

Accessorial Liability under the *Fair Work Act*

*A paper prepared for the
2014 Australian Labour Law Association Conference*

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Chapter 1 Introduction

1. Under s550 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**) those “involved in a contravention” of the Act can be held liable as an accessory. Directors and managers can be held personally liable for their corporation’s contraventions of industrial laws. Corporations can be held liable for the conduct of their subcontractors.
2. A person affected by the contravention as well as the regulator and an employee organisation have standing to initiate proceedings claiming pecuniary penalties against accessories.¹ These penalties are often paid to those affected by the contravention.² It is a particularly useful avenue where the corporate employer no longer exists or is otherwise unable to pay. It is also being used to try to encourage large corporations to ensure their subcontractors abide by industrial laws.³
3. Section 550 has existed in similar form since 2006. It is modelled on provisions found in consumer and corporations law. Despite it having been around for some time it has been

¹ Section 539 of the Fair Work Act.

² Pursuant to s546(3) Fair Work Act.

³ Workplace Express Tuesday 7 October 2014: “Coles enters ground-breaking deal for trolley collectors”.

the subject of limited analysis and there remain differences of judicial opinion on key aspects of its application.

4. The paper examines the circumstances in which a person will be held liable as an accessory for a failure to comply with the obligations imposed by the Fair Work Act. In doing so it considers some of the more significant contentious issues regarding the operation of s550, including:
 - a. what it means to say that an accessory must have had knowledge of the essential facts of a contravention (chapters 3 and 4);
 - b. how a corporation alleged to have been ‘involved in’ a contravention by a subcontractor can be said to have the necessary intent, including the contentious question of whether knowledge of various employees or directors can be aggregated and together imputed to the corporation (chapter 5);
 - c. whether an accessory can be required to pay compensation in addition to a penalty (chapter 6); and
 - d. how a natural person can claim a privilege to refuse to answer questions or provide information during judicial proceedings on the basis that to do so may expose the person to the imposition of a civil penalty (chapter 7).

Chapter 2 Section 550 and its history

5. Section 550 of the Fair Work Act is in the following terms:

550 Involvement in contravention treated in same way as actual contravention

A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

A person is involved in a contravention of a civil remedy provision if, and only if, the person:

has aided, abetted, counselled or procured the contravention; or

has induced the contravention, whether by threats or promises or otherwise; or

has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

has conspired with others to effect the contravention.⁴

⁴ Emphasis added.

6. Such accessorial liability provisions were first introduced by the *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) together with provisions introducing pecuniary penalties for certain breaches of the *Workplace Relations Act 1996* (Cth) effective from 27 March 2006. Surprisingly little was said about the new provisions in the Explanatory Memorandum circulated by the then Minister for Employment and Workplace Relations, the Honourable Kevin Andrews MP.
7. Section 728 of the *Workplace Relations Act 1996* was a near replica of provisions in the *Corporations Act 1989* (Cth) (now the *Corporations Law 2001*) and *Trade Practices Act 1976* (Cth) (now the *Competition and Consumer Act 2010*).⁵ In *Dowling v Kirk & Ors*⁶ Cameron FM accepted that s728 of the *Workplace Relations Act* should be interpreted in the same way as the corresponding provisions in *Trade Practices Act* and *Corporations Act*. Section 550 of the *Fair Work Act* in turn largely replicates the previous s728.
8. The political catalyst for the expansion⁷ and increased use of pecuniary penalty provisions by regulators stems from recommendations of the Senate Standing Committee on Legal and Constitutional Affairs contained in their *Social and Fiduciary Duties and Obligations of Company Directors Report*.⁸ The majority of the Committee, chaired by Senator Barney Cooney, were heavily influenced by the regulatory theory of Ian Ayres and John Braithwaite, known as the 'enforcement pyramid model'.⁹ The aim of the model is to provide a sanction for contraventions that fall short of a criminal offence, providing the regulator with a range of compliance tools moving up the regulatory pyramid.¹⁰
9. In *Australian Securities & Investment Commission v HLP Financial Planning (Aust) Pty Ltd*,¹¹ Finkelstein J referred to the Committee's findings at [50] saying:

The current regime of corporate regulation is, as the Cooney Committee's report observed (at 190), characterised by a "pyramid of enforcement". The basic premise is that to deter breaches of the legislation, there should be various levels of enforcement that correspond to the seriousness of the contravention. There are three levels to this pyramid: civil remedies at the base, civil penalties in the middle and criminal sanctions at the top. But it is the court exercising its civil jurisdiction that is the primary means of enforcement. Only the most serious contraventions now end up before a criminal court. Nonetheless when a criminal proceeding is commenced the criminal court should be given (and in many cases is expressly given) priority over civil litigation.

⁵ See now s79 *Corporations Act 2001* (Cth) and s151BW *Competition and Consumer Act 2010* (Cth).

⁶ [2007] FMCA 2150; 16 Ors [2007] FMCA 2106 at [33].

⁷ Civil penalty provisions were inserted into the *Corporations Act* in 1993 by the *Corporate Law Reform Act 1992* (Cth).

⁸ (1989) AGPS Canberra.

⁹ The model was first put forward by John Braithwaite, *To Punish or Persuade* State University of New York 1985

¹⁰ G Gillian, H Bird and I Ramsay *Regulating Directors' Duties – How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?* (1999) Centre for Corporate Law and Securities Regulation, Melbourne 8.

¹¹ (2007) 164 FCR 487.

10. The character and purpose of accessorial liability provisions are regulatory in nature in that they are directed to the promotion of social and economic structures and are thus broadly separate from crimes and private civil wrongs.¹²

Chapter 3 What must an accessory know?

Introduction

11. Most breaches of civil remedy provisions under the Fair Work Act do not require proof of intent. A failure to comply with the terms of a Modern Award or the National Employment Standards are examples of such strict liability contraventions. In such a case it is sufficient to prove the employer had an obligation to make certain payments and did not make them. However, as we identify in this chapter, to establish that a person was an accessory and so also liable it is necessary to prove that the person was “an intentional participant” in the contravention,¹³ which requires proof of knowledge of each of the essential elements of the contravention. This chapter addresses the difficult question of what it is that the putative accessory must be proved to have known to establish a contravention. At its heart the debate involves this question: is it sufficient to prove that the person knew how much the employee was being paid, or is it necessary to prove the person also knew that the amount being paid was less than the amount required to be paid?

Leading authorities

12. When considering accessorial liability the starting point is the High Court decision in *Giorgianni v R*.¹⁴ The case arose from a series of collisions between a truck owned by Mr Giorgianni and a number of cars that resulted in a family of five being killed and another driver sustaining grievous bodily harm. The truck had been driven by an employee of Mr Giorgianni who was subsequently convicted of a strict liability criminal offence, namely driving in a manner dangerous to the public. The brakes of the truck were dangerously defective, and it was alleged that Mr Giorgianni was liable as an accessory pursuant to s351 of the *Crimes Act* because he had sent the driver onto the road in a vehicle with defective brakes. Section 351 of the *Crimes Act* was in terms similar to s550(2)(a) of the Fair Work Act:

¹² Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002) pg 54.

¹³ *Yorke v Lucas* (1985) 158 CLR 661 at 670.9. Referred to in s 539 of Fair Work Act as a ‘contravention of a civil remedy provision’.

¹⁴ (1985) 156 CLR 473.

Any person who aids, abets, counsels or procures, the commission of any misdemeanour, whether the same is a misdemeanour at Common Law or by any statute, may be indicted, convicted and punished as a principal offender.

13. As a strict liability offence it was not necessary to prove the driver knew the brakes were defective. At issue was whether for Mr Giorgianni to be guilty as an accessory it was sufficient to prove that he should have known the brakes were defective (in other words was criminally negligent), or whether the prosecutor needed to prove he had actual knowledge that they were defective.
14. Wilson, Deane and Dawson JJ stated that for Mr Giorgianni to have aided, abetted, counselled or procured he must have intentionally participated in the principal offences, and so must have had knowledge of the essential matters which went to make up the offences of culpable driving on the occasion in question, whether or not he knew that those matters amounted to a crime.

As Viscount Dilhorne put it in *Reg. v Maxwell* "...it is clear that a person cannot properly be convicted of aiding and abetting in the commission of acts which he does not know may be or are intended"¹⁵

15. Their Honours approved a passage from the judgment of Lord Goddard CJ in *Thomas v Lindop*¹⁶ to the effect that it is not necessary to show a person knew it was an offence, since he cannot plead ignorance of the law, but it is necessary to prove that the accessory "*knew what the person was doing*".¹⁷
16. Their Honours went on to note that, whilst acts done with foresight of probable consequence may be sufficient to prove some crimes, recklessness is not sufficient to establish aiding and abetting. Actual knowledge must be proved. In other words, the prosecutor needed to prove Mr Giorgianni had known that the brakes were defective.
17. Both Gibbs CJ at 480 and Mason J, at 493 concluded that a person charged as a secondary party should in some way "be linked in purpose with the person actually committing the crime", relying on what Callen ACJ had said in *R v Russell*:¹⁸

All the words abovementioned are, I think, instances of one general idea that the person charged as a principal in the second degree is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering more likely, such commission.

18. Mason J noted that there was no need to prove an agreement between the principal offender and the secondary participant.¹⁹ The "link in purpose" between the secondary party and the principal offender however will not be established where a person does something to bring about, or render more likely, the commission of an offence by another

¹⁵ At 500, citations omitted, emphasis added.

¹⁶ [1950] 1 All ER 966 at 968.

¹⁷ At 505. Mason J approved of the passage at 494.

¹⁸ [1933] VLR 59 at 67.

¹⁹ At 439.

in circumstances in which, through ignorance of the facts, it appears to him to be an innocent act.²⁰

19. In *Yorke v Lucas*²¹ the High Court had cause to consider the principles in *Giorgianni* in the context of a civil proceeding. It had been proven that, upon a sale of business, the vendor had engaged in conduct that was misleading and deceptive as to the gross turnover of that business. To act in breach of what was then s52 of the *Trade Practices Act 1974* (Cth) (**TPA**) it was unnecessary for the applicant to prove that the vendor company intended to mislead. It was sufficient to prove that the vendor company had stated a turnover which was wrong and which had the effect of misleading and deceiving the purchaser.
20. At issue before the High Court was whether an agent who had acted on behalf of the vendor, and who had communicated the incorrect gross turnover to the purchaser, had been “involved in” the contravention by being “knowingly concerned” in it. Section 75B of TPA was relevantly in the same terms as s550 of the Fair Work Act.
21. The agent had taken steps to obtain the vendor director’s written confirmation on at least three occasions of the turnover figure. The agent was not aware and had no reason to suspect that the turnover figure he had been provided, and which he communicated to the purchaser, was incorrect.
22. As noted, s52 of TPA does not require intent to deceive. At issue was whether the agent was “involved in” the contravention because he had communicated an incorrect figure which was in fact misleading and deceptive, even though he did not know that the figure he had communicated was incorrect.
23. The Court applied the approach taken by the Court in *Giorgianni*, notwithstanding that the provision in the TPA was drafted in broader terms (“knowingly concerned”) than that considered in *Giorgianni* (“aided, abetted, counselled or procured”), and notwithstanding that what was at issue was accessorial liability for a civil wrong which did not require proof of intent.²²
24. The Court concluded that the agent, Lucas, could not be found liable because he had not known that the information he was communicating was misleading or deceptive. In coming to that conclusion, the Court approved of a passage from the judgment of the Full Court below to the following effect:

[There is] no reason why Parliament would have intended that a section which renders natural persons liable for a contravention by a corporation should require some mental element or absence of innocence in every case to which it refers except one which itself requires in its first limb that the person was ‘knowingly’ concerned in the contravention.²³

²⁰ At 494.

²¹ (1985) 158 CLR 661.

²² (1985) 158 CLR 661 at 668-669.

²³ (1985) 158 CLR 661 at 670, emphasis added.

