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STRATEGEYES:

Workplace Perspectives

People+Culture Strategies
Labour & Employment Law

A LOOK INSIDE:

Welcome

from the Founder and Managing Principal

As we draw to a close on the financial year it is with great pleasure that I welcome you our 23rd edition of Strateg-Eyes: Workplace Perspectives!

When I started the firm in July 2010 I was keen to ensure that our publications do not become "yet another newsletter" that is produced by a law firm alerting clients to recent legal developments. As you read through the articles on the following pages I trust you will agree that our firm demonstrates its commitment to content that is relevant, practical, commercial and interesting. Your feedback is of course always welcome.

I am so pleased that so many of our clients have taken up the option of either the PCS partnership or one of our PCS Partnership Plus offerings. The packages represent such excellent value for clients but do so much more than allow them the opportunity to save on their spend. The packages themselves provide the holistic solutions framework through legal advice and support, strategic insights into your people management capability and exclusive training and leadership development opportunities. Our signature programs of Advanced Strategic People Management and Issues in People Management are unlike any programs that are offered in the HR leadership space.

On the international side, our role as a prominent member of global alliance Innangard continues to be consolidated. Innangard now has a Chinese member firm, River Delta and I was fortunate to spend a day with the River Delta team in their Shanghai offices in May. In April of this year I was once again asked to speak at the International Bar Association's Employment Law Conference which was held in Lisbon, Portugal and I will be once again the Australian delegate for the International Employment Law Forum later this month in Dublin. It is a privilege to be seen as the only Australian boutique labour and employment law firm recognised in this way in the international space.

Finally, it is with a great deal of pleasure that I share the news of Erin Lynch's promotion to Director effective 1 July 2017. Erin has been a tremendous part of our firm's success in the five years she has been with PCS and her promotion is well-deserved. Erin has demonstrated an unwavering commitment to servicing clients of our firm with all her energy and passion and has been a great role model for all our staff and in particular our junior team members. Congratulations Erin and we look forward to many more years of continued success and growth with you and through you.

Joydeep Hor

FOUNDER AND MANAGING PRINCIPAL

A New Gig for the Fair Work Commission?

David Weiler, ASSOCIATE

It was recently reported that the gig-economy giant, Airtasker, had agreed to explore the option of a dispute resolution process overseen by the Fair Work Commission ("**FWC**"). This is an important step in coming to terms with how employment regulation should respond to an industry that allows users to access on-demand the services of individuals whose employment status and the basic conditions under which they work is uncertain.

The details of the proposal are not yet clear, but according to news sources, President Ross and Senior Deputy President Sams of the FWC along with Unions NSW and Airtasker have entered into a heads of agreement with respect to issues being faced in these types of work arrangements.

According to Unions NSW, the agreement commits Airtasker to:

- ensure that its recommended rates of pay are above award rates;
- offer workers using the platform an insurance product similar to workers' compensation to protect against workplace injuries and illnesses;
- work with Unions NSW and the FWC to introduce a dispute resolution process; and
- implement "best practice" WHS/OHS standards to protect workers and consumers using the platform.

In response to the announcement by Unions NSW, Airtasker has clarified that it already has an existing dispute resolution process operated by a third party provider, and that the potential involvement of the FWC in such a process is only at a "discussion stage". Airtasker did however take steps to amend its online pay guide for various tasks to reflect, at a minimum, award rates for such work. This willingness to work with employee associations and address concerns about the pay and conditions of workers is a significant deviation from the practices of other operators in the gig-economy.

Background

Founded in 2012, Airtasker is an Australian based online company that offers a platform for a user (a "**Job Poster**") to have various jobs performed by an individual ("**Worker**"), including specialised tasks performed by tradespeople.

It is free to post on the platform, where the Job Poster describes the task and indicates a budget for the work. Workers then post comments with regards to that task and can "bid" on the work, often indicating their experience and offering such features as "*satisfaction guaranteed or free".* Following negotiations between the Job Poster and the Worker, the Job Poster can accept an offer from the Worker and the agreed amount is paid into a trust account held by Airtasker. Upon completion of the task, the Worker can request payment, which prompts the Job Poster to agree to Airtasker "releasing" the funds. If the Job Poster does not accept that the task has been completed in accordance with the agreed terms, it may raise a dispute, which prevents Airtasker from releasing the funds to the Worker. As discussed above, disputes relating to the disbursement of these funds are currently handled by a third party, and both Job Posters and Workers have profiles with ratings and reviews that may affect future work prospects.

The service fee for using the platform is included in the "bid" made by the Worker and is 15% of the value of the task. The Airtasker website boasts that it has created $116 million worth of jobs and that nearly one million Australians use its platform.

