HARMERS
WORKPLACE LAWYERS

WORK INSIGHTS

Spring edition 2017

Editorial

Welcome to the Spring 2017 edition of *Work InSights.*

In this edition, we cover privacy protection and pre-employment checks and provide practical tips and recommendations to be considered by employers when recruiting new staff.

We then examine employers' legal obligations in relation to redundancies to minimise the risk of litigation and ensure that the people most effected are appropriately supported as they transition out of their employment.

Finally, we take a look at the area of accessorial liability as an avenue of redress currently utilised by the Fair Work Ombudsman to prosecute persons involved in contraventions of the *Fair Work Act 2009* (Cth). Recent decisions of the Federal Court and Federal Circuit Court warn of the hefty penalties that can be imposed against company officers, human resource managers, franchisors and accountants who are found to have been accessorially liable for contraventions of workplace laws. This article aims to ensure you understand your obligations in this regard.

We hope you find this edition of value.

Contents

Privacy protection and pre-employment checks

Amy Zhang

Introduction

The importance of hiring a suitable and qualified employee is invaluable and, in large part, is often achieved by conducting a thorough pre-employment check. However, employers are often unaware of the privacy issues involved with conducting pre-employment screenings. These issues can extend to the types of pre-employment checks which can be conducted and the information which can be obtained by an employer from such pre-employment screenings, through to authorised or unauthorised uses of such confidential and sensitive information as set out in the *Privacy Act 1988* (Cth) (**"*Privacy Act*"**). It is therefore important for employers and prospective employees to be aware of their respective rights in this area.

Pre-employment checks – why must employers be mindful of privacy?

Pre-employment checks are often conducted by employers at various stages of the recruitment process. However, most commonly, screenings are conducted before employment has been offered or commenced, and in many circumstances, the types of checks which are required by the employer will have been identified in the job description or the employment contract. Such checks include, but are not limited to, psychological, medical and functional assessments, review of a candidate's employment history, credit and criminal history, as well as their use of different social media platforms.

Employers must be mindful that these pre-employment checks can not only be intrusive, but also invasive to potential employees. They must also be wary of the confidential nature of the information which has been disclosed by a prospective employee and ensure such checks are being conducted and handled with due care so as to avoid placing the employer at risk of breaching the *Privacy Act*. In particular, correct handling of personal information is pertinent to ensuring compliance with the Australian Privacy Principles (**"APP"**) found within schedule 1 of the *Privacy Act*.

The APP, which was introduced in 2012, aimed to set out the rights and obligations for the collection and use of private and confidential information. Non-compliance with the APP can allow an aggrieved individual to make a complaint to the Australian Information Commissioner pursuant to section 36 of the *Privacy Act*. If the matter cannot be resolved via conciliation, the Commissioner, following an investigation, can make declarations such as ordering the employer to compensate the individual for any losses suffered: see section 52 of the *Privacy Act*.

Compliance with the APP can also protect an employer from an adverse action claim pursuant to the *Fair Work Act 2009* (Cth), or from a discrimination claim pursuant to Commonwealth or State anti-discrimination legislation, arising from an employer's inappropriate use of pre-employment information to discriminate against a prospective employee and reject their application on that basis.

Complying with privacy legislation

Important privacy principles relating to pre-employment checks

The definition of "personal information" under the *Privacy Act* is broadly defined to include most information employers are likely to obtain from or about a candidate during the recruitment process. Additionally, the handling of a prospective employee's information is not considered to be exempt from the APP: see section 7B of the *Privacy Act*. As a consequence, privacy laws may be applicable to the collection, use and disclosure, access and correction, openness, anonymity and data security of a candidate's pre-employment assessment(s). There are therefore various privacy issues an employer must take note of when conducting pre-employment checks.

The following pertinent APP are found in schedule 1 of the *Privacy Act:*

(a) employers may only collect and use personal information for the purpose of assessing a candidate's suitability for the role applied for (see *Privacy Act* Schedule 1- Part 2, Australian Privacy Principle 3);

(b) before or at the time of collection of the personal information, an employer must bring to the attention of the candidate the purpose for which the information is being collected, their right to access the information collected, and to whom the information will be disclosed (see *Privacy Act* Schedule 1 - Part 2, Australian Privacy Principle 3.1-3.4);

(c) collection of personal information from a third party about a candidate is only permissible if it is not reasonably practicable to obtain that information from the candidate directly. In the event that personal information is obtained from a third party, employers must inform the candidate that the information has been collected (see *Privacy Act* Schedule 1 - Part 2, Australian Privacy Principle 3.5-3.7);

(d) employers must not disclose personal information of a candidate to anyone not involved in the recruitment process or to whom it is not reasonable to disclose such information to (see *Privacy Act* Schedule 1 - Part 3, Australian Privacy Principle 6.1-6.4);

(e) employers must take steps to ensure that the personal information collected or relied upon is accurate, complete and up to date (see *Privacy Act* Schedule 1 - Part 4, Australian Privacy Principle 10);

(f) subject to numerous exceptions, one of which includes circumstances where granting access would unreasonably impact on the privacy of other individuals, employers, upon the request of a candidate, must provide the candidate with access to personal information held by the employer in relation to the respective candidate. The exception noted above might be relied upon by an employer where an employer does not want to provide a candidate with a copy of a reference obtained from a previous employer (see *Privacy Act* Schedule 1 - Part 5, Australian Privacy Principle 12);

(g) employers must not collect "sensitive information" in relation to a job candidate without the candidate's consent or unless the collection is required by law. Sensitive information includes information or an opinion regarding a person's racial or ethnic origin; political opinion; membership of a political, professional or trade association, or trade union; religious beliefs or affiliations; philosophical beliefs; sexual preferences or practices; criminal record, or health or genetic information. This requirement is particularly relevant to criminal record and passport checks that employers may undertake, and reinforces why prior consent is needed in order to conduct such checks (see *Privacy Act* Schedule 1 - Part 2, Australian Privacy Principle 3.3-3.4); and

(h) employers must take reasonable steps to protect a candidate's personal information from misuse or loss and from unauthorised access, modification or disclosure (see *Privacy Act* Schedule 1 - Part 4, Australian Privacy Principle 11).

