



## What does accessorial liability mean for franchisors?

There has been an increasing willingness on behalf of the Fair Work Ombudsman to widen the net of those being investigated for the exploitation of vulnerable workers.

Section 550 of the Fair Work Act 2009 (Cth), the legislation establishing the National Workplace System, allows for accessorial liability to be found by a Court where the person is knowingly 'involved in', or ought reasonably to have known, of a contravention of the Act.

'Involved in' in the context of section 550, refers to:

- Aided, counselled, abetted or procured the breach; or
- Through act or omission, directly or indirectly, was knowingly concerned in or party to the contravention, conspired with others to bring about the breach.
- Induced the contravention, through threats, promises or otherwise; or

The *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* is currently being debated by the Australian Senate. The Bill seeks to hold franchisors and holding companies responsible for certain contraventions of the Act by the businesses (i.e. franchisees) in their networks "if they knew or could reasonably have been expected to have known the contraventions would occur in their business networks and failed to take reasonable steps to manage the risk.". These amendments do not override the action of section 550 but rather are intended to supplement it.

In light of the increased attention the Fair Work Ombudsman has shown to holding related parties responsible (it is reported that 94% of matters filed by the FWO in Court in 2016 involved holding someone other than the employer responsible) for contraventions of the Act, what can a franchisor do to best protect themselves from the possibility of being found liable as accessories under the Act?

### **1. Ensure your operations manual prescribes an audit system that sets minimum ongoing compliance standards.**

Through setting minimum compliance standards, franchisors have an ability to identify whether compliance is occurring, through ongoing monitoring of those standards. Where a franchisee is not complying, increased compliance training can be initiated.

Sample auditing of payroll and other workplace obligations of your franchisees should be included in your franchise agreement, or the operations manual. If this is not in your existing franchise agreements then these should be updated along with the franchise policy manual.

Breaches of payroll services can be made a breach of the franchise agreement and thus form grounds for termination of the agreement.

### **2. Know what your obligations are under the Fair Work Act and any relevant awards.**

Seek professional assistance where needed to ensure that your pay rates and any other conditions under the relevant awards are up to date. Ensure that your franchisees are accessing this information.

### **3. Educate your franchisees about employment related laws.**

Introduce employment updates as part of your regular franchising conference, meetings or newsletters. Encourage discussion about workplace changes and how they affect the franchisees.

### **4. Prescribe or strongly recommend software.**

Software which automatically updates for changes to pay rates as they occur provides increased transparency and reduces the opportunity for underpayment of workers by the franchisees.

If you require assistance with your franchise agreement, or are looking to introduce compliance standards to better monitor your business networks, talk to us. We can review your franchise agreement and provide you with advice to help you and your network thrive.

### **5. Outsourcing of Payroll Function**

Where you are outsourcing the payroll function, your payroll service provider can be found liable for the employer's underpayment of wages. A recent Fair Work Ombudsman action vi in the Federal Court found that a payroll service provider 'must have known' about the underpayment of workers by an operator of a fast food outlet, yet persisted with maintaining its payroll system even though breaches occurred. This is the first time the Fair Work Ombudsman has pursued an external provider for its involvement in an employer's contravention of the law.

The case shows how the Fair Work Ombudsman is determined to expand the net of accessorial liability, questioning along the way 'trusted advisers' should not be held accountable when they give incorrect or bad advice or where they deliberately assist with a contravention.

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<sup>1</sup> Hall and Wilcox, Franchisor Liability for Franchisee Conditions - 8 May 2016.

<sup>1</sup> The Commonwealth Parliament of Australia, House of Representatives, FAIR WORK AMENDMENT (PROTECTING VULNERABLE WORKERS) BILL 2017 – explanatory memorandum, p. i

<sup>1</sup> Ibid, page 6.

<sup>1</sup> Natalie James 'The good', 'the bad' and 'the ugly' – navigating the road to compliance (Address at the Australian Industry Group PIR Conference, 2 May 2016)

<sup>vi</sup> Fair Work Ombudsman v Blue Impression