25. A key issue to be determined in accessorial liability cases under the *Fair Work Act* is the level of knowledge the accessory needs to have. Cases often turn on issues that are mixed law and fact, such as whether a particular award applied, or whether a worker was an employee at law. The critical question, yet to be authoritatively answered, is whether the applicant needs to prove more than knowledge of the underlying facts, but also knowledge that the conduct failed to meet an established standard (such that there is “an absence of innocence”) in circumstances where it is well established that ignorance of the law is no defence.²⁴
26. *Rural Press Ltd v ACCC*²⁵ involved a question of whether putative accessories to a TPA breach had to be shown to have knowledge of not just the underlying facts but also their legal consequences. It was a case brought against certain officers and senior employees of companies who had been involved in a market sharing arrangement involving an ‘exclusionary provision’ preventing, restricting or limiting the supply of goods or service contrary to ss45(2)(a)(ii) and 45(2)(b)(ii) of the TPA. A regional newspaper publisher had prevented another publisher circulating their newspaper in their region by threatening to start circulating its paper in second newspaper’s area unless they stopped.
27. The trial judge held that each of the alleged accessories, who had been involved in communicating the threats, had intended to procure a result whereby competition in the area would ‘come to an end’.²⁶ This finding was not challenged on appeal, however the accessories submitted on appeal that their guilt could not be found because they did not know that what they were participating in what amounted to a contravention of the TPA.
28. The High Court approved of the trial judge holding that it was necessary to find that the accessories had participated in the contraventions with actual knowledge of the “essential elements constituting the contraventions”. The High Court rejected an argument that the accessories needed to know that the conduct of the corporation would have the likely effect of “lessening competition in the market defined”. At [48] Gummow, Hayne and Heydon JJ, with whom Gleeson CJ and Callinan J agreed, said:

In the end the argument was only that McAuliffe and Law “did not know that the principal’s conduct was engaged in for the purpose or had the likely effect of substantially lessening competition ... in the market as defined.” It is wholly unrealistic to seek to characterise knowledge of circumstances in that way. Only a handful of lawyers think or speak in that fashion, and then only at a late stage of analysis of any particular problem. In order to know the essential facts, and thus satisfy s75B(1) of the Act and like provisions, it is not necessary to know that those facts are capable of characterisation in the language of the statute.²⁷

29. The Full Federal Court decision of *Medical Benefits Fund of Australia Limited v Cassidy*²⁸ also considered the issue of level of required knowledge a person must be proved to have to be an accessory in a case concerning a misleading and deceptive conduct

²⁴ *Giorgianni* at 505.

²⁵ (2003) 216 CLR 53.

²⁶ *Australian Consumer and Competition Commission v Rural Press* [2001] FCA per Mansfield J

²⁷ *Rural Press v Australian Consumer and Competition Commission* (2003) CLR 53 at 71.

²⁸ (2003) 135 FCR 1.

breach. The case was decided following the Full Court decision in *Rural Press* but prior to the High Court decision. Moore J, with whom Mansfield J agreed, identified what he described as:

A division of judicial opinion about whether an accessory, to be liable under [an accessory liability provision, i.e. “knowingly concerned in”], must be aware that the proscribed conduct of the principal was either misleading or deceptive conduct or conduct likely to mislead or deceive.²⁹

30. At first instance, MBF had been found to have engaged in misleading and deceptive conduct by certain television and billboard advertisements. John Bevins Pty Ltd created the television and billboard advertisements and arranged for them to be published. At issue on appeal was whether Bevins had correctly been found to be “knowingly concerned in” the contravention because it knew the facts which amounted to a contravention even though it did not have any intent to mislead nor, subjectively, knew that the advertisements were misleading.
31. Moore J (with whom Mansfield J concurred) concluded liability as an accessory in respect of false or misleading representations does not depend on an affirmative answer to the question of whether the alleged accessory knew that the representations were false or misleading. His Honour held that what was necessary was that the accessory know of the matters that enabled the representations to be characterised in that way.³⁰ His Honour noted that in *Yorke v Lucas* the High Court concluded that whilst Lucas was aware of the representations, indeed they were made by him, “*he had no knowledge of their falsity and could not for that reason be said to have intentionally participated in the contravention*”.
32. Moore J concluded that since the primary judge had held that Bevins’ staff knew that the limitations applied but did not know that the advertisements were misleading, it followed that they had not been aware that the advertisements might lead members of the public to mistakenly believe certain benefits could be enjoyed without limitations applying and accordingly were not liable as accessories. Moore J concluded:

As illustrated by the preceding consideration of the facts of this case, it is probably appropriate to consider, and only consider, the question of whether the alleged accessory knew that the conduct of the principal might lead members of the public to assume a state of affairs which was not the true state of affairs.³¹

33. Stone J in a separate judgement agreed with the result but for different reasons, finding that in a misleading and deceptive case an accessory must be shown to have knowledge of the misleading and deceptive nature of the relevant conduct.³² Stone J added:

This is not to say that to be liable as an accessory to a strict liability breach of s52 it is necessary to know that the conduct of the principal is unlawful, or

²⁹ *Medical Benefits Fund of Australia Limited v Cassidy* (2003) 135 FCR 1 at [2].

³⁰ (2003) 135 FCR 1 at [15].

³¹ (2003) 135 FCR 1 at [15]-[16], emphasis added.

³² *Ibid* at [80].

indeed to have any knowledge of the provisions of the *TPA* or the *ASIC Act*. But it is necessary to know the essential elements of the contravention, by which I understand that one must know that which makes the conduct a contravention; in this case, its misleading and deceptive character. Only then can one form the intention to participate in conduct of that character.³³

34. The issue of accessorial liability has arisen in industrial cases involving allegations that a union, by its officials, has been “involved in” a contravention of the former *Building and Construction Industry Improvement Act 2005* (Cth) (**BCII Act**) in circumstances where it appears alleged that there was unlawful industrial action taken by employees. The definition of “involved in” in s48(2) of the BCII Act was relevantly in the same terms as s550 of the Act.
35. One such case was *Australian Building and Construction Commissioner v Abbott (No 4)*.³⁴ Gilmour J held that union delegates and organisers had been “involved in” unlawful industrial action taken by employees. Gilmour J found that each were accessories because they had communicated a threat of industrial action or had failed to dissociate themselves from a statement made that there would be industrial action. This conclusion was overturned by the Full Federal Court in *Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate*³⁵ on the basis that merely conveying a threat of industrial action is no more than an act of communication and does not assist that which had been threatened.³⁶
36. The Full Court referred to the following passage from *Sent v Jet Corporation of Australia Pty Ltd*³⁷ where Smithers J (Sweeney J concurring) said:

But it is clear that to be involved in a contravention consisting of misleading and deceptive conduct it is necessary not only that the person concerned should know that a party proposed to engaged in a contravention but he should in some positive way, be associated therewith.

37. The Full Court noted that the key union delegate (Mr Upton) had communicated the threat but had done so in terms where it was clear that he was merely stating that which the employees themselves had decided to do. Further the delegate’s evidence that he had told the employees not to take industrial action was not put in issue. Third, in communicating the threat, the delegate had not stated that the union endorsed the industrial action. Given those facts, the Court held that the delegate did not have the requisite intention to render him liable as an accessory to the contravention.

The relevant principle to be derived from *Giorgianni; Yorke v Lucas* and *Rural Press*, is that the putative accessory must intentionally participate in the contravention and to form the requisite intent he or she must have knowledge of the essential matters which go to make up the contravention, whether or not he or she knows that those matters amount to a contravention. **The necessary**

³³ *Ibid* at [82].

³⁴ (2011) 211 IR 267.

³⁵ (2012) 209 FCR 448.

³⁶ (2012) 209 FCR 448 at [37].

³⁷ (1984) 2 FCR 201 at 207.

intent is absent if the person alleged to be the accessory does not know or believe that what he or she is assisting or encouraging is something which goes to make up the facts which constitute the contravention.³⁸

38. This echoed findings of an earlier Full Court in *Construction Forestry Mining and Energy Union v Clarke*,³⁹ which said (in relation to the accessorial liability provisions of s4(5) of the former *Workplace Relations Act 2006* (Cth)):

Regardless of the precise words of the accessorial provision, such liability depends upon the accessory associating himself or herself with the contravening conduct – the accessory should be *linked in purpose* with the perpetrators. . .

The accessory must be implicated or involved in the contravention . . . or must participate in, or assent to, the contravention.

39. One aspect of the decision of Gilmour J at first instance worth noting was his finding as to when the knowledge must be held. His Honour said:

The requisite actual knowledge must be before the conduct alleged to constitute the primary contravention occurs, and then possessed of that knowledge, the person acts anyway: *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v John Holland Pty Ltd* (2009) 180 IR 350 at [45].⁴⁰

40. To summarise the authorities discussed above, to find a person liable as an accessory the court needs to be satisfied of two things:

- a. the person had knowledge of each of the essential facts constituting the contravention;
- b. in that knowledge (that is, with intent) the person positively acted⁴¹ in a manner that established they were “linked in purpose” with the primary offender.

41. It is not, however, necessary to demonstrate that the person knew that the conduct of the primary offender was unlawful.

Required knowledge in the context of an award contravention

42. What are the essential facts that must be established to demonstrate that a person is an accessory to a contravention of a term of an award has not been authoritatively decided.

³⁸ *CFMEU v Director, Fair Work Building Industry Inspectorate* (2012) 209 FCR 448 at [37], emphasis added.

³⁹ (2007) 164 IR 299 at 308.

⁴⁰ At [192].

⁴¹ By a direct or indirect act or an omission; see s550(2)(c) of the Fair Work Act.

43. In respect of an underpayment case it seems clear that the putative accessory must be shown to have known that:
- a. there was a person employed (although query whether they need to know the exact identity of that person, an issue of some potential importance in cases against principals who are alleged to have been complicit in an underpayment by a subcontractor⁴²);
 - b. to do particular work; and
 - c. the amounts the employee was being paid, or at least how the pay was calculated.
44. However, in respect of an underpayment under an award, the question arises as to whether it is necessary to also show that the putative accessory knew that the amounts being paid were less than the amounts required by a relevant standard. This usually arises against a background where the primary offender is liable regardless of knowledge of the existence of the legal obligation, it being a strict liability contravention.
45. This issue is akin to the issue, discussed above, that has arisen in cases involving allegations of misleading and deceptive conduct as to whether it is necessary to prove that the putative accessory subjectively knew the statements would/did mislead, or at least knew facts from which it could be found the statements made were misleading.
46. In the context of an underpayment contravention case the controversy can be said to be one concerning whether it is necessary to demonstrate that the alleged accessory had one of three levels of knowledge in addition to the facts set out above, which we set out in descending levels of specificity:
- a. the accessory knew that a particular award existed which set a relevant rate and was involved in the employer making payments below that set level (regardless of whether they also knew that conduct amounted to a breach of a law) (**first level**);
 - b. the accessory knew there was a minimum standard and was involved in the employer making payments that were less than the minimum standard (without necessarily knowing from where that standard came from) (**second level**);
 - c. the accessory knew that the employer was making payments at a particular level and was involved in the making of those payments (perhaps being the person who decided to make the payments at that level) but did not know the payments were below a minimum standard (**third level**).
47. There is some authority to support the view that the first level of knowledge is not required, applying the principle that ignorance to the law is no defence. In *Fair Work*

⁴² See for example *FWO v Al Hilfi (No 2)* (2013) FCA 16.

*Ombudsman v Pocomwell Limited (No 2)*⁴³ Barker J dismissed the applicant's claim against the employer but in an *obiter* finding held that an accessory is not required to know that a particular award applies. At [281]-[282] his Honour said:

Similarly, I accept the applicant's submission that the fact that the relevant respondents did not know about the requirements for a fixed platform or a majority Australian-crewed ship was irrelevant to the question of knowing involvement. What they did know was that they were arranging for men to work as painters on rigs in Australia's EEZ on contracts at low rates. The evidence justifying that finding is ample and need not be repeated in detail.

The elements of a relevant contravention go to whether or not minimum wages required to be paid were in fact paid and whether or not the individual respondents were aware of what was proposed to be paid to each of the painters. In that regard, there is no doubt that each of the second and fourth respondents, as the guiding minds of the first and third respondents respectively (the second respondent as agent for the first respondent), actively organised the hiring of the painters and negotiated the terms of payment. Thus, the second, third and fourth respondents were fully aware of the facts that would have constituted a contravention of the FW Act, if such contravention had been proved.

48. The third level of knowledge was held to be sufficient in *Fair Work Ombudsman v Access Embroidery (Australia) Pty Ltd & Anor.*⁴⁴ In that case the putative accessory was the person who decided to make the payments and so 'knew' that the payments were being made at a level that, as a matter of law, was below a required level. He did not know what the required level was.
49. In that case Turner FM found that Mr Hua, the second respondent, was an accessory to various contraventions including award breaches. The undisputed evidence before the Court was that Mr Hua had determined the terms and conditions of employment, he made the payments to employees, he was responsible for providing pay slips to employees. However it was not proven he knew that there was an award or that there was a legal obligation to make and keep employee records.
50. The Court set out what it considered to be the essential elements of the contraventions in [45]-[47]:

It is clear that Hua was a knowing participant:

- in what payments were made to Wang;
- in calculating the rates paid to Wang;
- in not paying more than an additional \$1.00 per hour for overtime worked;
- in not paying the annual leave loading;

⁴³ [2013] FCA 1139.

⁴⁴ [2012] FMCA 835.

in not keeping the required records; and

in compiling the payslips without including the required details.

Hua intentionally participated in calculating and paying rates to Wang, in not keeping records, and in not including the required details in the payslips. He had knowledge of the essential matters going to make up the offences (the rates paid, the non payment of an annual leave loading, the non keeping of records, and the content of the payslips), even if he did not know they amounted to contraventions.

Hua was a knowing participant in the contraventions, and apart from Access Embroidery, he was the only participant.

Hua knew of the essential elements of the contraventions. Hua had knowledge of the essential facts constituting the contraventions. It is not necessary for Hua to have known that his conduct was in contravention of the law. The Court finds that Hua had knowledge of each of the essential elements of each contravention.