Pre-employment checks which are legal under privacy legislation

The *Privacy Act* neither expressly prohibits pre-employment checks, nor lists pre-employment checks which are permissible under law. Rather, employers must ensure pre-employment checks which are conducted comply with the relevant APP (as referred to above) and is actually a required condition for the performance of the advertised position (for example, all child care workers will be expected to undergo a working with children check before commencing employment).

Nevertheless, employers are considered to have a legitimate interest in performing the following (non-exhaustive) checks as long as they are within reason and necessary for the performance of the position advertised:

(a) academic record;

(b) character reference;

(c) credentials;

(d) credit history;

(e) criminal history;

(f) employment history;

(g) medical screening;

(h) passport check; and

(i) psychological screening.

Although there is no express prohibition on asking a candidate to disclose information regarding their criminal background or medical history, as noted above, employers must ensure that they obtain consent from the candidate before such information is obtained. Otherwise, employers may be exposed to complaints of discrimination in the event that the request is not reasonable in the context of the job that has been advertised. Of course, even where consent is obtained, employers must still be vigilant of potential discrimination complaints associated with such checks. Accordingly, employers should exercise caution in conducting pre-employment checks and only use them to the extent necessary.

Practical tips for employers

The following are some useful tips to bear in mind for employers seeking to conduct pre-employment screenings:

(a) where there is a discrepancy between the information obtained as a result of the pre-employment checks and the information provided by the candidate themselves, employers should discuss this discrepancy with the candidate and give them an opportunity to explain the discrepancy;

(b) candidates should be made aware of all required pre-employment screenings at the earliest date possible. This can either be made available at the time the job is advertised or at the time of the first interview;

(c) all pre-employment screenings which are conducted must be reasonable and reasonably required to ascertain the suitability of a candidate for the role set out in the job position which has been advertised;

(d) all employers must maintain the confidentiality and sensitivity of information obtained during the pre-employment screening process and ensure that such information is not divulged in an unauthorised manner which is contrary to the APP; and

(e) all employers should adhere to the APP during the pre-employment screening process.

Redundancies – managing the human cost and your legal risk

Jenny Inness

As businesses evolve and change in response to the economic environment in which they operate, it is often the case that there will be a need to implement redundancies as part of that change.

Employers must understand their legal obligations when it comes to implementing redundancies, so as to minimise the risk of litigation.

In addition, a well-managed redundancy process will not only ensure compliance with the minimum legal obligations, but will recognise the real human cost of redundancies, and take steps to ensure that the people most impacted are appropriately supported as they transition out of their employment.

Planning is crucial

When a business implements an organisational change, whether it be technological change, structural change, or otherwise, employers should start by carefully planning the redundancy process from start to finish.

To begin with, employers should carefully audit the applicable terms and conditions of employment of the impacted employees so that the employer has a full understanding of its redundancy obligations. These obligations may arise from a range of sources, such as legislation, industrial agreements, modern awards, employment contracts, and company policies and practices. Once these minimum legal obligations are understood, employers must ensure full compliance with them.

Communication is critical and should form part of the planning process. Well managed redundancies will always include a careful communication strategy, that is consistent across the business, and that is understood by line managers. Employers need to ensure that they avoid issuing mixed messages to staff. Similarly, employers want to avoid inaccurate information circulating to impacted staff, which can be highly damaging and derail an otherwise well implemented redundancy process.

Employers must also plan for, and comply with, any applicable consultation obligations with employees and their representatives. Consultation requirements in modern awards, for example, will include the requirement to notify affected employees about the proposed changes, to provide those employees with information about the changes and the expected effects, and a requirement to discuss steps to avoid and minimise negative effects on the employees (including considering ideas or suggestions that the employees themselves may have).

From the outset, employers should also have a plan in place to ensure employees have adequate support mechanisms available to assist during the redundancy process, which is a time when employees are often feeling vulnerable and uncertain about their future. External providers may need to be engaged if internal support services are not available.

Finally, as with any major business decision, employers should risk-manage the entire process by identifying if there is any prospect for adverse media attention, adverse commercial implications, or for adverse industrial action during the redundancy process. If these are potential risks, employers can take pro-active steps as part of the initial planning process to minimise those risks, and plan for their potential impact.

What is a genuine redundancy?

A genuine redundancy only arises when an employer decides that it no longer requires a job to be performed by anyone.

A dismissal for redundancy is not a dismissal on account of any personal act or default on the part of the employee dismissed.

More specifically, employers who may be exposed to claims for unfair dismissal also need to be aware of the particular statutory definition of "genuine redundancy" under section 389 of the *Fair Work Act 2009* (Cth). Pursuant to section 389, a persons' dismissal will be considered to be a "genuine" redundancy for the purposes of the unfair dismissal jurisdiction:

- if the employer has made a decision that it no longer requires the person's job to be performed by anyone, due to changes in the operational requirements of the employer's enterprise; and
- if the employer has complied with any applicable consultation obligations in a modern award or enterprise agreement;

however:

- a person's dismissal will not be considered to be "genuine" for the purposes of section 389 of the *Fair Work Act 2009* (Cth) if it would have been reasonable in all the circumstances for the person to be redeployed within another part of the employer's enterprise, or within any part of the enterprise of an associated entity of the employer.

Employees who are dismissed by reason of a genuine redundancy are not permitted to bring an unfair dismissal application under the *Fair Work Act 2009* (Cth).

