

An adviser's responsibility: the Fair Work Ombudsman's approach to accessorial liability
Address to the Australian Human Resources Institute (AHRI) Employee Relations / Industrial Relations Network NSW by Natalie James, Fair Work Ombudsman
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Advisers - it's a balancing act

It's a tough job being an adviser. A real balancing act.

Like your clients or employers, I have advisers. Lawyers, who help me understand and manage my legal risk.....often this takes the form of them telling me not to tweet things.....Human Resources and other Corporate advisers who help me understand the limits of my regulatory world....even when I want to smash through those boundaries to achieve some greater purpose.

It's a tough job, balancing the desires of CEOs and Boards to achieve organisational objectives while managing the risks of the many and varied frameworks we must all operate within.

It's a tough job, getting senior people who are set on a path, to hear the risks, the pitfalls, the possible consequences they may have not identified.

It's an especially tough job when you have to tell someone this sort of thing AFTER a course of action has already been embarked upon.

Or when you've found a problem with something the organisation has done – like a systems error that means people haven't been paid properly. Or when you have to address a less-than-perfect process that is being challenged - like a dismissal. And you suspect the process wasn't quite what it should have been... leading you to wonder, (not for the first time), why did the line area not come to you for advice earlier?!

I've also been an adviser, so I know how that feels!

You need to constantly balance a number of elements: your professional and ethical responsibilities; the need to work with the organisation to help it achieve its strategic goals; the need to broker solutions, not just raise problems.

Tensions can arise when these elements pull you in different directions.

Above all, you must explain the rules to your clients, make it clear when they are in danger of breaking them and not become involved in breaches of the law yourself.

To do so risks action not just against the organisation. In the case of workplace laws, if you are involved in facilitating a breach of the law, you are personally at risk of being found to be an accessory.

The Fair Work Ombudsman always carefully considers the role of individuals in breaches of workplace laws, and considers whether any enforcement action should be extended to them.

As an Adviser responsible for keeping the beneficiary of your advice on the right side of the law, there is something else you may wish to consider. The Government has made election commitments to enhance the tools available to the Fair Work Ombudsman to hold people involved in breaches of workplace laws to account.

One might suggest, if you were wanting to keep your organisation out of the courts and the newspapers, that there has never been a better time to ensure you are giving holistic and sound advice about compliance with workplace laws.

In approaching today's topic, I will outline an Adviser's risks and responsibilities from my perspective, in the context the Fair Work Ombudsman's active and evolving approach to accessorial liability. But I will also touch on the broader risks in the context of the community's expectations and the Government's election commitments.

The Long Arm of accessorial liability

So, to turn to the Fair Work Ombudsman's approach to the current framework.

We know that an employer is clearly responsible for making sure workers are paid correctly.

But where does the responsibility for compliance with the law begin and end?

The law also extends responsibility to others who are involved in a contravention. It does this through section 550 of the Fair Work Act.

Provisions extending liability for contraventions of the law to people 'involved' in the relevant conduct have been a feature of workplace relations legislation for a decade now.

Section 550 is a standard, 'bread and butter' accessorial liability provision. There are similar clauses throughout the statute books, including occupational health and safety law, as well as corporations, competition and consumer legislation.

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

We do this to reinforce the critical roles and responsibilities of the key personnel involved in the breach—whether they are company directors or advisers.

There is strong public interest in ensuring that such people inform themselves of the law, and to operate within it.

And we will explore every avenue available to us to ensure that exploited workers receive the wages that they are entitled to.

The accessorial liability provisions are especially important if we think a company might not continue to solvently operate when we commence proceedings against it. By naming accessories, we can still seek to recoup back-payments and penalties from individuals involved in the breach irrespective of whether the corporate employer is still operative, or has money in the bank.

In fact, last financial year, **46** out of **50** of the matters we filed in court (**92%**) sought orders against accessories.

This is up from the year before. In **2014-15**, **36** out of **50** litigations commenced (**72%**) involved an alleged accessory.

I am alive to the fact that your employers or clients care enough about doing things properly to engage you as trusted advisers. So we know they want to do the right thing...or at least to stay out of trouble!

But not everyone wants to play by the rules or work with us.

We see some operators who think they can short-change their employees and get away with it by liquidating their companies and hiding behind the corporate veil.

These operators are testing the boundaries of what they can get away with under the legal framework.

The Fair Work Ombudsman will not sit passively while these operators avoid the laws that are supposed to hold them to account. We have been adventurously testing the limits of accessorial liability provisions to ensure someone is held responsible for breaches of the Fair Work Act.