51. Mr Hua submitted he was not an accessory because he had no knowledge of the application of the award. This was rejected on the basis that ignorance of the law cannot be used as a defence. At [74], the Court said that:

Mr Follett submits that Hua's defence is not based on a claim of ignorance of the law, but on a lack of knowledge of all the circumstances (T 1/8/2012 p.73, l.21). The circumstances that Hua lacked knowledge of were the existence of the relevant Awards and legislation and the requirements under them. That is the same as claiming ignorance of the law, and that defence must fail.

52. Adopting the third level approach is more likely to be favoured in cases where the Court takes a view that the putative accessory was, in effect, responsible for the payments being made at that level, and hence can be said to be 'culpable' for the conduct of the corporate employer. It is an approach which has been said to rest in part on a statement made by Mason CJ, Wilson and Toohey JJ in *Hamilton v Whitehead*:

Indeed the fundamental purpose of the . . . legislation – to ensure the protection of the public – would be seriously undermined if the hands and brains of a company were not answerable personally for breaches of the Code which they themselves have perpetrated.⁴⁵

53. That quote, however, should not be taken out of context. The court in that case was not considering what level of knowledge an accessory need have to be found liable. At issue was whether it was possible to prosecute both company and the person whose actions were the actions of the company. In that case there was no question that the respondent managing director was not aware of all the material circumstances.
54. There is authority to support the view that the second level of knowledge is required.

⁴⁵ (1988) 166 CLR 121; cited in *FWO v Kentwood Industries Pty Ltd (No2)* (2010) 201 IR 234 at [199].

55. In *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2)*,⁴⁶ McKerracher J found that Mr Zhang, the sole officer of the employer and its managing director, was an accessory to the contraventions by the company to pay in accordance with a relevant industrial instrument. It was proven that Mr Zhang was aware that there was a minimum salary that had to be paid to the employees (being an amount set under Sub-class 457 visas under the *Migration Regulations 1994* (Cth) for a 38 hour week) and that employees had been paid less than that standard.

56. The Court referred to the fact that despite the matter proceeding on an *ex parte* basis, Mr Zhang had been involved and made submissions to the Court at [200]:

All of the admitted facts and unchallenged evidence, together with the way that Mr Zhang has appeared before and communicated with the Court and with the applicant during these proceedings, makes clear that Mr Zhang is the 'hands and brains' or guiding mind of Kentwood. It has been through his human agency that the corporate personality of Kentwood has perpetrated all of the contraventions alleged by the applicant.

57. It appears that, consistent with our view, McKerracher J found it necessary to establish that Mr Zhang was aware of a minimum standard (and that it was not being met) in order to find liability, even though it was not proven that Mr Zhang knew of the relevant industrial instrument.

58. In *Fair Work Ombudsman v South Jin Pty Ltd & Ors*,⁴⁷ Lindsay J dealt with a summary dismissal application of a case alleging accessory liability. In the course of dismissing the application, Lindsay J adopted language that appears to support the second level of knowledge we set out earlier. His Honour described the kind of evidence he envisaged would satisfy him that the second respondent would be an accessory:

Mere ignorance of the precise content of his legal obligations will not itself negate his being knowingly concerned if he knew that he was underpaying the employees or otherwise not fulfilling his award and statutory obligations; when the evidence of the second respondent is in and has been tested it may be appropriate to characterise the state of his knowledge of the extent to which he was not fulfilling his obligations, in that way.⁴⁸

59. In *Fair Work Ombudsman v AJSJ Pty Ltd*,⁴⁹ Burnett J found that a director and manager of the employer, Ms Ghag, was an accessory to a contravention of a collective agreement. At [79] the Court said:

That contravention occurred because she misconstrued or ignored the Collective Agreement. In that regard she was an intentional participant in the Employer's contraventions and was by her actions directly and knowingly concerned in the contraventions. As was submitted by the Applicant, she was involved in drafting

⁴⁶ (2010) 201 IR 234.

⁴⁷ [2013] FCCA 1057.

⁴⁸ *Fair Work Ombudsman v South Jin Pty Ltd & Ors* [2013] FCCA 1057 at [71].

⁴⁹ [2014] FCCA 902.

the Collective Agreement and accordingly ought to have been aware that it did not contain any provision for a classification of an employee as a “trainee.”

60. The evidence was that Ms Ghag drafted the collective agreement and informed the employee that she would be employed pursuant to the collective agreement.
61. In *Potter v Fair Work Ombudsman*,⁵⁰ Cowdroy J dealing with an accessories’ liability in relation to an award (Clerical NAPSA) contravention approached the matter in a way significantly different to McKerracher J in *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2)* and Turner FM in *Fair Work Ombudsman v Access Embroidery (Australia) Pty Ltd & Anor*.
62. Ms Potter was a director of a company that was the employer. Cowdroy J rejected Ms Potter’s appeal that the employer was not liable for the contraventions but upheld Ms Potter’s appeal that for a period of time she, as an accessory, was not involved in the contravention.
63. Ms Potter’s evidence was not only that did she not know that the Clerical NAPSA applied but that she believed that the Clerical NAPSA did not apply. At [81] his Honour said:

Knowledge that the Clerical NAPSA applied to the Employees is not identical to knowledge that a failure to pay the Employees in accordance with the Clerical NAPSA constitutes a breach of a civil remedy provision, although it is undeniable that the difference is a small one. The Court finds that, to be an accessory to the underpayment contraventions, Mrs Potter must have known the Clerical NAPSA applied to the Employees.

64. On one view of this passage, his Honour found that an essential element of the contravention is that a person must be aware that a particular award applied to an employee at least where there is more than one possible award or other legal entitlement (the first level above). However it is perhaps better viewed as supporting the proposition that to find an accessory liable it must be shown that they had intent to pay at a level below that which they understood to be a minimum level (without necessarily having to prove the existence of a particular award). On the facts of this case Ms Potter became aware at a point in time that the Clerical NAPSA was likely to apply and Cowdroy J found her liable as an accessory from that time. The finding that in the period before she had that knowledge she was not liable, turns, it can be said, not on the absence of knowledge that a particular award applied, but from the absence of knowledge that the payments being made were payments less than a relevant minimum standard.
65. There is much to be said for the following observation of Cowdroy J at [82]:

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

⁵⁰ [2014] FCA 187.

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.

66. In our view the second level is more likely to be ultimately preferred. As in *Giorgianni*, while the putative accessory need not know the conduct in which they were involved is a crime, they must know of the conduct that constitutes the crime. It was not sufficient that Mr Giorgianni knew and was responsible for the maintenance of the brakes, he had to also know they were defective. In the same manner it can be said, it is not sufficient for the putative accessory to know the amounts being paid, they must also know they are amounts less than they should be. As Mason J held in *Giorgianni*, a person is not an accessory if they have participated in conduct which, through ignorance of the facts, appears to the person to be an innocent act.
67. As in the misleading and deceptive cases, *Yorke v Lucas* and *Medical Benefits Fund v Cassidy*, more is required than simply knowledge of and involvement in the conduct, there must be knowledge that the conduct is of a character that makes it conduct that is contrary to law (without needing to know that it is contrary to law).
68. The second level does not require actual knowledge that the conduct amounts to a contravention of an award (just as the accessories in *Medical Benefits Fund* were held by Moore J not to need to subjectively know that their conduct was misleading and deceptive). It does require knowledge that the conduct is conduct that is contrary to a minimum standard (just as in *Medical Benefits Fund* Moore J held the putative accessories needed to know that the statements were false).
69. The third level is superficially attractive, particularly in cases where there is a sole directing mind of a company, such that it can be said that the conduct of the company is the conduct of the director. However taken at its narrowest it fails to take into account that, as a strict liability breach, the company is usually proved to be liable regardless of a lack of intent to pay below a minimum standard. A putative accessory, in contrast, is required to be shown to have intent, and arguably that can only be established if it is shown the accessory knew (or was wilfully blind) to the fact that there was a minimum standard which was not being met. Absent that it is difficult to see how it can be said that the accessory had the necessary intent.
70. In an employment context a court may be prepared to take judicial notice of the fact that there is a framework providing for minimum wages and conditions payable to all employees in Australia.⁵¹ A Court may be prepared to accept that it is a matter of general common knowledge that there is a national safety net of terms and conditions of employment that applies to all employees in Australia. That may be a relevant fact in attempting to prove wilful blindness (below) but will of itself not be sufficient to show that an accessory was aware that the payments being made were below a particular

⁵¹ See s144 of the *Evidence Act*.

minimum standard unless the payments were so low as to be below any minimum standard.

71. To take some examples, on the view we prefer:
- a. a directing mind of an employer that pays \$2 an hour might be said to know that the amount being paid was less than a minimum standard, even if it cannot be shown they knew of the particular standard in question, since it is generally known that there are minimum standards and on any view such a low payment must be below such a standard, and so be found to have the requisite intent to be knowingly involved in the underpayment;
 - b. a directing mind of an employer that pays \$16 an hour in the belief that a particular award applied which required \$15 an hour to be paid could not be said to have the requisite intent, even if as a matter of fact the relevant award required \$18 an hour to be paid; and
 - c. a directing mind of an employer that decides to pay \$15 an hour, in circumstances where the rate of pay for work of that type is \$16 an hour, would not, on those facts alone, be likely to be shown to have the requisite intent.
72. To apply the approach in *Kentwood Industries* and *Access Embroidery*, proceeding from the basis that the accessory was the director and manager of the employer (its “hand and brain”) would make it relatively easy to establish liability on a sole director in respect of smaller companies. In respect of larger employers, where responsibility is decentralised, on that approach it would be more difficult to find officers and senior managers liable. This disproportionate effect is reduced if the applicant must establish more than simply knowledge of the rates being paid and responsibility for making that decision, but also an intent to underpay. Indeed, relevant managers of larger organisations who are well educated and trained with knowledge of HR matters may find it more difficult to establish that they were not wilfully blind to rates of pay being paid that were below the relevant minimum standard.
73. In short the better view is that a person cannot be an accessory if they were unintentionally involved in underpaying employees. For it to be intentional what is likely to be required is knowledge not just of the amounts paid, but also that they were less than they should have been. As the Full Court held in *ACCC v IMB Group Pty Ltd*,⁵² even though a principal offender can, under certain statutory provisions, be found to have committed a contravention unintentionally, that is not so for an accessory:

... before any accessorial liability will arise, it is necessary to establish the subjective element of knowledge of each of the essential elements of the contravention. **That knowledge may be constructive in the sense that it may be possible to show wilful blindness in relation to the elements of a contravention. However, absent a finding of wilful blindness, it is**

⁵² [2003] FCAFC 17.

necessary to establish actual knowledge on the part of a person to whom it is sought to sheet home accessorial liability . . .⁵³

Chapter 4 Wilful blindness

74. As discussed in the previous chapter, a person will not be liable as an accessory unless he or she knew the essential matters that constitute the contravention. A negligent failure to make enquiries is not sufficient. However the Courts have been willing to find that a person had the requisite knowledge where it can be shown they were ‘wilfully blind’ to the truth.

75. ‘Wilful blindness’ is a conclusion that will be found where it can be established that a purported accessory deliberately closed their eyes to a matter that would otherwise have been obvious or where there are obviously suspicious circumstances combined with a failure to make proper inquiries leading the Court to find the person had actual knowledge.

76. In *Giorgianni* Gibbs CJ cited the relevant principle from the High Court decision in *R v Crabbe* as follows:

“When a person deliberately refrains from making enquiries because he prefers not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth, he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring.”⁵⁴

77. His Honour went on to draw a distinction between a state of mind that consists of deliberately refraining from making enquiries and a state of mind which is merely neglecting to make such enquiries as a reasonable and prudent person would make. The latter is not sufficient to establish the requisite knowledge.

78. In *R v Crabbe*⁵⁵ the High Court said:

. . . When a person deliberately refrains from making inquiries because he prefers not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth, he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring. According to Professor Glanville Williams, *Criminal Law: The General Part*, 2nd ed. (1961), p. 159:

A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and

⁵³ At [135].

⁵⁴ *Giorgianni* (1985) 156 CLR 473 at 482.9-483.

⁵⁵ (1985) 156 CLR 464 at [12]

this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice.

Again, in his Textbook of Criminal Law (1978), p. 79, Professor Glanville Williams said, in a passage cited by Lord Edmund-Davies in *Reg. v. Caldwell*:

A person cannot, in any intelligible meaning of the words, close his mind to a risk unless he first realises that there is a risk; and if he realises that there is a risk, that is the end of the matter.

79. In *Giorgianni* Wilson, Deane and Dawson JJ expressed a view to similar effect, noting that actual knowledge is required, not knowledge that can be imputed or presumed. Their Honours accepted that such knowledge can be found to exist where a person has deliberately refrained from making an inquiry about something about which they knew.⁵⁶

80. Mason J in *Giorgianni* described the test for 'wilful blindness' in a way that requires a deliberate act:

It is enough if the defendant has deliberately shut his eyes to a relevant fact or has deliberately abstained from obtaining knowledge by making an inquiry for fear that he may learn the truth.⁵⁷

81. In *Pereira v Director of Public Prosecutions*⁵⁸ the High Court heard an appeal from a conviction for possession of a quantity of a prohibited drug. The defendant had picked up a parcel from the post office containing a prohibited drug, but had not opened it. At issue was whether the prosecution had proved that the defendant knew the parcel contained the prohibited drug.