By way of example, on 5 May 2017 the Fair Work Commission handed down a decision in the case of *Laura Wrzoskiewicz v Easy Payroll Perth Pty Ltd* that considered what 'reasonable' redeployment options entail. In that case, Ms Wrzoskiewicz's job in Perth had become redundant, and her employer had discussed with her potential redeployment options, including the option of applying for an alternative role that would have required her to relocate from Perth to Sydney. Ms Wrzoskiewicz, whose husband and young child were based in Perth, made it clear to her employer that she was unable to move to Sydney. Ms Wrzoskiewicz did not formally apply for the alternative Sydney role. In the end, her employment was terminated for reasons of redundancy. Ms Wrzoskiewicz commenced an unfair dismissal claim and alleged that her employer failed to redeploy her because it did not formally offer Ms Wrzoskiewicz the Sydney role (the employer had merely encouraged Ms Wrzoskiewicz to apply for it if she so wished). In these circumstances the Fair Work Commission determined that, given what Ms Wrzoskiewicz had told her employer about her inability to move to Sydney, the Sydney role was not a suitable alternative role, and it was reasonable for the employer not to have redeployed Ms Wrzoskiewicz to that role. The dismissal was held to be a case of a 'genuine redundancy'.

What is not a redundancy

A classic trap for employers is to forget that it is positions that become redundant not people.

A dismissal for redundancy is not a dismissal on account of any personal act or default on the part of the employee. Employers can run into difficulties when they attempt to make a person "redundant" when the underlying reason for the termination of employment is poor performance or misconduct.

Employers may be attracted to the idea of characterising a termination as a redundancy because, for example, employees who are made redundant are not entitled to make an unfair dismissal application under the *Fair Work Act 2009* (Cth). However, if an employee has poor performance or misconduct issues, those are matters that relate to the individual employee, not to their position, and they need to be addressed as such with the individual employee in question. In contrast, a genuine redundancy only arises if the employer determines that a particular position is no longer required to be done by any person. The Fair Work Commission will allow an employee to make an unfair dismissal application if the Commission determines that the so called "redundancy" is not a genuine redundancy.

How much redundancy pay?

In general, most employers covered by the *Fair Work Act 2009* (Cth) are required, at a minimum, to provide redundancy pay upon termination of employment in accordance with the National Employment Standards in section 119 of the *Fair Work Act 2009* (Cth). This section of the *Fair Work Act 2009* (Cth) sets out a scale of redundancy payments determined by the length of service of an employee.

However, there are some important exceptions to this general obligation to pay redundancy pay under section 119 of the Act, including for example:

- where redundancies arise due to the ordinary and customary turnover of labour;
- where an employer applies to the Fair Work Commission to reduce the amount of redundancy pay (which may be nil) if the employer has an incapacity to pay or has obtained other acceptable employment for the impacted employee;
- if the employee does not have 12 months' continuous service;
- if the employee is employed for a specified period of time, for a specified task, or for the duration of a specified season;
- if the employee is a casual employee;
- if the employer is a small business employer.

Employers should seek specialist legal advice if they consider that any one of these exceptions might apply in a redundancy situation.

Importantly, a decision of the Full Bench of the Fair Work Commission late last year held that permanent employees can have prior periods of regular and systematic casual employment count towards the calculation of redundancy pay entitlements under the National Employment Standards. In the decision of *AMWU v Donau Pty Ltd* [2016] FWCFB 3075, the Full Bench held that, because the definition of "continuous service" in the *Fair Work Act 2009* (Cth) includes a period of regular and systematic casual employment, then such casual employment should count for calculating redundancy pay entitlements under section 119 of the *Fair Work Act 2009* (Cth). Whilst there are currently some attempts to challenge this outcome, for now it means that if an employee has transitioned from regular and systematic casual employment to permanent employment (without a break in service) before the date of termination of employment, then that casual employment period must be counted for redundancy pay purposes.

Employers should also be aware that redundancy pay obligations that are more generous than the National Employment Standards may arise from other sources, such as an employee's individual contract of employment or company policies and practices. A properly conducted audit of entitlements should identify any such entitlements at the planning stage.

Managing the human cost

For many people, a redundancy is a time of great stress and vulnerability, and it can have wide implications for an individual's family and financial circumstances. It is in this context that consultation is so important prior to any redundancy taking effect, so that an employer can afford the employee a proper opportunity to discuss with the employer any measures that may assist in mitigating against the adverse impact of redundancy. This may include, and in some instances may require, the employer giving consideration to any redeployment opportunities that may exist within the business.

If, following such consultation, and following consideration of any possible redeployment opportunities, it is determined that the person's employment will terminate due to redundancy, then there are a range of support options that employers should consider making available to impacted employees.

These include measures to assist the reputation and future career of the employee. For example, the employer could offer the employee a reference and could also provide to the employee outplacement services.

In redundancy situations employers may wish to offer employees access to financial advice and/or independent legal advice to ensure the employee understands their legal rights and entitlements, and the financial implications arising from the redundancy.

Importantly, employers should give serious consideration to providing impacted staff with access to counseling and health support services, whether that be via an existing EAP provider, or via an independent external provider that can be made available to employees on a confidential basis.

Finally, on a day-to-day basis, it is the line managers and leaders on the ground within the business which are the people that often have the most regular contact with impacted employees during a redundancy process, and it is vital that those managers make themselves available to answer questions and discuss the change process with employees as the need arises. Again, to ensure consistency in delivery of information, all of those managers should receive training prior to the redundancy process so that the communication strategy regarding the redundancy is aligned across the organisation.