We are pursuing employers who cannot or will not pay, using every lever available to us to ensure wages that should have been paid to workers are put back into their hands. And we are striving to ensure those who breached their workplace obligations don't get the chance to do that again.

There must be clear consequences for those in trusted positions, those whose advice is relied upon and those with the responsibility to know better who play a part in undermining workplace laws.

Extending the Long Arm: accessories can be liable for back-pay

We have up until recently confined the orders we sought against accessories to seeking penalties. We had not sought to recover back-pay from an accessory.

Not anymore.

The first person to experience our new approach was Mr Owen Jennings, the former director of now wound-up Gold Coast security operation, Step Ahead Security Services¹.

The case saw Mr Jennings pay a hefty penalty of **\$51,400** after he was found to be involved in the underpayment of eight security guards by the employing entity for which he was responsible.

But of even greater significance, he was also ordered to **personally repay** the eight employees **almost \$23,000** in lost wages, in what was (for the FWO) a precedent-setting decision.

This case involved the classic criteria we look for when deciding whether to take action against an accessory.

Firstly, the matter involved vulnerable employees.

¹ *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd & Anor* [2016] FCCA 1482.

Secondly, Mr Jennings tried to exploit the legal framework to avoid paying employees their entitlements. We considered it was appropriate to hold Mr Jennings personally liable when he wound-up the company after we initiated proceedings against it. While the employees were left without the payments that they were owed, Mr Jennings was involved in a new company doing exactly the same work, with the same workers, operating from the same address. His son was the director of the new company, and Mr Jennings was a 'consultant' to that company.

Thirdly, Mr Jennings also had an extensive history of non-compliance and his conduct was clearly deliberate. He had been known to us for over a decade through his previous security companies, and had previously deregistered a company when we started investigating. The public interest demands that Mr Jennings should not be in a position to repeat this conduct in the future.

In the Federal Circuit Court in Brisbane, Judge Jarrett found that Mr Jennings had:

*...demonstrated **calculated and deliberate** conduct which plainly amounts to a blatant disregard for Australia's workplace laws and the rights and entitlements of the first respondent's employees.*

Our action against Mr Jennings shows that we will seek to cut off the escape route of winding up a company if the purpose behind that action is to avoid having to back-pay workers.

And it opens the door for us to seek orders to make a range of accessories personally liable in the future – directors, contractors, franchisors and human resources managers included.

And rest assured, we also refer these sorts of examples to the Australian Securities and Investments Commission. You have to ask whether individuals such as Mr Jennings, who blatantly seek to avoid their legal obligations in this manner, should be entitled to continue to act as a Director and benefit from the protection of the corporate veil.

The Full Reach of the Arm can catch a range of accessories

A year or two ago, most of the accessories in our proceedings were directors of the corporate employer. The reasons for this are obvious. The director is the person who leads, manages and controls the employing entity. And is intimately involved in, and ultimately responsible for, the decisions of that entity – including decisions to comply (or not to comply) with workplace laws.

Over time we have extended our use of accessorial liability to other persons involved in the contraventions. Accessories have included human resources staff²; administration or day to day managers³; staff engaged to assist with recruitment and supervision⁴; and other companies or individuals involved through a supply chain or franchise network⁵.

When do we consider such personnel should be held legally accountable? We consider the part they have played, the conduct that has led to underpayment of employees and, as is always case, whether the conduct was deliberate.

Let me give you some more examples to give you a better sense of what this looks like.

In December last year, we initiated our first proceedings against a third-party accountancy firm as an accessory. We allege that this firm processed wage payments for workers at a Melbourne fast food restaurant, despite having explicit knowledge that those payments were well below the award rate. The accounting firm now faces penalties of up to \$51,000 per breach. Our view is that accountants' professional responsibility demands that they cannot close their eyes to breaches of the law by their clients.

In another matter that we recently filed against the operators of Chinese restaurants in Australia and Shanghai, we have named the director, the restaurant manager and the human resources manager as accessories. We say they were involved in the underpayment of hospitality staff employed by the company.

We allege in this case, that the business presented us with one set of records, purporting to demonstrate that all employees were paid correctly.

However, after engaging legal representation, a different set of records was produced, this time showing a range of underpayments.

When deciding which entities or individuals to include in our action, we were mindful of the serious and deliberate nature of the alleged misconduct.

² Eg. *Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Ors* [2011] FMCA 459.

³ *Fair Work Ombudsman v Ross Geri Pty Ltd & Ors* [2014] FCCA 969; *Fair Work Ombudsman v Liquid Fuel Pty Ltd & Ors* [2015] FCCA 3139.

⁴ *Fair Work Ombudsman v Jay Group Services Pty Ltd & Ors* [2014] FCCA 2869.

