The regulator, the Fair Work Ombudsman (FWO), has reported that it sought penalties against accessories in 72% of cases in 2014/15 and 94% of cases in 2015/16.

5. 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.

Accessorial liability – what is it?

6. 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.
>
> (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.

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

   a. Corporations Act, s 79 and

   b. Competition and Consumer Act, s 75B.

8. Importantly, in contrast to what is required to be proved against the employer, it 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

9. Broadly two matters must be established to demonstrate a person is liable as an accessory.

10. **First**, to be *knowingly concerned* the person must have been an intentional participant with knowledge of the essential elements constituting the contravention: *Yorke v Lucas* (1985) 158 CLR 661 at 670.

11. Constructive or imputed knowledge is not enough; actual knowledge is required: *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107 at [11].

12. It is not necessary, however, that the person also knows that the elements amount to a contravention of a law: *Yorke v Lucas* at 667. A person may be an accessory without knowing that the conduct in which they are involved is unlawful: *ACCC v Giraffe World Australia Pty Ltd (No 2)* (1999) 95 FCR 302 at [186]

13. **Second**, the person must have engaged in conduct which "*implicates or involves*" them in the contravention. 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: *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]. Such conduct can be a failure to act (an omission): s550(1)(c).

14. *FWO v Blue Impression Pty Ltd* [2017] FCCA 810 (the *Ezy Accounting case*) provides a recent 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.

Establishing actual knowledge

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

16. Actual knowledge can be inferred from "exposure to the obvious": *Giorgianni v R* (1985) 156 CLR 473 at 507-508; *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107 at [11].

17. 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 made no enquiries: *FWO v South Jin Pty Ltd* [2015] FCA 1456 at [231]-[232]; *FWO v Blue Impression Pty Ltd* [2017] FCCA 810.

18. 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. The High Court referred to knowledge in these circumstances in *Pereira v Director of Public Prosecutions (Cth)* (1988) 63 ALJR 1 at 3-4; 82 ALR 217 at 220:

> [A] combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter. In a case where a jury is invited to draw such an inference, a failure to make inquiry may sometimes, as a matter of lawyer's shorthand, be referred to as "wilful blindness".

19. Having considered the authorities White J in *ASIC v ActiveSuper Pty Ltd (in liq)* [2015] FCA 342; (2015) 235 FCR 181 at [402]-[403] summarised the law on wilful blindness:

> … only actual knowledge of the essential matters will be sufficient but that that knowledge may be able to be inferred from a defendant's knowledge of matters raising suspicion, together with a deliberate failure to make the enquiries which may have confirmed those suspicions.
>
> The determination that a person has actual knowledge in this manner is not always easy. Amongst other things, it requires consideration of the defendant's knowledge of matters giving rise to suspicion, the circumstances in which the defendant did not make the obvious enquiry, and the defendant's reasons, to the extent that they are known, for not making the enquiry. It is necessary to keep in mind that it may not be every deliberate failure to make enquiry which will support the inference of actual knowledge.

20. 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].

21. 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: *ASIC v ActiveSuper Pty Ltd (in liq)* [2015] FCA 342; (2015) 235 FCR 181 at [403]; *FWO v South Jin Pty Ltd* [2015] FCA 1456 at [232].

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?

22. In *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034 at [957]-[958] 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.

23. 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.

24. 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*. There is accordingly still some uncertainty 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.

25. 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 inquiries 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.

What must the accessory be shown to have known?

26. Assume a Modern Award requires a retail worker to be paid $20/hour for weekend work and a director of Company A is unaware of the existence of that particular award but does know that:

    a. an employee of Company A who does retail duties is paid $18.50/hour for all hours worked; and

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

    In both cases the 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)?

27. 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.

28. 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 level set by that award;

    b. that there was a minimum standard, without knowing the award name, and that the payments being made were less than the minimum standard; or merely

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

Does the accessory need to know about the award provisions?

29. On the one hand, ignorance of the law is no defence. There is no need to prove the person knew the level of payment contravened the Act. On the other hand, the applicant does need to prove that the person knew that the employer's conduct was not an innocent act.

30. 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.

31. In *Potter v FWO* [2014] FCA 187 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.

32. In *FWO v Devine Marine Group Ltd* [2014] FCA 1365 White J cited the passage above from *Potter* and also comments made Besanko J in *FWO v Al Hilfi* [2012] FCA 1166, 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.

33. Besanko J in *FWO v Complete Windscreens (SA) Pty Ltd* [2016] FCA 621 gave further support for that view in at [309]:

> A particular issue which has arisen in the context of alleged involvement in the contravention of industrial instruments such as awards is whether the alleged accessory must know of the provisions of the instrument before he or she can be held liable. In *Potter v Fair Work Ombudsman* [2014] FCA 187 ("*Potter*"), Cowdroy J who was considering a contravention constituted by an underpayment of wages decided that the alleged accessory must have known that the Clerical NAPSA applied to the employees before she could be held liable. Otherwise, his Honour said, a director might be held liable even though he honestly believed the relevant award did not apply (at [81]). In *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 ("*Devine Marine Group*"), the applicant's case was that the alleged accessory had been involved in contraventions by a company involving a failure to pay applicable minimum hourly rates and Saturday penalty rates and Sunday penalty rates. White J considered the authorities, including the decision in *Potter* and my decision in *Fair Work Ombudsman v Al Hilfi* [2012] FCA 1166 and held that before the alleged accessory in that case could be held liable, it needed to be shown that he knew that there is an award which was applicable and which prescribed minimum rates or entitlements (at [188]). The FWO suggested that there was a difference between the approach in *Potter* and the approach in *Devine Marine Group*. I do not need to address this submission because it was common ground between the parties, and I think it is correct that, taking the meal breaks as an example, the FWO must prove that Mr Lindsay Dean knew that the relevant employees were governed by an

> industrial award and that the award stipulated minimum meal breaks and that the meal breaks actually provided were less than stipulated under the award before he is held liable under s 728 of the WR Act and s 550 of the FW Act.

