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E-Alert: The Fair Work Ombudsman Comes Hunting – Personal and Supply Chain Risk in Employment Compliance, Underpayments and Penalties

By ,

7-Eleven – Obscures the real exposure

The media coverage of the underpayment allegations and prosecutions against franchisees of 7-Eleven has highlighted the potentially significant business damage (both legal and reputational) which can arise from underpayment of workers, whether vulnerable or not. It has also demonstrated the speed with which such damage can occur.

Coverage of the magnitude of the allegations has however clouded a significant underlying shift in enforcement approach by the Fair Work Ombudsman **(FWO)** that has been ongoing for at least seven years – the move to supply chain and personal liability for all involved in employment related non-compliance.

Piercing the corporate veil & supply chains

No longer can managers or companies expect that the corporate veil or complex corporate or contracting structures will protect them from liability and penalties for non-compliance by others in their labour supply chain.

The FWO's focus is no longer just on the direct employers, but on all of those that have been "involved in" any non-compliance. This approach has seen prosecutions against:

- Managers of employers personally;
- Principal contractors and their managers;
- Head contractors and their managers;
- Franchisors and their managers; and
- Advisers to employers, including external accountants.

For example, in 2012, the FWO commenced multiple underpayment prosecutions against numerous persons and entities, including Coles Supermarkets, associated with underpayments to employees who were engaged by subcontractors to collect shopping trolleys.

To Coles' credit, to resolve the prosecutions against it, it entered into an enforceable undertaking to, amongst other things, back pay its contractors' employees for the underpayments (approximately $220,000). This has not prevented the Federal Court recently imposing personal penalties on the director and manager of Coles' contractor of $188,100, being 75% of the available maximum penalty for the breaches.

Similar prosecutions relating to trolley collection services for other significant retail entities remain ongoing.

Aggressive use of accessorial liability

The FWO's ability to extend its reach through the corporate veil and up the supply chain sits in section 550 of the Fair Work Act 2009 (Cth) **(FWA)** which provides:

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

As will be apparent from the above two provisions, the threshold for a person to be deemed to have contravened an offence provision is not high. Decisions in the area have confirmed that all that is required is that the:

1. person knew the employees were employed by the offending employer during the relevant period;
2. person had knowledge that an award (or provision of the FWA setting a minimum entitlement) applied to the employee, although they did not need to know the name of the award or detail of the provision;
3. employees performed work of a kind which entitled them to receipt of entitlements under the award or the FWA; and
4. employer did not meet the requirements.

In circumstances where contracts, particularly those predominantly for labour, are awarded at prices where it would be impossible for the contractor to perform the work whilst still complying with FWA and award minimum entitlements, it is relatively easy for the FWO to satisfy the above requirements and therefore prosecute the head entity and potentially their managers as well.

The FWO's active, some would say aggressive, use of the accessorial liability provision is demonstrated by the fact that last financial year, nearly 95% of all prosecutions commenced by the FWO included prosecutions against accessories, be they mangers, directors or entities up the supply chain. This approach is now supplemented by the FWO having launched an "Anonymous Report" service to assist in its targeting efforts.

Action items

It is now more essential than ever to avoid personal liability that directors and managers of businesses which have a significant labour component in their supply chain audit FWA, Modern Award and enterprise agreement compliance.

At its most fundamental, directors and managers need to ensure that their businesses and those that supply to them at least are keeping appropriate employee records in compliance with the FWA from which it is possible to properly assess compliance and defend the possibility of prosecutions.

For directors and managers in any way in doubt of their obligations, Broadley Rees Hogan's Employment and Work Health & Safety Team can assist.

Should you wish to discuss any matters arising out of this article, please contact the author:

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