Accessorial liability under the *Fair Work Act* for the failure of a business to pay employee entitlements

David Bates and Christopher Nowland

Introduction

The *Fair Work Act* 2009 (Cth) (***"Fair Work Act"***) has applied to most Australian workplaces for more than eight years, but surprisingly few employers and business advisors are aware of their considerable legal risk under the often-misunderstood and overlooked 'accessorial liability' provisions found in section 550. In fact, the Fair Work Ombudsman (**"FWO"**), Australia's workplace relations regulator, has displayed an increasing willingness in recent years to rely on the accessorial liability provisions of the *Fair Work Act* to pursue a wide range of people allegedly 'involved' in the failure of a business to pay its employees their correct entitlements.

In July 2016, FWO Natalie James stated:

> We're increasingly using this mechanism to ensure that someone is held to account when we find deliberate exploitation of vulnerable workers.[1]

Importantly, the FWO's reliance on section 550 is not confined to its pursuit of rogue employers. The FWO has used the accessorial liability provisions of the *Fair Work Act* to hold a wide range of advisors to business – both internal and external - personally responsible for an employer's failure to comply with the National Employment Standards (**"NES"**) and applicable Modern Awards. The wide net cast by the accessorial liability provisions was highlighted by FWO Natalie James in November 2016 when she said:

> Company Directors, human resource staff, day-to-day managers, accountants, administrative staff and companies or individuals involved in a supply chain are all examples of accessories that have been found to have been involved in breaches of workplace laws.[2]

The FWO's tough words have been matched by equally tough action. According to the FWO 2015-2016 Annual Report, 92 per cent of its matters *"roped in an accessory"*.[3]

Given the FWO's aggressive approach, it is now critical that all those who provide advice to businesses - including human resources managers, company directors, accountants, bookkeepers and even lawyers - are aware of the reach of the accessorial liability provisions in order to protect both themselves and others from being found personally liable for an employer's acts or omissions.

Relevant legislation

Section 550(1) of the *Fair Work Act* states that a person who is involved in a contravention of a civil remedy provision is also taken to have contravened that provision.

Relevantly, section 550(2) provides that a person is involved in a contravention of a civil remedy provision if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

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

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

(d) has conspired with others to effect the contravention.

What is evident from the case law is that, in order for a person to be found liable as an accessory under section 550, they must be a "knowing participant" in a contravention of the *Fair Work Act.* A person will be a "*knowing participant"* where they[4]:

(a) have knowledge of the essential facts constituting the contravention;

(b) are knowingly concerned in the contravention;

(c) are an intentional participant in the contravention based on actual not constructive knowledge of the essential facts constituting the contravention; and

(d) need not know that the matters in question constituted a contravention.

This sets a relatively low bar for a finding of accessorial liability, as a person can still fall foul of section 550 despite not being aware that they are contravening the *Fair Work Act.* This means that even if a person did not know that the employer they were advising was, for example, underpaying employees contrary to the terms of a modern award, they could still be found personally liable as an accessory to the employer's contravention[5].

Accessories are liable for pecuniary penalties

Where a person is found liable as an accessory to a contravention of the *Fair Work Act,* such as the underpayment of employee entitlements, they may be ordered to pay a pecuniary penalty in respect of that contravention. A court may order pecuniary penalties be payable to the Commonwealth, an organization, or a particular person (or group of persons) who was/were the victim of the contravention(s)[6].

The maximum pecuniary penalty that may be imposed by the courts against a person (be they the primary person contravening the *Fair Work Act* or simply an accessory to a contravention) is set by reference to:

(a) the specific provisions of the *Fair Work Act* which have been breached; and

(b) whether the person is an individual or a corporation.

From 1 July 2017, the maximum penalty for a single contravention of a term of a modern award, such as the failure to pay correct wages or provide meal breaks, has increased to $12,600 for individuals and $63,000 for corporations[7]. It is important to note that individual penalties may be awarded for each separate contravention of the *Fair Work Act*.

In determining whether a pecuniary penalty is appropriate in the circumstances and, if so, what percentage of the maximum an individual or a corporation should be liable to pay, the courts have regard to a number of different considerations, including[8]:

- the nature and extent of the conduct

which led to the contraventions;

- the circumstances in which that conduct took place;
- the nature and extent of any loss or damage sustained as a result of the contraventions;
- whether there had been similar previous conduct by the contravener;
- whether the breaches were properly distinct or arose out of the one course of conduct;
- the size of the business enterprise involved;
- whether or not the breaches were deliberate;
- whether the party committing the breach had exhibited contrition;
- whether the party committing the breach had taken corrective action;
- whether the party committing the breach had cooperated with the enforcement authorities;
- the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- the need for specific and general deterrence.

Company directors

Company directors are the controlling hand and guiding mind of a business, and are often intimately involved in the operational decisions that result in contraventions of the *Fair Work Act*, such as systemic underpayments. For this reason, where a business is found to have contravened the *Fair Work Act*, company directors are regularly targeted individually as accessories to those contraventions.

In addition to being held liable for pecuniary penalties under the *Fair Work Act* for underpayments, FWO Natalie James has made clear that where a company director is found liable as an accessory, the FWO may facilitate processes that "impact on their future business endeavours", such as by reporting them to ASIC for breaches of the *Corporations Act 2001* (Cth).[9]

In 2016, the Australian Labor Party introduced a Private Members Bill in the Commonwealth Parliament which, among other things, sought to amend the *Fair Work Act* to provide the Federal Court with the power to disqualify persons from managing corporations if the Court is satisfied that those persons have been involved in a contravention of the *Fair Work Act* concerning a failure to pay award entitlements[10].

While this Bill has stalled in the Senate and appears unlikely to pass in its current form, it is further evidence of the increased scrutiny company directors are under from regulators and politicians alike for their personal involvement in contraventions of the *Fair Work Act*.

Case study: *FWO v Step Ahead Security Services Pty Ltd & Anor* [2016] FCCA 1482

Background

In this case the FWO alleged that the respondents, Step Ahead Security Services Pty Ltd (**"Step Ahead"**) and its sole director, had breached the *Fair Work Act* by not correctly paying eight casual employees, working as security guards, over a period of nearly three months. The FWO conducted an audit of the respondents and determined that the casual employees were underpaid a total of $22,779.72.