34. More recently Katzmann J came to a different view in *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034, 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"

35. 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 below 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 a 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 [26] above, it seems much more likely that the director of Company A will be liable in the second situation where the employee is getting $10/hr, than the first where the employee is getting paid only just below award rate of pay.

Aggregation of knowledge

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

37. Pursuant to s 793 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.

38. 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?

39. 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* [2016] FCAFC 186. 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)* [2012] WASCA 157; (2012) 44 WAR 1 and its interpretation of *Krakowski v Eurolynx Properties Limited* [1995] HCA 68; (1995) 183 CLR 563. The Full Court in *Kojic* rejected the notion that facts can be aggregated whenever they 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: at [66]. 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: Allsop CJ at [67]; Edelman J (with whom Allsop CJ and Besanko J agreed) at [112]-[113].

40. 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.

Penalty privilege

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

42. The history of penalty privilege is of ancient authority. In *TPA v Abbco Iceworks* 52 FCR 96 at [115] 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* (1910) 11 CLR 738 per Issacs J, 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*."[5]

43. 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: *Rich v ASIC* (2004) 220 CLR 129 at [140].

44. Section 713 *Fair Work Act* abrogates privilege in regard to the production of documents to the FWO.

45. 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: *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. An individual may be required to file a defence but not to verify it, nor to make admissions: *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* [2014] FCA 1032. 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: *ASIC v Mining Projects* [2008] FCA 952.

46. 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: *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. The Supreme Court of Victoria took the opposite course in *Sidebottom v Commissioner of Taxation* (Cth) [2003] 173 FLR 335.

47. 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

48. 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.

49. 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?

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

50. 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

51. 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

52. 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

53. 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

54. 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*)

55. 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 relevant. 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]

56. 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.

57. 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 s 570, 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), 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 s 550. 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 s 550. The nature of such an allegation against a lawyer is obvious, and its gravity obliges the party making the allegation to set out a proper factual basis for it.

Case Examples - franchisors

7-Eleven

58. 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.

59. 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.

60. 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, 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

61. 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

62. 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

63. For underpayment claims the maximum penalty for each contravention is $10,800 for an individual and $54,000 for a company.

64. Each non-payment on each day to each employee is a contravention, however, pursuant to s*557*(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: *Rocky Holdings Pty Ltd v FWO* [2014] FCAFC 62.

65. Section *557*(1) is generally thought not to apply to consolidate contraventions of different terms of an award, or terms of different awards (*Rocky Holdings Pty Ltd v FWO* [2014] FCAFC 62) 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: cf *FWO v Safecorp Security Group Pty Ltd* [2017] FCCA 348 under appeal.

66. The record fine to date is $444,100 against company and $88,810 against its director: *FWO v Rubee Enterprises Pty Ltd* [2016] FCCA 3456.

Penalty can be paid to applicant

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

> … 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

68. 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.

69. 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.

70. The FWO's approach was presumably influenced by paragraph 2177 of the Explanatory Memorandum, which said:

> 2177 . . . 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.

71. 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.

72. 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: *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.

73. In 2016 the FWO altered its position and in *FWO v Step Ahead Security Services Pty Ltd and Anor* [2016] FCCA 1482 successfully obtained compensation orders against an accessory for the first time. Since then the FWO has sought such orders in other cases.

74. 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

75. As noted, s 545 provides a power to make "any order the Court thinks is appropriate".

76. In *FWO v Grouped Property Services Pty Ltd* [2016] FCA 1034 and *FWO v Yoguberry World Square Pty Ltd* [2016] FCA 1290 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.

Proposed legislative changes

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

77. This Bill was introduced to Parliament on 1 March 2017. If enacted there would be a ten-fold increase in penalties for "serious contraventions" by way of underpayment, so that a single contravention would have a maximum penalty of $540,000 for corporation.

78. A contravention would be a "serious contravention" where it is "deliberate", namely the company "expressly, tacitly or impliedly authorised the contravention"; and "part of a systematic pattern of conduct": proposed s557A

79. The Bill also increases penalties for record-keeping failures where there is a "systematic pattern of conduct". This is presumably influenced by cases such as *FWO v Yogurberry World Square Pty Ltd* [2016] FCA 1290, where the Judge inferred that the respondents had deliberately not kept proper records so as to frustrate the FWO's capacity to determine if there had been underpayments: at [24].

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

80. This Bill, also introduced by the Government in March 2017, would make franchisors and holding companies responsible for underpayments by franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them.

81. 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.

82. Franchisors however would not be held 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;

    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 have arrangements in place to encourage Award compliance.

Conclusions

83. For those acting for an applicant accessorial liability can be a useful adjunct, and, where the employer has no assets, it is essential to obtaining a 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).

84. 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 benefit a 'class' who have been underpaid.

85. 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. 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 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.

86. The case law in this area is still 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.

87. Most of the cases against accessories at first instance have involved admissions. The *Ezy Accounting case* is a recent notable exception. The outcome in that case suggests 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.

88. 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. 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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