82. The Court confirmed that actual knowledge of the accused is necessary and not that which might be postulated of a hypothetical person in the position of the accused. However knowledge can be inferred. Mason CJ, Deane, Dawson, Toohey and Gaudron JJ noted:

. . .where knowledge is inferred from the circumstances surrounding the commission of the alleged offence, knowledge must be the only rational inference available. All that having been said, the fact remains that 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.⁵⁹

83. Negligence or even recklessness as to the factual position will not be sufficient to prove actual knowledge. However, a wilful or reckless failure to make such enquiries as an honest and reasonable person would make will assist the Court to determine if there has

⁵⁶ At 505.

⁵⁷ At 495.

⁵⁸ (1988) 82 ALR 217.

⁵⁹ At [11].

been a “calculated abstention from inquiry”⁶⁰ which would disentitle a person from relying upon a lack of actual knowledge.

Wilful blindness in Industrial Authorities

84. In *Potter*, the Fair Work Ombudsman submitted that if it were necessary to prove that Ms Potter knew of the existence of the relevant Award then that had been established because Ms Potter had been wilfully blind to the fact that the award applied. This submission was rejected on the basis that there was insufficient evidence to draw that conclusion. His Honour referred to an extra-curial statement by Dawson J in a passage in ‘Recent Common Law Developments in Criminal Law’, in (1991) 15 *Crim LJ* 5 at 15 at [82]:

. . . whilst knowledge as an ingredient of an offence may be established by inference, it must be established as a fact. If the term “wilful blindness” is used merely as a shorthand expression to indicate circumstances which warrant the drawing of the necessary inference, then it is acceptable. But it is unacceptable if it is used as a basis for imputing knowledge where actual knowledge is not proved.

85. In *Fair Work Ombudsman v Access Embroidery (Australia) Pty Ltd & Anor*,⁶¹ the Fair Work Ombudsman made a similar submission to the effect that Mr Hua had been wilfully blind to the fact that the award applied relying on the fact that Mr Hua had received and read a letter from the Department of Employment and Workplace Relations about an underpayment to another employee of Access Embroidery. The Court in that case held that Mr Hua was liable as an accessory due to his actual knowledge of what had been paid, finding that the regulator did not need to prove knowledge of the existence of the relevant award. In an *obiter* finding the Court rejected the submission that Mr Hua had been wilfully blind to the existence of the award, finding that Mr Hua had decided not to make any further inquiries but that he did not do so deliberately and as such was not wilfully blind to the existence of the award obligations. At [77] Turner FM accepted that:

. . . Hua was “mistaken, perhaps cavalier, it was careless, it was reckless” (T 1/8/20102 p.70, l.18), but was “not motivated by malice or spite or intent”.

86. The reasons in the *Access Embroidery (Australia)* case do not disclose the terms of the letter from the Department. If the letter referred to the award or to the entitlement such as requirement to pay overtime etc and Mr Hua continued to cause the employer to not comply with the award, then in light of *Giorgianni*, a finding of actual knowledge may have been open to the Court since in that case it would have been open to find that Mr Hua wilfully closed his eyes to a matter that would otherwise have been obvious or

⁶⁰ *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [261] per Finn, Stone and Perram JJ.

⁶¹ [2012] FMCA 835.

where there are obviously suspicious circumstances combined with a failure to make proper inquiries.⁶²

Chapter 5 Aggregation of knowledge

Introduction

87. In order for a potential accessory to be found liable, it is necessary to establish that that person had knowledge of the essential facts which constitute the contravention. Where the “person” is a corporation, it is necessary to prove that the corporation had that knowledge. Where there are a number of facts, all of which need to be known, the question arises whether the corporation will be liable in circumstances where no single employee of the corporation knew all those things, but where each of those facts was known by at least one employee of the company.
88. In other words, in order to establish the necessary knowledge, can one aggregate the knowledge of various employees in order to conclude that the corporation had knowledge of each of the essential matters in order to establish the necessary “intentional involvement”?
89. This issue arose, at least in the context of strike out proceedings, in the proceedings the FWO took against Coles in respect of trolley collectors engaged by contractors to collect trolleys at Coles supermarkets.⁶³ The trolley collectors had been underpaid, but could it be demonstrated that Coles had the requisite knowledge of the material facts,⁶⁴ in circumstances where Coles had sub-contracted for a service fee, and had not required particular rates to be paid by the ultimate employer. Could knowledge as to matters such as the hours worked, the rates paid and the identity of the employees be imputed from the value of the contracts and/or by aggregating the knowledge of various employees?

Legal authorities

90. The leading authority on the capacity to aggregate knowledge is the High Court decision in *Krakovski v Eurolynx Properties Ltd.*⁶⁵ The case involved a sale of property. The purchasers told both the agent for the vendor Eurolynx (Cini) and a director of Eurolynx (Mr Ryan) that they were prepared to pay a purchase price equal to ten times the annual rent. The purchasers were then told the property had been leased for six years at an annual rate of \$156,000. On the basis of that information the purchasers agreed

⁶² *Giorgianni* at 495 per Wilson, Deane and Dawson JJ agreed.

⁶³ *FWO v Al Hilfi and Ors (No 2)* [2013] FCA 16.

⁶⁴ As to the knowledge required, see chapter 3.

⁶⁵ (1995) 183 CLR 563.

to pay \$1.56m for the property. The purchasers made the usual enquiries upon the purchase of land and, in response, received answers signed by a different employee of Eurolynx (Mr Gilbert) disclosing the existence of the lease which had the annual rent sum. The purchasers, however, were not told by Mr Gilbert of the existence of a side letter to the lease, which stated that the lessee had three months' rent free and had been given \$156,000 to fund the fit out of the premises, the net result being that the true value of the lease was approximately 20% less than appeared on the face of the lease. Mr Gilbert knew about the side agreement. Mr Gilbert, however, said he did not know that the purchasers had only wanted to purchase at a price ten times the lease value, and said that he had not understood that he needed to disclose the side agreement, which he might have regarded as no more than an item in the cost of developing the unit. The question arose as to whether the knowledge of the Eurolynx director Mr Ryan could be aggregated with that of the Eurolynx employee Mr Gilbert to establish that Eurolynx had engaged in fraud.

91. The Court held that the mind of Eurolynx did not depend upon the acceptance of the evidence of Mr Gilbert alone. Rather, account also had to be taken of the evidence of the knowledge of Mr Ryan and the property agent for Eurolynx since:

Their knowledge was the knowledge of Eurolynx, for they were the persons who were responsible for the initial negotiations and who had set the scene in which the representation had been made by the [answer to requisitions] and the proffered contract of sale. As Bright J said in *Brambles Holdings Ltd v Carey*:

Always, when beliefs or opinions or states of mind are attributed to a company, it is necessary to specify some person or persons so closely and relevantly connected with the company that the state of mind of that person or those persons can be treated as being identified with the company so that their state of mind can be treated as being the state of mind of the company. This process is often necessary in cases in which companies are charged with offences such as conspiracy to defraud.⁶⁶

92. That passage has been subsequently relied upon (including by Coles in the *Al Hilfi* proceedings⁶⁷) for the proposition that the only persons whose knowledge can be aggregated are those who can be said to constitute the directing mind and will of the corporation.
93. The Court noted a number of facts which led it to infer that the company Eurolynx intended, or was willing to deceive the purchaser by providing, in answer to a request for information, documentation that failed to disclose the true value of the lease. Those facts included:
- a. that Eurolynx did not call as witnesses either the property agent or Mr Ryan;

⁶⁶ (1995) 183 CLR 563 at 582.8-583.

⁶⁷ *FWO v Al Hilfi and Ors (No 2)* [2013] FCA 16

- b. the request for information clearly required the side agreement to be produced, but it was not;
 - c. when the time for settlement of the purchase was approaching, Eurolynx concealed the existence of the rent-free period by accepting a claim for an adjustment of the “rent” for eleven days (even though no rent was being paid at that time) suggesting that steps were being taken to deliberately conceal from the purchasers the existence of a rent free period;
 - d. the solicitor acting for Eurolynx in the lease of the property and the sale of the property was not called to give evidence.
94. Whilst clearly aggregating the knowledge of Mr Ryan and Mr Gilbert, the Court did not set out any clear principle as to the circumstances in which such aggregation will be appropriate, beyond the broad statement at 583:

A division of function among officers of a corporation responsible for different aspects of the one transaction does not relieve the corporation from responsibility determined by reference to the knowledge possessed by each of them.⁶⁸

95. Following the decision in *Eurolynx*, Courts have struggled to determine the circumstances in which it is possible to aggregate knowledge of different officers or employees of a corporation to establish the necessary knowledge of a corporation.
96. One such case was the decision of the Victorian Court of Appeal in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*.⁶⁹ The case involved a bank which took a mortgage from a trustee company to secure a guarantee of a third party’s debt. The debtor procured the guarantee and mortgage by forgery, affixing the company seal even though he was not a director of the company. No one officer of the Bank knew all relevant facts sufficient to establish that the Bank had either been wilfully blind or knew that the mortgage had been obtained by fraud. Nevertheless, various officers had knowledge and it was contended that it was permissible to aggregate the knowledge of the individual officers and to impute the sum of that knowledge to the corporation. It was contended that if one person had known all those facts then that person would have known that there had been a fraud and so the bank could be held to have dishonestly proceeded to loan the funds anyway, even though no servant or agent was aware of the forgery or of the facts which ought to have disclosed it.
97. Tadgell JA, with whom Winneke P agreed, referred to the High Court decision in *Eurolynx* and in particular to the short passage from 583 set out above. Tadgell JA said:

Neither that passage in *Eurolynx* nor any other principle justifies the simple aggregation of the knowledge of a number of persons individually unaware of fraud, or facts which ought to disclose it, to create a notional person with a

⁶⁸ (1995) 183 CLR 563 at 583.2, emphasis added.

⁶⁹ [1998] 3 VR 133.

dishonest intent. The High Court in *Eurolynx* was not purporting, in the passage relied on, to lay down any such principle but to authorise a consideration of the knowledge and circumstance of all relevant persons – including what may properly be inferred – in order to ascertain the mind of the corporation.⁷⁰

98. Ashley AJA, while in minority, also concluded that the information held by various employees could not be aggregated in a manner that rendered the bank liable. Ashley AJA said, in respect of the same passage from *Eurolynx* at 583 quoted above:

The effect of this proposition was that the actual state of mind of a servant or agent of the company, which was in the circumstances to be treated as the company's state of mind, could be attributed to the company for the purpose of determining whether a representation made by another servant of the company (which representation was evidently false) had been consciously made by the company. That, it appears to me, is different to saying that certain facts known to different servants or agents of the company may be aggregated so as to give rise to a factual totality from which a dishonest corporate intent, held by none of the individuals, may be inferred.

99. The question of aggregation of corporate knowledge was one of the matters considered by the Western Australian Supreme Court of Appeal in *Westpac Banking Corporation v The Bell Group Ltd (In Liquidation) (No 3)*.⁷¹ Drummond AJA, in a lengthy section of a very long judgment, considered at [2174]-[2200] the various authorities on the question of aggregation of knowledge (with whom Lee AJA concurred at [1100]). Drummond AJA summarised the decision of the High Court in *Eurolynx*, concluding that the High Court had found that *Eurolynx* had a consciously fraudulent state of mind when a false representation was made on its behalf:

... by aggregating the knowledge about one matter (the separate agreement with the tenant) possessed by the company's solicitor who prepared the statement, containing the representation and the company's employee who signed that statement, with the knowledge of the company's real estate agent and one of its officers, about a separate matter (the return the purchaser required on the purchase price) that gave the representation its false character, even though neither the solicitor nor the employee adverted to that separate matter and even though the agent and the officer had no involvement in making the representation.⁷²

100. Drummond AJA then stated:

What justified aggregation of the knowledge of these various officers and employees and external agents was that they had responsibility to act for the company in different aspects of the one transaction.⁷³

101. Drummond AJA rejected the approach of Ipp JA in *Port Stephens Shire Council v Tellamist Pty Ltd*,⁷⁴ with whom Giles JA agreed, who contended that the decision in *Eurolynx* did

⁷⁰ [1998] 3 VR 133 at 145.2.

⁷¹ (2012) 89 ACSR 1.

⁷² At [2183].

⁷³ At [2183].

⁷⁴ [2004] NSWCA 353.

not provide any support for the proposition that the state of mind of each employee and agent can be said to be the state of mind of the company. Ipp JA stated that he:

. . . doubted whether the requisite mental element (be it consciousness of wrongdoing, or recklessness) or the inference of high-handed contumelious behaviour, essential to an award of exemplary damages, can be established by theory of collective knowledge.