Step Ahead employed the security guards on flat hourly rates for weekdays, weekends and public holidays. These rates did not reflect the rates of remuneration and entitlements set by the relevant award, and therefore the respondents had contravened a term of that award.

The respondent admitted the contraventions, as did the sole director, who also admitted he was involved in the contraventions for the purposes of s 550 of the *Fair Work Act*. Evidence demonstrated that the sole director was the controlling mind of Step Ahead, and that he was aware of the requirements imposed by the Award.

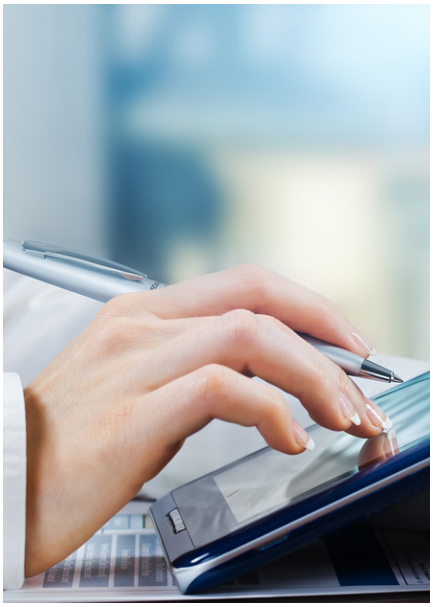
Decision

The Court found that the respondents had contravened the *Fair Work Act* by failing to pay the employees their entitlements to a basic minimum wage. In doing so, Justice Jarrett accepted that both respondents demonstrated calculated and deliberate conduct, amounting to a blatant disregard for Australia's workplace laws and the entitlements of their employees.

Justice Jarrett listed the following factors as likely to be relevant matters in determining whether an order for compensation should be made against an accessory (being the sole director of Step Ahead)[11]:

- *"whether such an order is unnecessary given the capacity of the employer to make the compensation payments;*
- *the nature and extent of the accessory's involvement in the contravention;*
- *any relevant public policy reasons; and*
- *the nature of the order sought, including whether the accessory is to be made solely liable, or jointly liable."*

In the present case, Justice Jarrett noted that Step Ahead's sole director, *"was plainly aware of Step Ahead Security Services' statutory obligations"* given he had *"previous*



dealings with the Fair Work Ombudsman".[12]

Indeed, His Honour considered it a *"significant factor"* that the second respondent had been the sole director of *"two previous security companies that were each wound up".*[13] At the same time, Justice Jarrett highlighted the need for *"general deterrence in the security industry"* and *"specific deterrence in [the present] case".*[14]

Ultimately, the Court imposed penalties on both Step Ahead ($257,040.00) and the sole director personally ($51,408.00).[15]

See also:

- *Fair Work Ombudsman v Mamak Pty Ltd & Ors* [2016] FCCA 2104 – In this case, three restaurant owner-operators were ordered to pay pecuniary penalties of $37,000, $35,000 and $35,000 respectively for underpaying six visa-workers a total of $87,000; and
- *Fair Work Ombudsman v Maroochy Sunshine Pty Ltd & Anor* [2017] FCCA 559 – In this case, a sole-director and shareholder of a fruit farm was ordered to pay an individual pecuniary penalty of $41,300 for his "appalling treatment" of 22 migrant workers, in which he withheld $77,649.16 in wages.

Human resources personnel

By their very nature, human resources personnel are responsible for implementing and enforcing a business's workplace policies, determining employee working hours, maintaining accurate employee records, establishing rates of pay, and generally ensuring that employees are treated in accordance with their rights under the *Fair Work Act*.

It follows that where a business is found liable for a failure to comply with its obligations under the *Fair Work Act* - particularly where underpayments are involved – its human resources personnel face significant risk of

being regarded as "knowing participants" to the contravention. Where this occurs, the FWO is likely to pursue those employees as 'accessories' under section 550 of the *Fair Work Act*.

Case study: *Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Ors* [2011] FMCA 459

Background

This case involved the personal liability of a human resources manager for the sham contracting and underpayment of ten Corporate Associates (**"Associates"**). The respondents in this matter were Centennial Financial Services Pty Ltd (**"Centennial"**), its sole director and share-holder (who was responsible for the day-to-day management and operation of Centennial) and Centennial's human resources manager.

The FWO alleged that the respondents had changed the Associates' employment status from 'employee' to 'independent contractor' and failed to pay the Associates their accrued annual leave.

The FWO brought proceedings against Centennial for allegedly breaching the *Workplace Relations Act 1996* (Cth) (**"*WRA*"** – the precursor to the *Fair Work Act*), and against the director and Human Resources Manager for being 'involved' in these contraventions. It was clear that Centennial had contravened the *WRA,* and Centennial's Director made no submissions in response to the accessorial liability proceedings brought against him.

However, Centennial's Human Resources Manager disputed that he had been involved in Centennial's contraventions of the *WRA* on the basis that he had *"merely been following the instructions of the [second respondent] and had not had any input into the decisions which gave rise to the contraventions".*[16] Furthermore, he submitted he had been the recipient of negative publicity that *"had effectively ruined his career in human resources"* and *"had not been able to secure a permanent role"* following the commencement of proceedings against Centennial *"despite applying for thousands of positions".*[17]

Decision

The Court held that both the Director and Human Resources Manager were accessorily liable for Centennial's contraventions of the *WRA*. The Court imposed penalties of $13,200.00 against the Director and $3,750.00 against the Human Resources Manager.