⁵ *Fair Work Ombudsman v GRI Global Pty Ltd (in Liquidation) and Security International Services Pty Ltd* (FCCA BRG1151/2014) Jarrett J 17 November 2015 (delivered ex tempore); *Fair Work Ombudsman v Al Hilfi* [2016] FCA 193

We say that the individuals involved in the alleged production of the false records or who made use of them by handing them to my Inspectors, ought to be held accountable as accessories for that deceptive and unlawful conduct.

Their external lawyer clearly saw that this was unacceptable, and advised the company to hand over the 'real' records. And if that lawyer hadn't, we'd have considered extending our action to that firm.

The Long Arm can deploy a range of tools

Our adventurous approach does not end with the range of accessories we are joining to our actions.

My lawyers have been getting creative about the nature of the orders we are seeking.

The Courts have shown a preparedness to make a range of orders – injunctions against future contraventions of the Act, freezing orders to prevent the shifting of assets to defeat employee creditors, and even orders to compel employers and individuals to commission (at their own expense) audits of their entire payroll and training in respect of workplace obligations.

More than one businessperson is now enjoined from future contraventions of the Fair Work Act as the result of injunctions obtained by the Fair Work Ombudsman⁶. If any of those individuals are caught out again then the consequences for them will include a proceeding for contempt of the Court.

A very recent example shows how we can extend liability beyond individuals to other corporate entities in a network or supply chain.

You may have read in the media that we are seeking a range of orders against a frozen yogurt outlet, Yogurberry, in the World Square shopping centre in Sydney's CBD. We are alleging that four Korean backpackers were underpaid a total of **\$17,827**. We are taking the employer to court– but we are also seeking orders against accessories through the franchise network – the head company and master franchisor, the payroll company and a manager of the head company for their alleged involvement in the underpayment of subclass 417 visa holders at the World Square outlet.

⁶ *FWO v James Nelson Pty Ltd & Anor* [2016] FCCA 531 (17 March 2016); *FWO v Step Ahead Security Services Pty Ltd & Anor* [2016] FCCA 1482 (17 June 2016); *FWO v AIMG BQ Pty Ltd & Anor* [2016] FCCA 1024 (31 May 2016)

This builds on our earlier work using accessorial liability in trolley collecting supply chains, where we have used the provisions to hold the beneficiaries of the labour – big supermarkets – accountable for exploitation of their contractors’ and subcontractors’ workers.

For example, in October 2014, Coles stepped up to accept moral and ethical responsibility for workers in its supply chain, by entering into an Enforceable Undertaking (EU) with us and agreeing to backpay its contractor’s employees, conduct broad-ranging compliance audits, re-train its relevant people and ultimately bring its trolley collection services in-house.

And just last month we released our Inquiry report into Woolworths’ trolley collection supply chain, which exposed a range of entrenched non-compliance. We believe that if Woolworths adopts the recommendations in our report, it will promote and build a culture of compliance in its trolley collector sub-sector.

Even just this week, (in what was one of our earliest supply chain matters), we have secured **over \$90,000 in penalties** against the beneficiaries of the exploitation of vulnerable trolley collectors, in a case where the employing entity, South Jin, had been wound up.⁷

In Yogurberry, we are seeking to leverage the accessorial liability provisions, by asking the court to place some strong obligations on the head company– requiring a professional external audit of all of the stores throughout the entire retail chain. We are also seeking an order requiring head office to commission workplace relations training for their managers.

We have sought these orders because we believe the underpayment problems are more widespread than just the World Square outlet. Action confined to that outlet, on its own, is unlikely to build a culture of compliance in the entire franchise chain.

Seeking a broader range of court orders against accessories as well as corporate employers allows us to tailor our response to the circumstances of each employer and accessory that we take to court.

We are seeking to change behaviour, build sustainable compliance within workplaces. Achieving this in some cases may require more than a penalty and a press release.

⁷ *Fair Work Ombudsman v South Jin Pty Ltd* (No 2) [2016] FCA 832

If the Long Arm doesn't reach you...the media might

And you may have noticed that in some of our press releases, we name parties other than the direct employer of workers.

When we find exploitation of vulnerable workers, it is our standard practice to look up the supply chain to the entity benefiting from that labour, and ask the question: What contribution has that established, profitable company made to what has occurred?

Because the company at the top of the supply chain, or the centre of a franchising network, is often controlling the settings, including how much money is going into the supply chain or network.

In some parts of our labour market, I'm afraid to say, non-compliance with workplace laws has become a cultural norm. The common characteristics are: low-skilled work, price-driven procurement, a proliferation of entities in the supply chain or network, tight profit margins and vulnerable, often migrant workers.

Think... trolley collecting. Or cleaning or security.