102. Drummond AJA preferred the minority decision in *Port Stephens Shire Council v Tellamist Pty Ltd* of Santow JA, who held:

A corporation, including a Council, can be liable in torts on the basis of conduct and knowledge (where it is relevant) of several persons who are sufficiently closely and relevantly connected to the Council as to attribute responsibility to the Council.⁷⁵

103. Drummond AJA went on to conclude that Tadgell JA in *Sixty-Fourth Throne* was wrong to conclude that the High Court decision in *Eurolynx* did not “justify the simple aggregation of the knowledge of a number of persons individually unaware of fraud, or facts which ought to disclose it, to create a notional person with a dishonest intent”. Drummond AJA held:

[Tadgell JA’s] only explanation for saying that was that the Court in *Eurolynx* was doing no more than “authorise a consideration of the knowledge and circumstances of all relevant persons – including what may properly be inferred – in order to ascertain the mind of the corporation”. That is true. But what the High Court held was that, by considering what the four relevant personnel of *Eurolynx* each knew and by aggregating their knowledge, the company had a fraudulent intent not possessed by any of its personnel. *Eurolynx* is, in my opinion, clear authority for the principle which Tadgell JA rejected.⁷⁶

104. Drummond AJA went on to note that in *Eurolynx*:

. . . even if the states of mind of *Eurolynx*’s real estate agent and officer were treated as the company’s state of mind, they were not involved in making the representation. *Eurolynx* was only held to have consciously made the fraudulent representation by aggregating with their knowledge the states of mind of the solicitor and the employee, though none of the four had any fraudulent intent.⁷⁷

105. Drummond AJA then rejected the proposition that in order to establish knowledge, there must be circumstances to impute that someone with sufficient authority to be described as the company’s “guiding mind” had that knowledge. Rather, in the opinion of Drummond AJA:

. . . what is necessary is that the people whose knowledge is sought to be aggregated should be involved in the one transaction, irrespective of their role

⁷⁵ (2012) WASCA 157 at [2187].

⁷⁶ (2012) WASCA 157 at [2187].

⁷⁷ (2012) WASCA 157 at [2187].

in the company's organisation. Otherwise, the company would be able to take the benefits of corporate personality, including the right to acquire and hold assets and to engage in various business activities, but to deny responsibility for how those assets were acquired or how those activities were conducted.⁷⁸

106. Drummond AJA drew support for the notion that information can be aggregated if it is the same transaction, but not otherwise, from the decision of Finn J in *Australian Competition and Consumer Commission v Radio Rentals Ltd.*⁷⁹ Finn J rejected the notion that an inference could be drawn from the records of many hundreds of individual but unrelated dealings with a particular customer by a large number of employees over a four year period to demonstrate that the company knew that the customer in question was intellectually disabled. In circumstances where no individual employee had any reason to think the customer might be handicapped, Finn J declined to aggregate the information in the records generated by the various employees on the basis that they could not be said to be involved in different aspects of the one transaction.⁸⁰
107. In the case in question, Drummond AJA found that the trial judge had been entitled to take into account that various officers of the Banks had together obtained knowledge which his Honour could ultimately use to make a finding that the Bank knew about the insolvency of the Bell Group.⁸¹ Drummond AJA found that there was no need to find for each Bank a guiding mind in which reposed all relevant knowledge.⁸² Drummond AJA also rejected the position that aggregation was only possible if each officer had a duty to communicate that which they knew with another or to some central superior.⁸³

Section 793 of the Fair Work Act

108. Section 793 of the Fair Work Act provides that a body corporate is liable for the conduct of its officers, employees and agents. Subsection (2) states as follows:
- (2) If, for the purposes of this Act or the procedural rules, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is enough to show:
 - (a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and
 - (b) that the person had that state of mind.
109. As can be seen, s793(2) permits the Court to find that the corporation had a state of mind in respect of certain conduct, which was the state of mind of an employee who engaged in that conduct. That section, however, still requires proof that the individual employee had the requisite state of mind. Further, it does not deal with the question of

⁷⁸ (2012) WASCA 157 at [2189].

⁷⁹ [2005] FCA 1133.

⁸⁰ (2012) WASCA 157 at [2189].

⁸¹ (2012) WASCA 157 at [2198].

⁸² (2012) WASCA 157 at [2199].

⁸³ (2012) WASCA 157 at [2200].

whether various states of mind of individuals can in some way be aggregated to create some “super” corporate state of mind.

Aggregation of knowledge – industrial cases

110. As noted above, the Federal Court examined the issue of the capacity to aggregate knowledge in a summary judgement application to strike out the FWO’s pleadings against Coles.⁸⁴
111. Coles contended before Besanko J that knowledge of Coles employees could only be aggregated and attributed to Coles if the named employees constituted the directing mind and will of Coles or if there was duty on the part of one employee or officer to communicate information to another.⁸⁵ Besanko J held at [25]:

It is at least reasonably arguable that the terms of s793(2) are wide enough to permit aggregation without the need to show a duty to communicate information. Secondly, even if the common law principles apply to s793, it is at least reasonably arguable that a duty to communicate information is not a prerequisite to aggregation at common law and that having regard to the High Court decision in [*Eurolynx*] at [582]-[583] per Brennan, Deane, Gaudron and McHugh JJ it is sufficient if it is appropriate to regard the persons involved in a particular transaction as part of the directing mind and will of the body corporate... or that the relevant persons were involved in the one transaction (*Westpac Banking Corporation v Bell Group Limited (in liq) (No 3)* (2012) 89 ACSR 1 at [2174]-[2200] per Drummond AJA (with whom Lee AJA agreed at 172 [1100])).

112. In *FWO v Valuair Ltd (No 2)*⁸⁶ the FWO sought to rely on s550 to find that Jetstar Airways Pty Ltd was an accessory to alleged underpayments made by two overseas corporations that had employed overseas aircraft cabin crew to work on Jetstar flights both overseas and on flights between Australian cities at rates of pay less than the relevant Modern Award. Buchanan J held that the primary contravention had not been established, finding that the Fair Work Act did not apply to the employers in question. In an *obiter* finding Buchanan J held that if the primary contravention had been made out he could not see how Jetstar could have resisted the conclusion that it was also liable.⁸⁷ Such a finding would not have been remarkable given that Jetstar had contracts with the overseas companies to provide the cabin crew which led directly to them being employed. Jetstar, who was in charge of rosters, knew who each employee was, their exact hours of work and that they were being paid in accordance with local contracts of employment and not in accordance with the Award that Jetstar, as an employer of cabin crew, knew applied to Australian workers.

⁸⁴ *Fair Work Ombudsman v Al Hilfi (No 2)* [2013] FCA 16.

⁸⁵ [2013] FCA 16 at [12].

⁸⁶ [2014] FCA 759.

⁸⁷ At [123].

Conclusion

113. The issue of whether and in what circumstances knowledge of individual employees can be aggregated to demonstrate knowledge of a corporation is an unsettled area of law. While the High Court was prepared to aggregate information held by different corporate officers and employees in *Eurolynx*, that case involved a fact situation which led the Court to infer that the corporation did have an intent to deceive, even though there was no evidence to prove that any single individual employee had that intent.
114. There is support for the notion, derived from the High Court decision in *Eurolynx*, that at least at common law if knowledge is to be aggregated, it has to be knowledge arising from one transaction and/or knowledge held by persons who together constitute the directing mind and will of the corporation.
115. Where one is considering aggregating knowledge in order to prove intent to be an accessory to a contravention, Courts will be slow to do so if they cannot find in any one employee a state of mind constituting an intent to be “involved” in a contravention. The facts in *Eurolynx*, including the failure to call employees and the attempt to mislead the purchaser as to rent adjustments, assisted the Court to find the existence of an overall “corporate” intent. In contrast, the Victorian Court of Appeal in *Sixty-Fourth Throne* was not prepared to find such intent where it rested upon proving that if one person had known all the facts known by a number of different individuals that person would have had enough knowledge to believe that a mortgage was being signed fraudulently. To find that the knowledge of a series of employees involved in a single transaction (as in *Westpac Banking Corporation v Bell Group Limited (in liq) (No 3)*) can be aggregated can be accepted, but that does not of itself mean that one can find the necessary ‘intentional’ state of mind.
116. As noted by Besanko J in the *Al Hilfi* proceedings, it is arguable that, given the terms of s793(2), a corporation can be said to have the state of mind of each of the employees who did a relevant act. Still to be determined is the question of whether the section evinces an intention to invest a corporation with a state of mind constituted by adding up the various states of mind of each of its employees. As Wootten J noted in *Dunlop v Woollahra Municipal Council* a corporation might have mixed motives and the Courts must in those circumstances somehow grapple with the facts to discern a single corporate intent. It is for that reason that Courts have in the past sought to find a guiding or controlling mind and impute to the corporation that intent of that mind.
117. Until this issue is settled it may be a difficult task for an applicant to establish that a large corporation had the requisite intent absent a situation like the *Valuair* case where it could be shown that Jetstar had exact knowledge of the terms of the employment and the minimum standard that applied.

Chapter 6 Can an accessory be ordered to pay compensation?

118. The question of whether a person “involved in” a contravention of a civil remedy provision within the meaning of s550 can be ordered to pay compensation in addition to a penalty has, perhaps surprisingly, not yet been authoritatively determined.
119. The issue arose in *AFMPKIU v Beynon*.⁸⁸ Forgecast Australia whilst in receivership made all employees redundant but failed to pay them redundancy pay in contravention of Federal certified agreements. Forgecast was later wound-up. The AMWU and AWU brought proceedings against the sole director and secretary of Forgecast, Mr Beynon, who had, via another corporation of which he was also the sole director, placed Forgecast into receivership in circumstances where Mr Beynon hoped to emerge after receivership with continued control of the business of Forgecast but with a reduced number of employees, having cast onto GEERS⁸⁹ the burden of the redundancy entitlements of the discarded employees.⁹⁰ The unions sought orders against Mr Beynon as a person “involved in” the contravention of the Agreements, including orders that he pay the redundancy entitlements by way of a ‘compensation’ order. Gray J held the unions had standing to seek such orders.⁹¹ The unions failed, however, to establish that Mr Beynon was an accessory since the contravention did not accord with Mr Beynon’s intention, it having arisen from the decision of the receiver to close the business. As a result his Honour did not need to consider contentions that the only remedy available against Mr Beynon was a pecuniary penalty.⁹²
120. There have been a few cases where the Court has ordered that an accessory pay compensation. However in all but the most recent of these cases⁹³ the power to order the accessory to pay compensation was not put in issue either because there was some agreement as to the orders that should be made⁹⁴ or no appearance for the respondents.⁹⁵
121. The primary reason for the issue not arising to date is that the Fair Work Ombudsman, whilst very active in seeking penalties against directors of failed corporations, has taken a position that it will not seek in addition orders of compensation. This approach appears to be based upon a paragraph in the Explanatory Memorandum⁹⁶ and a view that absent clearer legislative provisions of the sort found in other legislation⁹⁷ the Act does

⁸⁸ [2013] FCA 390.

⁸⁹ The Commonwealth’s General Employee Entitlements and Redundancy Scheme pursuant to which certain redundancy entitlements not paid by companies that have gone into receivership or liquidation are paid by the Commonwealth.

⁹⁰ Gray J held that Mr Beynon had that state of mind at [68].

⁹¹ At [21].

⁹² Anderson and Howe ‘Making Sense of the Compensation Remedy in Cases of Accessorial Liability under the *Fair Work Act*’ (2012) 36 *Melbourne University Law Review* 335 at 339 and footnote 16.

⁹³ *Scotto v Scala Bros Pty Ltd & Anor* [2014] FCCA 2374, Cameron J.

⁹⁴ For example *McDonald v Il Migliore Pty Limited (No 2)* [2014] FCCA 1110 and *TWU (NSW) v No Fuss Liquid Waste Pty Ltd* [2011] FCA 982. In the latter case Flick J did not accept the power granted by s545(1) extended to a power to ban a director, but expressed no concern regarding other proposed consent orders by which the directors were required to pay compensation in addition to penalties.

⁹⁵ An example of the latter is *Fair Work Ombudsman v Proplas Industries Pty Limited* [2011] FMCA 506.

⁹⁶ Discussed below.

⁹⁷ See for example *Corporations Act Part 5.7B, Division 3; Federal Police Act, s53A*.

not evince an intention to permit the corporate veil to be pierced so as to place upon persons other than the employer the obligation to make payments for work done for the benefit of the employer.

122. Within the constraints of this policy position the FWO has nevertheless been active in seeking to have employees compensated for underpayments. This includes innovative orders by which penalties are paid to employees affected by an underpayment⁹⁸ in proportion to each employees' lost wages.⁹⁹

Legislative provisions

123. Under the *Workplace Relations Act 1996 (Cth)*, following the *WorkChoices* amendments, an accessory to a failure to comply with an Award could be penalised,¹⁰⁰ however, there was no power to impose upon a person other than the employer an obligation to make good an underpayment.¹⁰¹ The *Fair Work Act*, in contrast, provides broader powers to the Federal Court and Federal Circuit Court wherever a person has contravened a civil remedy provision. Section 545 provides:

545 Orders that can be made by particular courts

Federal Court and Federal Circuit Court

- (1) The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.
- (2) Without limiting subsection (1), orders the Federal Court or Federal Circuit Court may make include the following:
 - (a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;
 - (b) an order awarding compensation for loss that a person has suffered because of the contravention;
 - (c) an order for reinstatement of a person.