Federal Magistrate Cameron appeared to accept the Ombudsman's submissions that the Director was the *"controlling mind"* of Centennial and that the Human Resources Manager had been *"centrally involved"* in the contravening conduct.[18]

See also

- *Cerin v ACI Operations Pty Ltd & Ors* [2015] FCCA 2762 – In this case, a Human Resources Manager was ordered to pay a penalty of $1,020 for failing to provide the applicant with five weeks' notice of termination, as required by the NES.
- *FWO v Oz Staff Career Services Pty Ltd & Ors* [2016] FCCA 105 – In this case a Human Resources Manager was fined $9,920 for unlawfully deducting meal allowances and administration fees from employee's wages.

Accountants and bookkeepers

Accountants and bookkeepers, particularly those who provide pay-roll services, will often have actual knowledge of the rates at which a business remunerates its employee (including compulsory superannuation contributions), and the hours worked by each of their clients' employees. A recent case discussed below demonstrates that accountants and bookkeepers may be held personally liable as accessories where they assist in the establishment of systems that result in employee underpayments, or where they fail to take corrective action to prevent the relevant contraventions from occurring.

Case study: *Fair Work Ombudsman v Blue Impression Pty Ltd & Ors* [2017] FCCA 810

Background

In early 2014, the FWO conducted an audit of a Japanese restaurant run by Blue Impression Pty Ltd (**"Blue Impression"**) and identified a number of contraventions of the *Fair Work Act* that related to the failure to pay employee entitlements in accordance with the *Fast Food Industry Award 2010* (**"Fast Food Award"**). These contraventions were set out in a letter provided to Blue Impression's accountant and payroll provider, Ezy Accounting 123 Pty Ltd (**"Ezy"**).

Ezy was asked to calculate the relevant underpayments identified by the FWO so that Blue Impression could make back payments to the affected employees. While completing this task, Ezy became aware of the correct hourly rate of pay under the *Fast Food Award* but did not make the relevant adjustments in its MYOB payroll software and, as a result, further contraventions of the *Fair Work Act* occurred.

The FWO brought proceedings against Blue Impression, Mr Wong (the controlling hand and mind of Blue Impression), and Ezy as an accessory to the contraventions of the *Fair Work Act*. Blue Impression and Mr Wong admitted to the contraventions and pleaded guilty. However, Ezy denied liability and argued that it *"had no authority to make adjustments to the [pay rates] Blue Impression provided",* and that it lacked actual knowledge of Blue Impression's failure to pay specific employees the correct entitlements under the Fast Food Award.

Decision

The Court was satisfied that, pursuant to section 550 of the *Fair Work Act*, Ezy was involved in the relevant contraventions admitted by Blue Impression and Mr Wong. Justice O'Sullivan held that Ezy was *"wilfully blind"* to the contraventions because, as a consequence of the 2014 audit, it became aware of:

- the duties performed by the relevant employees;
- the flat rate of pay paid to the relevant employees;
- the hours worked by the relevant employees during the relevant pay periods;
- systematic problems with Blue Impression underpaying employees;
- the correct minimum rate in the relevant award; and
- its failure to change the data in the MYOB payroll software following the 2014 audit,

but failed to take any corrective steps to rectify the underpayments. The proceedings have been adjourned for a future penalty hearing.

Franchisors

Following the recent and widely reported underpayment scandals involving major franchises 7-Eleven, Domino's and Caltex (to name a few), the Commonwealth

Government has introduced legislation that attempts to prevent franchisors from turning a blind eye to contraventions of the *Fair Work Act* that occur in their franchises.

Under the proposed Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (**"Vulnerable Workers Bill"**) which is currently before the Senate, a franchisor, or an officer of a franchisor, will be found to have contravened the *Fair Work Act* where they *"knew or could reasonably be expected to have known"* a contravention by a franchisee (i.e. a failure to pay award wages) *"would occur"* or *"was likely to occur"*.[19] These provisions will supplement, but do not override, the accessorial liability provisions in the *Fair Work Act*.

If passed, the Vulnerable Workers Bill would also:

- create a new penalty classification for "serious contraventions" of civil remedy provisions in the *Fair Work Act* with a maximum fine of $126,000 for individuals, and $630,000 for corporations[20];
- grant the FWO new evidence gathering powers (akin to those currently exercised by ASIC and the ACCC) to investigate businesses and their employees and officers; and
- create stronger prohibitions against businesses, their employees and officers creating false or misleading documents, such as pay-slips or time and wages records.

The FWO has thrown its support behind the Vulnerable Workers Bill, saying that it *"will go some way to giving the FWO the tools to combat the most serious worker exploitation"*.[21]

Case study: *Fair Work Ombudsman v Yogurberry World Square Pty Ltd* [2016] FCA 1290

Background

In this case, a franchisor, Yogurberry World Square Pty Ltd (**"Yogurberry"**), was fined $75,000 for the underpayment of four migrant workers, who were collectively underpaid almost $18,000, at a chain store in Sydney's World Square.

Yogurberry was part of a group of family companies, which included the second and third respondents, YBF Australia Pty Ltd (**"YBF Australia"**) and CL Group Pty Ltd (**"CL Group"**). The fourth respondent, Ms Soon Ok Oh, was an officer of the three corporate respondents.

Yogurberry admitted contraventions of the *Fair Work Act* including:

- the failure to pay minimum rates of pay, casual loading and penalty rates in line with the Fast Food Industry Award 2010;
- the failure to pay wages in full by making unlawful deductions; and
- the failure to keep records and to issue payslips as prescribed by the *Fair Work Regulations 2009* (Cth).

YBF Australia, CL Group and Ms Oh also admitted to being involved in the contraventions committed by Yogurberry because:

- YBF Australia directly operated the World Square Yogurberry store for a period of time and had knowledge of, and participated in, establishing rates of pay and making payment of wages and determining hours of work;
- CL Group became responsible for accounting, payroll and logistical operations for Yogurberry stores in Australia and also had knowledge of, and participated in, establishing rates of pay, making payment of wages and determining hours of work; and
- Ms Soon Ok Oh was the person who set the rates of pay and gave instructions to the manager of the World Square Store.