And you may think legally, those workers are not your responsibility. And you may be right...or not. We have taken action against non-employing but benefiting entities in supply chains.⁸

But even if you are, on balance, comfortable with the legal risk your company or client is taking on, that's not the end of it.

Think beyond your narrow legal risks to brand and reputation.

Because the community expects better from established, profitable companies. The community reaction to hearing that such companies are benefiting from black market labour is swift and strong.

It doesn't matter whether the workers, are engaged via franchising, outsourcing or labour-hire arrangements.

The community expects business to take responsibility for its labour, regardless of where strict legal liability begins and ends.

⁸ *Fair Work Ombudsman v GRI Global Pty Ltd & Anor* (FCCA BRG1151/2014) Jarrett J 17 November 2015 (delivered ex tempore); *Fair Work Ombudsman v Al Hilfi* [2016] FCA 193

You may not think that it is your job to give public relations advice. But an organisation that limits their risk analysis to the strictly legal questions about compliance with workplace laws is not considering the real risk.

Every week, my people sit across the table from the Corporate Counsel or Human Resources Managers who are adopting a narrow focus. I sometimes feel that their company would be better represented if they broadened their perspective ...and their advice...beyond defending a legal strategy and considered the full set of consequences of what has occurred. Not to mention the moral and ethical part of the picture.

And this becomes even more significant when we consider the Government's election commitments.

Extending the Long Arm of the law – new tools

In the recent election campaign, the Government committed to making a range of changes to the Fair Work Act.

To deal with franchisors like 7-Eleven, the Government has committed to new laws that capture franchisors and parent companies that fail to deal with exploitation in their networks.

It is interesting to contemplate what 7-Eleven or Yogurberry might look like had these new laws been in place.

The policy also commits to strengthening the Fair Work Ombudsman's compliance and enforcement powers to allow us to **compel employers and other witnesses to produce information or answer questions**, subject to appropriate checks and balances. This will greatly assist my agency to get the evidence it needs to take employers and accessories to court.

The Government has also indicated that it intends to increase the penalties that apply to employers who deliberately and systematically underpay workers or fail to keep proper employment records. The increased penalties will be **ten times the current maximum**, and should strongly deter those employers who might otherwise be tempted to cut costs by underpaying employees.

These proposals have been informed by our experience and we look forward to working with the Government in framing effective and appropriately balanced amendments.

So, in light of the actions of the Fair Work Ombudsman and the intentions of the Government, it's fair to say that employers and advisers who set out to do the wrong thing have cause for concern.

And that is good news for the rest of us. Because bit by bit, my agency is doing what it can to ensure a level playing field, so that compliant businesses that are doing the right thing and seeking the right advice are not at a competitive disadvantage.

Avoid the Long Arm of accessorial liability: Get your house in order

We are hopeful that a very welcome boost to our powers in the future will help us to drive cultural change, to enable us to work with others to build a culture of compliance with workplace laws. We know the law is only part of the picture, but it's a critical part.

And as a result, the CEO of your company, and the clients that you deal with, may be more receptive to the messages that you give them about managing risks holistically when it comes to Australian workplace laws.

If any of you have ever had trouble persuading your Board or your CEO of the merits of your advice, I'm here to give you the new pitch. Compliance with workplace laws is not simply a question of tick and flick.

If it's sitting at the green light end of a risk matrix, you may want to consider what assurance you have put in place, not just with respect to the company's own workers, but with respect to its labour supply chains. Who's emptying the bins or staffing the counter downstairs? Are you sure they are being paid correctly?

Those involved in the decision making around the strategy for and compliance with workplace laws are on notice. You can find yourselves personally liable for the actions or inactions you help the company take.

We are hopeful that employers will accept that it is ultimately their responsibility under the law to do the right thing.

They will know that the Fair Work Ombudsman takes a dim view of deliberate, systemic, exploitative or opportunistic non-compliance and will know that we will tackle that conduct with every tool in our enforcement toolkit.

And just like employers, we expect advisers to take their responsibilities seriously.

If you know that your employer or client is running two sets of books or keeping false records or not paying the employees their full entitlements, know that the new higher penalties may soon extend to them...and to you.

If someone you are advising is breaching workplace laws, call them out, for their sake and yours.

You have a tough job as advisers.

And by working together to build a culture of compliance, **we will make your job easier.**

By being a member of a professional organisation – such as AHRI – you are taking your professional responsibilities seriously. Taking steps to ensure the businesses you advise stay out of the spotlight for the wrong reasons. You provide them and the community with a valuable service which ultimately contributes to fairer workplaces, a level playing field and employees getting what they are entitled to. And we applaud that service.