⁹⁸ Pursuant to subsection 546(3)(c).

⁹⁹ See for example *Fair Work Ombudsman v Shah* [2014] FCCA 270.

¹⁰⁰ Section 728 of the WR Act was similar to s550 in treating a person who "was involved in a contravention of a civil remedy provision" as having contravened the provision; Sections 717, 719 and 727, when read together, provided the Court with power to impose a penalty on a person who is bound by a term of an Award and failed to comply with it.

¹⁰¹ WR Act subsections 719(6) and (8).

124. There does not seem to be any reason why the broad power in subsection 545(1) should be read down such that orders awarding compensation for failing to pay an amount due under the Act or a fair work instrument can only be made against an employer.¹⁰²
125. This conclusion is bolstered by the terms of subsection 545(3) which provide a limited power to non-Federal Courts. It states:
- An eligible State or Territory court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:
- (a) the employer was required to pay the amount under this Act or a fair work instrument; and
- (b) the employer has contravened a civil remedy provision by failing to pay the amount.
126. That an eligible State or Territory court is, by subsection s545(3) restricted to making underpayment orders only against an employer¹⁰³ serves to confirm that the Federal Court and Federal Circuit Court are not so constrained. Had the legislature intended such a restriction (which it imposes on non-federal courts) one would expect the restriction to be stated in clear terms in respect of the federal courts.
127. The only jurisdictional requirement that needs to be met in order for the Federal Court or Federal Circuit Court to make such orders as it considers appropriate is for the Court to be satisfied that a person has contravened or proposes to contravene a civil remedy provision. The section goes on to make clear that that power extends to a power to make an order awarding compensation for loss that a person has suffered “because of the contravention”. The contravention referred to is a contravention, or proposed contravention, of a civil remedy provision. Pursuant to s550(1) an accessory is “taken to have contravened” a civil remedy provision that they were “involved in”. Section 550, accordingly, directs a Court to treat the accessory as themselves having contravened a civil remedy provision. It follows that the accessory, being taken to have contravened the civil remedy provision, can be liable to suffer an order to pay compensation to a person that “has suffered because of the contravention”.
128. In the first contested decision considering the question of whether an accessory can be ordered to pay compensation, *Scotto v Scala Bros Pty Ltd & Anor*,¹⁰⁴ Cameron J of the Federal Circuit Court held that the Court has the power to make such orders.¹⁰⁵ In a similar manner to that set out above, his Honour contrasted the lack of power under the *Workplace Relations Act* to the provisions of the FW Act, concluding that the broad power granted to the Court to make compensation orders extended to a power to make an

¹⁰² See the Full Federal Court in *TWU V Qantas Airways Ltd* (2012) 199 FCR 190 at [4] and [51]-[52] discussing s492(5) of the *Workplace Relations Act* which granted a power to the Court to make “any. . . orders, that the Court considers necessary. . . to remedy [the contraventions]”. See too *ALAEA v IASA* (2011) 193 FCR 526 at [407]-[409] and [421]-[422] regarding the scope of s545(1) to grant an order of compensation.

¹⁰³ *Mildren v Gabbusch* [2014] SAIRC 15: Hannon J upheld a finding by the Industrial Magistrate that the employer pay redundancy pay but quashed an order that the director of the company also pay the redundancy pay on the basis that s545(3) only empowers an eligible State or Territory Court to make orders against an employer.

¹⁰⁴ [2014] FCCA 2374.

¹⁰⁵ [2014] FCCA 2374 (17 October 2014) at [495]-[498].

order being made against a person ‘involved in’ a contravention. His Honour’s judgment does not make clear what arguments, if any, were put against the proposition, and in particular it does not make reference to the Explanatory Memorandum (dealt with below).

129. An accessory may attempt to contend that an applicant must demonstrate the loss suffered was because of the contravention by the accessory, rather than because of the primary contravention. That is, an accessory may attempt to contend that even though they were “involved in” the contravention the applicant must demonstrate that the accessory’s involvement caused the loss. An accessory may attempt to contend, for example, that the incapacity of a company to make good an underpayment because it was placed into receivership/liquidated is the reason that the applicant cannot recover the lost entitlements and as such it cannot be said that the applicant has suffered loss “because of” the actions of the director/manager. Such an argument is unlikely to succeed for two reasons. First, s550 directs a Court to treat the accessory as having contravened the same civil remedy provision as was contravened by the employer (in other words, the director/manager is “taken” to have committed the same contravention, namely the contravention that caused the loss). In that sense there is no *different* contravention that caused the loss. Second, the specific power set out in subsection 545(2)(b) is not the limit of the federal courts’ powers to make orders. As the opening words of subsection s545(2) make clear, the powers enumerated in that subsection are merely examples of the wide power to make “any order the court considers appropriate” that those Courts can exercise and there is no reason to read the words in subsection 545(2)(b) as limiting that broad power.¹⁰⁶
130. Accordingly, upon a person being found to be an accessory within the meaning of s550 the only restriction on the Court’s power to order compensation against the accessory is the exercise of the Court’s discretion. In circumstances where the employer, who gained the benefit of the employment, is capable of making compensation payments the Court is likely, in the exercise of its discretion, to see no reason to require an accessory to make such compensation payments. While the Court’s discretion is at large, and accordingly the Court could take into account any relevant matter in determining whether to make an order for compensation against an accessory, it is difficult to see why a Court would not require an accessory to pay compensation to those who had suffered loss as a result of a contravention they were “involved in” if the Court were of the view that otherwise the loss would not be compensated.
131. The policy reasons underpinning the imposition of compensation orders on accessories include the deterrence of conduct that undermines the standard required¹⁰⁷ and to prevent persons retaining a benefit resulting from their misconduct. It is these considerations that should be considered when the Court determines whether or not to

¹⁰⁶ Barker J in *ALAEA v IASA* (2011) 193 FCR 526 at [423] noted that s545(2) does not limit the ambit of the Court to award compensation under s545(1).

¹⁰⁷ *Zhu v The Treasurer of New South Wales* (2004) 218 CLR 530 at [121].

exercise its discretion to order ‘gate-keepers’¹⁰⁸ (both within the corporation and outside it) to pay compensation.

*The Explanatory Memorandum*¹⁰⁹

132. Paragraphs 2175-2177 of the Explanatory Memorandum dealt with proposed s550. Paragraph 2176 and 2177 were as follows:

2176. The clause means that a pecuniary penalty for a contravention of a civil remedy provision can also be imposed on a person involved in a contravention. For example, where a company contravenes a civil remedy provision, a pecuniary penalty can also be imposed on a director, manager, employee or agent of the company.

2177. However, while a penalty may be imposed on a person involved in a contravention, the clause 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.

133. In light of what has been set out above there are two ways of reading paragraph 2177. On one view it is stating what is literally true, namely the mere fact that a person is found to have been “involved in” a contravention does not mean that that person automatically becomes liable to remedy the effects of the contravention. On the view we take as to the Court’s powers under s545, the Court must first consider whether such an order is an appropriate exercise of its discretion before it would make such an order. The second possibility is that the Explanatory Memorandum in this respect is simply wrong. Certainly, if it is to be read as stating an intention that the Court does not have power to make award of compensation against a person who an accessory, it appears to be contrary to the broad power provided to the Court by s545.

Approach of the Fair Work Ombudsman

134. As noted earlier, the Fair Work Ombudsman to date has not sought orders for compensation against accessories. This may be because it takes a view, contrary to the authors, that the Courts’ power conferred by s545 is limited in the manner by which paragraph 2177 of the EM appears to assume. Further, or alternatively, the Fair Work Ombudsman may consider there are policy reasons why it should not seek compensation orders against those involved in a contravention even where it is unable to seek

¹⁰⁸ See for example R Kraakman “*Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*” (1986) 2 J Law Econ Organisation 53-104; Price John Commissioner ASIC compliance: *How internal audit can strengthen the corporate governance framework* 15 November 2012.

¹⁰⁹ Explanatory Memorandum to the *Fair Work Bill 2008* which became the Fair Work Act: see Explanatory Memorandum to the *Fair Work Bill 2009*.

compensation orders against the employer, for example because the employer no longer exists. It might be that the Fair Work Ombudsman considers that to attempt to make a director personally liable for non-payment of wages would serve to discourage persons from taking the role as director and/or because the work done was for the benefit of the employer, not the director, and accordingly the director should not have to pay for that work.

135. There is no doubt that in many fact situations it would be appropriate for the regulator, exercising its discretion, to not to seek compensation orders against an accessory. However we share the view expressed by Anderson and Howe, in their article 'Making Sense of the Compensation Remedy in Cases of Accessorial Liability under the *Fair Work Act*', that there are good reasons why compensation orders should be sought against accessories in some circumstances.¹¹⁰
136. First, in many cases the accessory is the primary or only shareholder of the corporate employer and so can properly be said to have been the potential beneficiary of the work of the employees. Second, by seeking compensation in appropriate cases it removes a current incentive for directors to place the company in liquidation. If a company is not in liquidation then a penalty can be imposed on the company plus orders for compensation. A sole director/shareholder may well see it to their financial advantage to place such an employer into liquidation, since in those circumstances the penalty that can be imposed on the individual director is 1/5th of that which can be imposed on the corporation and the FWO will not pursue the back pay. There should be no incentives given to directors to place companies into liquidation. When the company goes into liquidation it is not just the employees whose entitlements are potentially put at risk. Not only are other creditors, including often the Australian Taxation Office, less likely to be paid, but the entitlements may end up being paid, part at least, by the tax payer via the Fair Entitlements Guarantee (which has replaced GEERS).
137. In *Fair Work Ombudsman v Ramsey Food*¹¹¹ the Court considered a fact situation where Mr Ramsey had placed three employing companies into liquidation after orders had been made by the Federal Court against them to pay penalties and compensation.
138. It is true that in circumstances involving a company in liquidation issues arise as to whether employees may potentially receive double compensation if orders are made against a director to pay outstanding entitlements in circumstances where those employees may ultimately receive some portion of their wages from the liquidator and/or receive payments pursuant to the Fair Entitlements Guarantee scheme. These concerns, however, are ones which a Court could no doubt address by making appropriate orders. As Anderson and Howe have suggested¹¹² much of this concern can be removed by the order requiring the compensation to be paid to the liquidator.

¹¹⁰ Anderson and Howe, above n 92.

¹¹¹ (2011) 198 FCR 174.

¹¹² Anderson and Howe, above n 92, 353.

Conclusion

139. Notwithstanding paragraph [2177] of the EM, it seems clear that the Federal Court and Federal Circuit Court have power to order an accessory to pay compensation for loss that a person has suffered because of the contravention that the accessory was “involved in”. Whether it is appropriate or necessary to seek such an order, and whether the Court in its discretion would grant it, depends on the circumstances of the case. The mere fact that a director has been “involved in” a contravention would not be sufficient to render that director liable to make good a non-payment. However, there does not seem to be a good reason why such an order should not be made in circumstances where a director of a failed corporation was the guiding mind and sole shareholder. That is particularly the case where the individual has gone on to continue to run the same or similar business through a new corporate structure (sometimes referred to as ‘phoenixing’). Use of the power in appropriate cases would in fact go some way to discouraging directors from seeking some financial advantage by placing the corporation into liquidation.

Chapter 7 The right of a natural person to claim privilege to refuse to answer questions or provide information

Introduction

140. Those alleged to be accessories in civil remedy proceedings under the Fair Work Act are often natural persons. Natural persons, unlike corporations, are entitled to rely on a privilege against exposure to penalties.¹¹³ This makes it harder to prove the allegations against them. This chapter examines ‘penalty privilege’. It discusses the extent to which the penalty privilege has been abrogated by Fair Work Act and how to rely on the penalty privilege during judicial proceedings in light of court rules and the *Evidence Act 1995* (Cth).

What is penalty privilege?

141. As a matter of common law a natural person is not bound to answer any question or to produce any document in judicial proceedings if to do so would expose the person to a penalty (**the penalty privilege**).
142. The privilege is available to be claimed by individuals who are subject to proceedings in which a penalty is sought against them for contravening a civil remedy provision in the Fair Work Act. In *Rich v Australian Securities and Investments Commission*¹¹⁴ (**Rich v ASIC**),

¹¹³ The penalty does not apply to corporations at common law: *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 447 at 499-500, 504-505; codified in *Corporations Act 2001* (Cth) and *Evidence Act 1995* (Cth).

¹¹⁴ *Rich v Australian Securities and Investment Commission* (2004) 220 CLR 129.

the High Court said that ‘penalty privilege’ is not confined to pecuniary penalties but also applies where there is an order for the natural person to be disqualified from acting in the management of a corporation or loss of statutory office.¹¹⁵ An order for compensation¹¹⁶ or an order seeking a declaration¹¹⁷ of a contravention of a civil penalty provision have been held to not be a penalty.