The central issue before Justice Flick was the quantification and apportionment of the penalties to be imposed on each of the Respondents.

Decision

Justice Flick (at [57]) fined the respondents as follows:

- Yogurberry: $75,000;
- YBF Australia: $25,000;
- CL Group: $35,000; and
- Soon Ok Oh: $11,000.

When fixing the quantum of penalties to be imposed against the respondents, Justice Flick placed considerable importance on the need for specific and general deterrence, and the Respondents' failure to cooperate with the FWO.

His Honour found that the respondents had *"deliberately refrained from keeping proper records"* and did so with the *"objective of gaining personal financial benefit by cloaking the quantum of payments made to employees from the scrutiny"* of the FWO.[22]

Justice Flick also found that the respondents had failed to *"cooperate in relation to matters touching upon their financial circumstances"*, including by failing to provide profit and loss statements, income tax returns and bank statements.[23]

This conduct, Justice Flick concluded, indicated the respondents *"simply regarded the prospect of a penalty being imposed as the 'cost of doing business'"* and that such an approach to the respondents business undertakings warrants a more severe penalty than that proposed by Counsel for the respondents.[24]

Insolvent and 'phoenix' companies

The FWO has increased its efforts against officers of insolvent companies in order to expose and discourage illegal 'phoenix' activity (i.e. the practice of entities entering into voluntary liquidation in order to avoid paying debts such as back payments to employees and pecuniary penalties before "rising from the ashes" as a different corporate entity). In June 2016, FWO Natalie James confirmed the accessorial liability provisions are being used specifically for that purpose[25]:

> *"The tide is turning. The escape routes of sending a company into liquidation to avoid penalties and having to back-pay workers… are now being shut down".*

As the Federal Circuit Court's decision in *FWO v Step Ahead Security Services Pty Ltd & Anor* [2016] FCCA 1482 demonstrates, proceedings brought under accessorial liability provisions are capable of exposing individuals to liability after companies have been 'wound up' and become insolvent. Similarly, in September 2016, the Federal Circuit Court imposed penalties of $50,872.50 on the sole director and shareholder of an

Indian Restaurant, which had been placed in voluntary liquidation, for underpaying two employees a total of $58,704.90.[26]

In addition to providing the courts with the power to disqualify contravening company directors from directorships, the *Fair Work Amendment (Protecting Australian Workers) Bill* 2016 (discussed above) also seeks to amend the *Fair Work Act* to provide for "phoenixing compensation orders". If passed, these orders would grant the Federal Court the power to require executive officers of phoenixed companies to pay amounts owed, such as back-payments or pecuniary penalties under the *Fair Work Act* or another Fair Work instrument (such as a Modern Award or Enterprise Agreement) by their failed companies.[27]

See also:

- *Fair Work Ombudsman v Sheth & Anor* [2016] FCCA 3433 – In this case, a sole director, secretary and shareholder of a Brisbane cleaning company (which was placed into administration) was fined a record $126,540 and was ordered to back-pay $59,878 to four migrant employees. The Court found that Mr Sheath was involved in the company's contraventions and he was, accordingly, held responsible under section 550 of the *Fair Work Act*; and
- *Fair Work Obudsman v Haider Pty Ltd & Anor* [2015] FCCA 2113 – In this case, an owner-operator of a wound-up business was ordered to pay a pecuniary penalty of $6,970 directly to the victim employee as there was "little to no chance" of the employee being back-paid compensation by the company.

Adverse action

While not the subject of this article, it is important to remember that accessorial liability provisions are not only limited to enforcing award entitlements and rectifying underpayments, but can also be used to assign liability for other contraventions of the *Fair Work Act*.

For example, in *Fair Work Ombudsman v Windaroo Medical Surgery Pty Ltd & Ors* [2015] FCCA 554, an accountant-director and a medical practitioner-director, were held to be 'involved in' a contravention of the General Protections provisions of the *Fair Work Act* by the employer medical surgery. Justice Jarrett imposed penalties against the employer medical surgery of ($39,600), the accountant-director ($7,920) and the medical practitioner-director ($3,960).[28]

Conclusion

The FWO is increasingly relying on section 550 of the *Fair Work Act* to effectively prosecute all those allegedly involved in an employer's breaches of the *Fair Work Act*. Recent decisions of the Federal Court and Federal Circuit Court warn of the significant penalties which can be imposed upon company officers, human resource personnel, franchisors, and accountants and bookkeepers who are found to have been involved in contraventions of the *Fair Work Act* and related instruments. Even lawyers have been cautioned for their involvement providing services to contraveners of the *Fair Work Act*, with FWO Natalie James stating that they *"may become liable for the sins of [their] clients"*.[29]

Furthermore, both sides of Parliament have expressed support for the FWOs increased reliance on section 550, and have attempted to pass legislation to strengthen the accessorial liability provisions in the *Fair Work Act*.

In light of the above, it is clearly critical that all those involved in providing advice to businesses are fully-aware of their obligations under Australian employment law, and that they take appropriate steps to ensure they, and their colleagues, reduce their risk of being held personally liable as an accessory to their clients' acts and omissions.

1 Natalie James, 'An adviser's responsibility: The Fair Work Ombudsman's approach to accessorial liability' (Speech delivered at the Address to the Australian Human Resources Institute (AHRI) Employee Relations / Industrial Relations Network NSW, 27 July 2016).
2 Natalie James, 'Regulation of Work and Workplaces: The Fair Work Ombudsman's Role in the Development of Workplace Law' (Speech delivered at the Australian Labour Law Association National Conference 2016, 4 November 2016).
3 https://www.fairwork.gov.au/annual-report/year-in-review.
4 *Fair Work Ombudsman v Blue Impression Pty Ltd & Ors* [2017] FCCA 810 at [25].
5 *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034 at [1019].
6 *Fair Work Act s* 539(3).
7 *Fair Work Act ss 539 and 546(2); Crimes Amendment (Penalty Unit) Bill 2017.*
8 *Kelly v Fitzpatrick* [2007] FCA 1080, at [14].
9 Natalie James, 'Directors exposed as we lift the corporate veil' (Media Release, 23 June 2016).
10 *Fair Work Amendment (Protecting Australian Workers) Bill 2016* s 546A.
11 *FWO v Step Ahead Security Services Pty Ltd & Anor* [2016] FCCA 1482, at [69].
12 Ibid, at [74].
13 Ibid, at [78].
14 Ibid, at [41].
15 Ibid, at [42].
16 *Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Ors* [2011] FMCA 459, at [28].
17 Ibid, at [30].
18 Ibid, at [17].
19 *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, s* 558A.
20 Ibid, s 557A.
21 Natalie James, 'Opening Statement – Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017' (Media Release, 12 April 2017).
22 *Fair Work Ombudsman v Yogurberry World Square Pty Ltd* [2016] FCA 1290, at [25].
23 Ibid, at [33].
24 Ibid, at [51].
25 James, 'Directors exposed as we lift the corporate veil', above n 9.
26 *Fair Work Ombudsman v Shaik* [2016] FCCA 2345.
27 *Fair Work Amendment (Protecting Australian Workers) Bill 2016* s 545A.
28 *Fair Work Ombudsman v Windaroo Medical Surgery Pty Ltd & Ors* [2016] FCCA 2505.
29 N James, "The Changing Landscape of the Australian Workplace: The Modern Advisor" speech delivered at the Law Institute of Victoria Workplace Relations Conference 2016 (28 October 2016).

About us

Harmers Workplace Lawyers "**Harmers**" focuses on innovative, high quality problem solving and a preventive approach to law across all areas of employment and industrial law. We are perhaps unique in Australian employment practices in that, while having an emphasis on corporate Australia and its senior executives, the firm seeks to implement workplace fairness for all, and will represent employers, employees and their representative organisations as needed. Harmers has represented many of Australia's leading corporations, senior executives and media personalities as well as having run some of Australia's leading cases in employment and discrimination areas.

Harmers was the recipient of the 2017 Australian Law Awards *"Workplace Relations & Employment Team of the Year"*. The Firm was also ten times the recipient of the Australasian Law Awards for *"Employment Law Specialist Firm of the Year"* (2017, 2016, 2015, 2013, 2011, 2010, 2009, 2008, 2007 & 2006); and has received several global awards for *"Employment/Industrial Law Firm of the Year - Australia"* (2017 - 2011). The Firm has also received a number of prestigious awards for people management, work-life balance, diversity, innovation and workplace excellence.

Harmers is the Australian member firm for L&E Global, an alliance specialising in providing counsel on cross-border labour and employment law issues with 23 international practices across 5 continents and 1500 + attorneys worldwide. L&E Global brings together premier national labour and employment law firm boutiques – as one firm – with a unified fee-for-all services approach, across borders and throughout the world. L&E Global won The European Lawyer 2016 *"Global Network of the Year"*, and has been ranked by Chambers Global in the *"Band 1 - Global – Wide Employment Law Network"* Category (2017 – 2013).

If you would like more information regarding Harmers, or would like to discuss any aspect of this newsletter, please contact one of our experienced professionals.

Michael Harmer
Chairman & Senior Team Leader
michael.harmer@harmers.com.au

Mark Bastick
Executive Counsel & Team Leader
mark.bastick@harmers.com.au

Margaret Diamond
Executive Counsel & Team Leader
margaret.diamond@harmers.com.au

Claresta Hartley
Executive Counsel & Team Leader
claresta.hartley@harmers.com.au

Jenny Inness
Executive Counsel & Team Leader
jenny.inness@harmers.com.au

Paul Lorraine
Executive Counsel & Team Leader
paul.lorraine@harmers.com.au

Sandra Marks
Executive Counsel & Team Leader
sandra.marks@harmers.com.au

Emma Pritchard
Executive Counsel & Team Leader
emma.pritchard@harmers.com.au

Sophie Redmond
Executive Counsel & Team Leader
sophie.redmond@harmers.com.au

Greg Robertson
Executive Counsel & Team Leader
greg.robertson@harmers.com.au

Sudhir Sivarajah
Executive Counsel & Team Leader
sudhir.sivarajah@harmers.com.au

David Bates
Team Leader & Strategic Consultant
david.bates@harmers.com.au

HARMERS WORKPLACE LAWYERS

SYDNEY
Level 27 St Martins Tower
31 Market Street
Sydney NSW 2000
tel: (+ 61 2) 9267 4322
fax: (+ 61 2) 9264 4295
info@harmers.com.au

MELBOURNE
Level 40
140 William Street
Melbourne VIC 3000
tel: (+ 61 3) 9612 2300
fax: (+ 61 3) 9612 2301
info@harmers.com.au

BRISBANE
Level 19
10 Eagle Street
Brisbane QLD 4000
tel: (+61 7) 3016 8000
fax: (+61 7) 3016 8001
info@harmers.com.au

SUBSCRIPTIONS
Please contact
Jane Kewin
Client Service & Communications Director
jane.kewin@harmers.com.au
tel: (+61 2) 9993 8537

www.harmers.com.au

© Copyright Harmers Workplace Lawyers 2017. All rights reserved. No part of this publication may be reproduced, in whole or in part, by any means whatsoever, without the prior written consent of Harmers Workplace Lawyers.

Disclaimer: This newsletter provides a summary only of the subject matter covered without the assumption of a duty of care by the firm. No person should rely on the contents as a substitute for legal or other professional advice.

L&E GLOBAL
an alliance of employers' counsel worldwide

Cr. 170667