143. In practice the privilege applies in a similar way as the privilege against self-incrimination. They are both based on the premise that those who allege criminality or other illegal conduct should prove it.¹¹⁸
144. The history of penalty privilege is of ancient authority. In *TPA v Abbco Iceworks*¹¹⁹ (**TPA v Abbco**) Burchett J cited a 1871 volume of Daniell’s Chancery Practice as stating that the privilege applies to “*criminal prosecution, or to any particular penalties, as maintenance, champerty, simony, or subornation of perjury*”.¹²⁰ In the first Australian case on penalty privilege, *R v Associated Northern Collieries*¹²¹, Issacs J 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.*”¹²²
145. The penalty privilege applies to defeat what would otherwise be a compulsion to make admissions or produce documents (to the extent not specifically abrogated by statute).
146. While it is well settled that an applicant cannot compel a natural person to produce documents, answer interrogatories or comply with discovery during proceedings¹²³ 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.
147. Penalty privilege is a common law doctrine but is not a substantial rule of law like legal professional privilege that has application outside of judicial proceedings. Whether or not the penalty privilege has application in a tribunal such as in the Fair Work Commission is not a matter that has been determined.
148. The penalty privilege can be, and has been abrogated by statute in certain respects. Statutory provisions routinely provide regulators with the power to require an individual to produce documents or attend a compulsory examination where the purpose is the investigation of a potential breach. Such compulsion can apply even where the person is potentially exposed to a penalty.¹²⁴ However, where that occurs the evidence

¹¹⁵ Ibid at 144 and 146 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

¹¹⁶ Ibid at 144.

¹¹⁷ *Construction, Forestry, Mining and Energy Union of Australia v Inspector Alfred* (2004) 130 IR 343 per Wilcox, Moore and Marshall JJ at 346 per Wilcox J, Moore J at 347.

¹¹⁸ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 281 at 310.

¹¹⁹ *Trade Practices Commission v Abbco Iceworks Pty Ltd* [1994] FCA 1279 at [26]; 52 FCR 96.

¹²⁰ Ibid at 115.

¹²¹ *R v Associated Northern Collieries* (1910) 11 CLR 738.

¹²² Ibid at 748.

¹²³ Ibid.

¹²⁴ This applies to Australian Securities and Investment Commission (ASIC), s1316A *Corporations Act* 2001 (Cth), Australian Competition and Consumer Commission (ACCC) s555(2) *Australian Consumer Law* (Cth) and Fair Work Ombudsman, s713 of *Fair Work Act* 2009 (Cth).

gathered as a result of non-voluntary disclosure is usually subject to provisions preventing the regulator from relying on any admissions or documents obtained in future criminal proceedings.¹²⁵

Does the privilege apply to a compulsion to produce document or answer questions during an investigation or a proceedings?

149. Section 713 of the Fair Work Act, titled 'self-incrimination', provides that a person is not excused from producing a document or a record to the Fair Work Ombudsman on the ground that it might incriminate the person or expose the person to a penalty. The section goes on to state such documents are not admissible in evidence against the individual in subsequent criminal proceedings. There is, however, no provision that prevents such documents being used in subsequent civil penalty proceedings.

150. The admission of evidence in a civil proceeding against the individual or the corporate employer is subject to the *Evidence Act* and court rules. Section 551 of the Fair Work Act states:

A court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention, or proposed contravention, of a civil remedy provision.

151. Section 128 of the *Evidence Act* provides a basis upon which a person can object to giving evidence if it may tend to prove either directly or indirectly that the witness or a party¹²⁶ is liable to a civil penalty.

152. In *Rich v ASIC*, the High Court, in regard to s1317L of *Corporations Act*, which is similar to s551 of the Fair Work Act, said at 140:

It follows from s1317L that the statute itself requires the application of the body of law which has developed in relation to the privileges against penalties and forfeitures, when deciding whether the appellants should be ordered to make discovery of documents in the proceedings. It should be emphasised that, rightly, this proposition is not disputed by the Commission, and, in the course of oral argument in this Court, its counsel affirmed that it had not argued that "such privilege as there may be has been abrogated".

153. It follows that s551 of the Fair Work Act provides the foundation for a submission that orders for the production of documents or discovery should not be made by a court to the extent such an order would require a person to disclose material that might incriminate them in civil penalty proceedings. Less clear is whether s551 provides a basis for a person to object to the tender of documents that were compulsorily obtained by the regulator during the investigation using its powers under s713. On one view

¹²⁵ See ss555 and 713A of the Fair Work Act.

¹²⁶ While s128 only refers to a witness, s132, which places an obligation on the Court to be satisfied a person is aware of their right to object to giving evidence, refers to a witness or a party. In *Odgers S Uniform Evidence Act Tenth Edition Thomson Reuters* at [1.3.12840] pg 727 it is said that it appears that s128 applies to a witness or to a party.

s713, by expressly preventing their use of such documents in criminal proceedings but being silent as to their use in civil penalty proceedings, evinces an intention to permit them to be used in such proceedings. On the other hand, it could be contended that where a person has chosen to rely on the privilege it would be contrary to the policy underpinning the privilege for documents they were required to produce to be used to prove facts they could not be compelled to admit.

154. While s713 of the Fair Work Act requires a person to produce documents, the FWO cannot force a person to attend an interview. Where an individual agrees to attend an interview, the person may still rely on the penalty privilege to not answer certain questions that may expose that individual to possible future proceedings.
155. Section 187 of the *Evidence Act 1995* provides that in a proceeding, a body corporate is not entitled to refuse to produce a document or answer a question on the basis that it might tend to incriminate the body corporate or make it liable to penalty. There is no such abrogation for natural persons.
156. During court proceedings where a corporate defendant is compelled to produce documents a person cannot complain that a corporate defendant's compliance with an order or a requirement to produce documents or information might tend to expose it to pecuniary penalty.
157. Practical questions arise about the protection of an individual's privilege in the context of a corporation, particularly where the corporation is a small employer with a single director.
158. A corporation may be required to provide documents and information which may tend to expose the person to a penalty. In *TPA v Abbco*, discovery was ordered against the corporation. Burchett J with whom Black CJ and Davies J agreed said:

It has been argued that this conclusion indirectly diminishes the value of the privilege for individuals. Where both a corporation and its officers are at risk of prosecution, to require discovery of the corporation is to make available documents which may accuse its officers. But their privilege has never been, nor should it be, a shield against the use of incriminating evidence – only a right to decline to be themselves the authors of their own destruction by producing the evidence. If evidence produced by the corporation condemns them, the relevant law is vindicated without any breach of the principle against self-incrimination.¹²⁷

159. *Microsoft Corporation v CX Computer Pty Ltd*¹²⁸ involved proceedings for infringement of copyright and registered trade mark which also constituted criminal offences. The applicant sought discovery of documents seized by the Australian Federal Police. The corporate respondent and the individual respondent contended that they be excused from complying with the discovery orders on the grounds that to do so would involve the individual incriminating himself. Lindgren J at [32] found that one person (a corporation)

¹²⁷ *TPA v Abbco* at 116.

¹²⁸ (2002) 116 FCR 372.

cannot rely on the privilege against self-incrimination on the ground that providing documents tends to incriminate the natural person on the basis that the privilege is attached to the individual.

160. However, where the corporation can only rely on the natural person to comply with a court direction to produce documents or to file evidence, the corporation will not be in breach of such an order where the person who must file the statement or affidavit is the person claiming privilege.¹²⁹ In *ASIC v Mining Projects Group Ltd*¹³⁰ (***ASIC v Mining Projects***) at [5] Finkelstein J said:

If MPG's defence is defective and it is required to provide further information, it may not be able to satisfy that requirement if the only source of its information is the director defendants and they are entitled to remain silent.

How does a person claim the penalty privilege?

161. A claim of penalty privilege must be made at the time or prior to being compelled to provide information or a document.
162. The privilege does not operate to excuse the person from making any disclosure that might otherwise be required as part of ordinary legal processes unless the person elects to rely on the penalty privilege. This means, for example, that a person should make a claim clearly in the defence to avoid an obligation that would otherwise arise to admit facts. Such a pleading also puts the applicant on notice that the privilege will be claimed throughout the proceeding.

Filing a defence

163. Court rules require a respondent to inform the applicant as to which parts of the statement of claim are admitted and which parts are denied.¹³¹ The purpose of a pleading is to promote the administration of justice by identifying the precise issues in dispute between the parties. However the Rules permit the Court to dispense with any requirement of the rules "if satisfied that it is appropriate to do so".¹³² This provides a basis for the Courts to waive an obligation where it is inconsistent with the penalty privilege.

¹²⁹ *Australian Competition and Consumer Commission v Mining Projects Group Limited (No 3)* [2008] FCA 952 at [7] per Gordon J; *Australian Competition and Consumer Commission v J McPhee & Sons (Aust) Pty Ltd (No 2)* (1997) 77 FCR 217 at 220 per Heery J.

¹³⁰ [2007] FCA 1620.

¹³¹ Uniform Civil Procedure Rules (UCPR) and Federal Court Rules 2011 (FCR).

¹³² Section 14 of *Civil Procedure Act 2005* (NSW); Section 23 of the *Federal Court of Australia Act 1976* (Cth) is to the same effect.

164. The penalty privilege is not so wide as to excuse a respondent from filing any kind of defence at the beginning of the proceedings, *in limine*.¹³³ But how far does the person's privilege permit a dispensation from the rules of pleading?
165. The case law is far from consistent. The majority of the decisions in the Federal Court and in the NSW Supreme Court allow the person to indicate in the defence the allegations that are admitted, denied or not admitted without in any way exposing himself or herself to a civil penalty by the requirement to give information which may be used to the persons' disadvantage.
166. In a New South Wales Court of Appeal decision: *Macdonald v Australian Securities and Investments Commission*¹³⁴ (**Macdonald v ASIC**), Macdonald sought an order to dispense with the requirement to file a defence as to do so would expose him penalties. Spigelman CJ, Mason P and Giles PA were all in agreement that penalty privilege was engaged as "*there is a likelihood or, indeed a non-fanciful risk that, either directly or derivatively, compliance may assist the respondent to establish any part of its case which could result in the imposition of a penalty.*"¹³⁵
167. The court however took the view that Macdonald should not be excused from filing a defence provided it was one that did not require the defendant to make admissions contrary to the penalty privilege. Mason P with whom Giles PA agreed held that the appropriate order was to require Macdonald to file an unverified defence, but relieve him from the obligation to comply with rules 14.14 and 15.1, being the rules that required pleadings to plead any matter that may take the other side by surprise, plead any matter that raises matters of fact not arising out of the preceding pleadings and the giving of necessary particulars.
168. Mason P at [71] said:
- . . . the claimant should not be compelled to include in his Defence any information that may have the tendency to expose him directly or indirectly to the penalties being sought by ASIC.
169. In *A & L Silveri Pty Ltd v Construction, Forestry, Mining and Energy Union & Ors*¹³⁶ Gyles J at [17] held that the defendants were required to file a limited defence:
- A personal respondent to a penalty proceeding is entitled to put the applicant to proof of its case. Such a respondent cannot be forced to make an admission and no solicitor acting for that person can be held responsible for not ensuring that a party plead in a way which goes further than this. In other words, such a respondent can decline to admit matters alleged against it. To the extent that the rules of pleading require to be modified to enable this to take place, that will be done. There is no occasion, however, for relieving respondents of

¹³³ *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat & Livestock Corporation* (1979) 42 FLR 204 at 210-212 per Deane J.

¹³⁴ *Macdonald v Australian Securities and Investment Commission* (2007) 73 NSWLR 612.

¹³⁵ *Ibid* per Spigelman CJ at 615.

¹³⁶ [2005] FCA 1658. See also *Hadgkiss v Construction, Forestry, Mining and Energy Union & Ors* (2005) 146 IR 106 at 111-112.

a duty to plead. Even in a criminal trial, a defendant pleads guilty or not guilty. The issue would arise in a case where a personal respondent proposes to rely upon a positive defence. Penalty proceeding or not, means must be found to advise the applicant and the Court of any positive defence so that the trial can be properly prepared and conducted.

170. What if the respondent wishes to prove a positive case? Is the respondent required to set out in the defence the grounds and facts she or he intends to rely on to defeat the claim? In *ASIC v Mining Projects* Finkelstein J held that the respondent may do so by filing an amended defence after the applicant concludes its case. At [13] he went on to say:

What should occur is that the defendant should be entitled to rely on the privilege until the plaintiff's case is concluded. If at that point the defendant decides to run a positive case he can deliver an amended defence that will outline his case. In an exceptional case the judge may grant a short adjournment to allow the plaintiff time to prepare, if he is otherwise taken by surprise. In most cases that will not be necessary. By the time the plaintiff has closed his case the nature of the defence will usually be apparent. That is the experience of those who prosecute criminal cases. The advocate who runs a civil penalty proceeding should be equally adept at dealing with the defendant and his witnesses without knowing in advance every word they are about to say.

171. In *Macdonald v ASIC*, the majority took a similar view. Mason P set out a proposed pleading at 625:

If, which is denied, the matters alleged in para X constitute a contravention of sY of the Corporations Law, the defendant says that the matters alleged by ASIC also establish that the claimant relied upon information or professional or expert advice (etc) / acted honestly (etc). The defendant reserves the right to advance in his case additional material in support of his defence, the details whereof will be disclosed by amending this paragraph after the close of ASIC's case.

172. In *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)*,¹³⁷ the applicant sought to strike out the first respondents' defence on the basis that it did not comply with court rules. The first respondent had pleaded "do not know therefore cannot admit" to a number of allegations in the statement of claim. The applicant claimed that the first respondent was required to make positive inquiries of employees and officers who had claimed penalty privilege in the same proceedings.

173. Barker J at [49] and [52] rejected the applicant's application on the following basis:

I reject the broad submission made that a party, such as the CFMEU in this instance, is obliged in relation to factual allegations made against it, of which it does not know the truth or falsity, to undertake positive inquiries in order to make a plea admitting or denying an allegation.

¹³⁷ [2014] FCA 1032.

I do not accept a suggestion made on behalf of John Holland that any information that were to be provided by individual respondents could be used to develop the pleaded defence of the CFMEU without prejudice to the continuing entitlement of the individual respondents to the penalty privilege they claim. I accept the submission made on behalf of the CFMEU that in such circumstances, once the information had been provided, the individual's penalty privilege would be of no practical utility. Thus, any order requiring, in effect, the union to obtain instructions about factual matters from individual respondents would have the effect of undermining the penalty privilege of the individual respondents and achieve indirectly what cannot be achieved directly.

174. It has been held that in circumstances where a corporate respondent cannot gain knowledge from its officers or employees because to do so would impinge upon the penalty privilege it is sufficient to plead "do not know therefore cannot admit". If at a certain time later in the proceedings factual matters become known by the corporate respondent, it may alter its non-admission pleadings.¹³⁸
175. A person may waive penalty privilege by taking steps inconsistent with it. Hence care must be taken when drafting a defence.
176. In *ASIC v Mining Projects*, the respondent filed a defence and the applicant sought further and better particulars of the defence. The respondent claimed privilege and the applicant contended that the respondent waived privilege as a result of filing the defence. Finkelstein J at [18] noted that penalty privilege may be waived expressly by contract and impliedly by conduct but found that the respondent had not waived privilege by filing a defence. At [24] his Honour said:

On the question of waiver, ASIC contends that the directors have waived each privilege by providing information in their respective defences which they were not obliged to provide. It may be accepted, indeed it was not disputed, that the directors have waived each privilege as regards the admitted and asserted "facts". But, in my opinion, the waiver is confined to what appears in the defences. First of all, what is conceded in each defence is not that the "facts" asserted or admitted are true "facts". The defences do no more than relieve ASIC of the need to prove those "facts". Second, there was no intention to waive privilege beyond what appears in each defence. The prefatory qualification makes each director's intention clear. Third, at least as regards self-incrimination privilege, I do not accept that it can be waived by the mere admission of some facts (other than, of course, the admitted facts).

177. In conclusion the better view, it would appear, is that while a person is not required to plead in a defence to matters that might incriminate them they are not relieved from referring to facts and conduct said to have constituted the exculpatory conduct in the defence. The defence must include reference to an intention to invoke statutory defences or a positive defence. Furthermore, the person may file an amended defence after the applicant closes its case.

¹³⁸ *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* [2014] FCA 1032 at [51]

Evidence

178. Section 128 of the *Evidence Act 2005* reflects the common law position that a person claiming penalty privilege cannot be compelled to give evidence during a proceeding that may expose that person to a penalty. Subsection 128(1)(b) states that “*this section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness is liable to a civil penalty.*”
179. However, where a person elects to give evidence, the penalty privilege is lost in regard to the alleged contravention, although not to other contraventions. In the same vein, a person who has made a prior statement, without compulsion, before the hearing, can be compelled to repeat that statement in court. However this does not apply to making an admission in a pleading as a defence does not amount to a statement of the truth of the facts therein.¹³⁹
180. An issue about which Courts disagree is whether the privilege permits natural persons to elect not to file evidence yet still call evidence after the applicant’s case has closed.
181. The Federal Court takes the view that respondents are entitled to take that approach. In *Australian Competition and Consumer Commission v J McPhee & Sons (Australia) Pty Ltd*¹⁴⁰ Heery J found that the defendants should not be required to file affidavits prior to the applicant closing its case as they would be “analogous to answers to interrogatories or the production of documents on discovery.”¹⁴¹ Furthermore, a corporate defendant or the primary contravener will not breach a direction to file its evidence if its only evidence is from a witness who claims penalty privilege.¹⁴²
182. In 2003 a Full Court of the Federal Court confirmed that view in *Australian Competition and Consumer Commission v FFE Building Services Ltd*.¹⁴³ The court held that no order should be made for the provision of witness statements, and that a failure to file witness statements would not prevent the respondents from calling evidence. Emmett, Heely and Jacobson JJ found that:

While there would be no direct compulsion on Fodera and Bell to file statements pursuant to the directions sought by the Commission, the practical consequence of the direction may be that they will be compelled to file statements in order to preserve the option to which they are entitled, to decide after the Commission’s case is closed, to go into evidence. If they are compelled either to file statements before the commencement of the trial or to be precluded from going into evidence, there is a practical compulsion imposed

¹³⁹ *Boileau v Rutlin* (1848) 2 Ex 665 referred to in *ASIC v Mining Projects* at 35.

¹⁴⁰ (1997) 77 FCR 217.

¹⁴¹ *Ibid* at 220; see too *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (1999) 163 ALR 465.

¹⁴² *Australian Competition and Consumer Commission v J McPhee & Sons (Australia) Pty Ltd* (1997) 77 FCR 217 at 220.

¹⁴³ (2003) 130 FCR 37.

on them, in order to preserve the option that the law gives to them, to file statements. That is inconsistent with the privilege.¹⁴⁴

183. This line of authority stands in contrast to the decision of the Full Court of the Court of Appeal in Victoria of *Sidebottom v Commissioner of Taxation* (Cth).¹⁴⁵ In *Sidebottom*, the defendant sought to file his affidavits after the applicant closed its case. Phillips and Batt JJA and O'Bryan A-JA said that a direction to file witness statements, unlike an order for discovery or for the answering of interrogatories, does not involve compulsion and accordingly the penalty privilege is not engaged.¹⁴⁶ Their Honours reasoned that the exposure to penalty occurs by giving of the evidence, not the timing of the disclosure of the evidence and that the applicant should not get a “forensic advantage” of seeing the evidence prior to closing its case as referred to by Sackville J in *Ancor* decision.¹⁴⁷
184. The NSW Supreme Court has not authoritatively determined its position, although a number of judges have indicated that they prefer the position of the Federal Court.¹⁴⁸
185. Finally, it is worth noting that 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 in practice 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.

Chapter 8 Conclusion

186. Section 550 of the Fair Work Act is a potent provision, enabling the regulator and those affected by contraventions of the Act to seek penalties not only against a principal offender (for example the employer) but also those ‘involved in’ the contravention (such as managers or directors). The provision provides a powerful incentive for those who direct corporations and organisations to take positive steps to ensure that their organisation complies with industrial law.

¹⁴⁴ *ACCC v FFE Building Services Ltd* [2003] FCAFC 132; (2003) 130 FCR 37 at [29].

¹⁴⁵ [2003] 173 FLR 335.

¹⁴⁶ *Ibid* Batt JA at 348.

¹⁴⁷ *Ibid* at 346.

¹⁴⁸ In *Rich & Silbermann v ASIC* [2003] NSWCA 342; 183 FLR 361; (2003) 203 ALR 671 McColl J who was in the minority at [392]; See *Chief Executive Officer of Customs v Evenfront* [2007] NSWSC 431 per Bell J as she then was at [41]; *Chief Executive Officer of Customs v Camile Trading Pty Ltd & Ors* [2004] NSWSC 1256 per Dunford J at [38].

187. The quantum of the penalties can be significant. For most contraventions the maximum penalty for an individual is \$10,200 and for a corporation \$51,000.¹⁴⁹ Where an employer fails to comply with more than one provision in an Award or the NES then a separate maximum penalty arises in respect of each contravention¹⁵⁰, subject to the principle of totality, with the potential for penalties to exceed \$100,000.
188. In addition to such penalties, in our view the Court also has power to order accessories to pay compensation for the loss arising from the breach.¹⁵¹ In some cases this could amount to huge sums. In the *AFMPKIU v Beynon*¹⁵² case, discussed in chapter 6, the amount being sought against Mr Beynon was reported to be more than \$2m in redundancy payments.¹⁵³ Currently the FWO takes a policy position that it will not seek compensation orders against accessories in addition to penalties. In those circumstances determination of the question as to whether compensation orders can be made awaits a claim being made against an accessory by person affected, most likely a union as occurred in the *Beynon* proceedings.
189. The flipside to the potential potency of s550 is that Courts will be careful to only uphold a claim against an accessory where the strict requirements to establish liability are established. Those requirements are more onerous than commonly understood.
190. First it requires proof that the accessory had knowledge of the essential matters that constitute the contravention. As *Giorgianni*¹⁵⁴ and *Yorke v Lucas*¹⁵⁵ establish, accessorial liability only arises where there is ‘intentional participation’ in the offence. That is “some mental element or absence of innocence”.¹⁵⁶ Courts will be slow to impose accessorial liability in the absence of some proof of what might be said to be moral culpability. As Brennan J said in *Yorke v Lucas*, accessorial liability will not be imposed where the person is honestly ignorant of the circumstances that give that conduct a contravening character.¹⁵⁷
191. Second, it requires an act or omission by the accessory which permits the Court to find the accessory had the necessary intent to be found to have been “involved in” the contravention. It must be shown that the putative accessory did not remain silent¹⁵⁸ but took reasonable steps to prevent the relevant conduct¹⁵⁹ or was not just aware of the contravention but “in some positive way, associated therewith”.¹⁶⁰

¹⁴⁹ See s539.

¹⁵⁰ Note s557 allows for multiple contraventions of the same term of an Award or NES to be treated as a single contravention.

¹⁵¹ See chapter 6.

¹⁵² [2013] FCA 390.

¹⁵³ Workplace Express 23 June 2010: ‘Unions pursuing director over \$2m in unpaid entitlements’.

¹⁵⁴ (1985) 156 CLR 473.

¹⁵⁵ (1985) 158 CLR 661.

¹⁵⁶ The passage from the Full Court that the High Court approved in *Yorke v Lucas*.

¹⁵⁷ *Yorke v Lucas* at [14].

¹⁵⁸ *Sutton v AJ Thompson Pty Ltd* (1987) 73 ALR 233 (an accountant remained silent while false papers made by vendor of the business was found to be an accessory).

¹⁵⁹ *Sent v Jet Corporation* at 208-209.

¹⁶⁰ See *Sent v Jet Corporation* (1984) 2 FCR 201 at 207 approved by the Full Court in *CFMEU v FW BII* (2012) 209 FCR 448 at [8].

192. It is a matter of controversy whether to establish liability it is sufficient to demonstrate that the putative accessory was the “hands and brain”¹⁶¹ of the corporation. If a corporation has contravened the Act and there is a person who decided it will act in that manner (for example to pay employees at a particular rate of pay) then it might be thought to follow that person caused the resultant contravention and so should be found to be an accessory.¹⁶² However, as discussed in chapter 3, such an approach fails to take into account that, as a strict liability breach, the company is usually proved to be liable regardless of a lack of intent to pay below a minimum standard. A putative accessory, in contrast, is required to be shown to have intent, and arguably that can only be established if it is shown the accessory knew (or was wilfully blind¹⁶³) to the fact that there was a minimum standard which was not being met. As Cowdroy J found in *Potter v Fair Work Ombudsman*,¹⁶⁴ it is difficult to find the necessary culpability in respect of a person who genuinely believed the amounts being paid by the employer complied with the minimum legal obligations.
193. While yet to be authoritatively decided we take the view that before a person can be found to be an accessory it must be shown that they not only knew of the conduct but also knew it was conduct that fell short of a required standard. That does not mean they have to know the conduct contravened the Act, but does mean they need to be aware of the existence of a minimum standard. If that is right it will make it harder to prove liability in some cases.
194. Finally, as discussed in chapter 7, a further factor that can make it more difficult to establish a claim against individuals is that they have a right to claim privilege against self-incrimination, otherwise known as ‘penalty privilege’.

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¹⁶¹ *Hamilton v Whitehead* (1988) 166 CLR 121; cited in *FWO v Kentwood Industries Pty Ltd (No2)* (2010) 201 IR 234 at [199].

¹⁶² This is the approach we have called ‘level three’ in chapter 3 and was preferred in *Fair Work Ombudsman v Access Embroidery (Australia) Pty Ltd & Anor* [2012] FMCA 835.

¹⁶³ See Chapter 4.

¹⁶⁴ [2014] FCA 187.