Employment relationship

In a Senate inquiry held in April 2017, Airtasker's CEO, Tim Fung, testified that the people bidding for work (i.e. the Workers) are defined under the site's terms and conditions as independent contractors and that he "*certainly doesn't think that there's any form of employment relationship being created*."

The terms and conditions expressly state that if a Job Poster accepts an offer from a Worker, a "Task Contract" is formed between the Worker and the Job Poster (i.e. Airtasker is not a party to this arrangement). The terms also only permit "natural persons" to use the platform, so corporations are excluded from posting jobs or bidding on work, however persons may "*represent a business entity."* Not surprisingly, the platform and its terms and conditions have been structured to create a strong argument that no employment relationship is created between Airtasker and the Worker.

Minimum wages

In 2014, Unions NSW published an issues paper that challenged the status of work arrangements in the gig-economy, and specifically questioned the obligations of Airtasker in relation to, among other things, minimum rates of pay. The paper included a comparison between Airtasker's recommended pay rates for popular tasks like data entry, sales and cleaning and the relevant minimum award rates for such work. In some instances, where the cost of the 15% service fee charged by Airtasker was accounted for, this difference was almost $10/hour.

Importantly, the service fee is built into the value of the bid made by the Worker and accepted by the Job Poster at the time the Task Contract is entered into. As such, the cost of using the platform (which is arguably an equally shared benefit for both the Worker and the Job Poster) is borne entirely by the Worker and remains largely hidden from the Job Poster in relation to determining the value of the task.

Another concern for Workers is the fact that fees are set per task and not per hour. If a task takes longer than anticipated, the Worker can negotiate for an additional payment to complete the task, but this must be agreed between the parties. If the task is not performed in the agreed time, the Job Poster may refuse to pay the Worker at all, which would likely lead to the dispute being brought to the third party (the cost of which the parties must bear).

Dispute resolution

The potential move towards a dispute resolution process overseen by the FWC is certainly welcomed by Unions NSW, but its scope is far from certain. The lack of clarity of the terms of many of these agreements has the potential to disproportionately disadvantage the Workers. One such example is a case study that has been published on Airtasker's website, which sets out that even after an offer is accepted and

a Worker travels to the Job Poster's location and is willing and able to perform the work, if the Job Poster cancels the Task Contract prior to the Worker commencing the work, unless there is an express term that has been agreed in relation to these circumstances, the Worker will not be entitled to any payment. An important point here is that these relationships are largely governed by comments left on postings and private messages between the parties, which in many (if not most) cases lack the basic terms and conditions around when and how a Job Poster can terminate a Task Contract.

Some important considerations regarding the establishment of an FWC dispute resolution process include:

- what powers the FWC would be able to exercise (determinative or advisory only); and
- the type of disputes within its jurisdiction.

The terms and conditions that a party accepts by using the Airtasker platform set out that the current third party provider has the power to arbitrate (that is, to issue a binding determination on the parties). The FWC process could involve similar powers to arbitrate disputes. It is likely that if this method was implemented, the FWC would also require the parties to conciliate prior to arbitration.

The type of disputes that may come within the FWC's jurisdiction is also uncertain at this point but conceivably, it could include the enforcement of pay rates at the award minimum. It could also be empowered to ensure that certain conditions are met in respect of task contracts (e.g. around cancellation periods).

Insurance

A further issue relating to these arrangements is the provision of insurance for Workers. An aspect of the recent announcement is that Airtasker is working with a third party provider to develop personal insurance policies for Workers, which would address the concerns raised by Unions NSW around workers currently being excluded from workers' compensation insurance.

Conclusion

The proposed partnership with the FWC and this collaborative engagement between Unions NSW and Airtasker is certainly a change of pace for observers of the gig-economy. It reflects an interest in finding ways to provide a platform of minimum conditions and a fair dispute resolution process. But it is important to note that neither of these aspects would necessarily make it an employment relationship. The fact that Airtasker is Australian and has grown in a market that has longstanding, strong workers' rights protections may explain why its approach stands out amongst similar platforms. However, it is still early days for the company and the industry as a whole, and the only certainty is that we need ways to deal with the work undertaken pursuant to such arrangements as technologies develop and the demand for such services increases.

Good Cop and Bad Cop:

How the Fair Work Ombudsman might engage with your business and tips for how to respond

Sam Cahill, ASSOCIATE

The Fair Work Ombudsman ("**FWO**") carries out a range of compliance and enforcement activities. In this article, we look at the different ways in which the FWO engages directly with employers and set out our tips for how employers should manage such an engagement.

What are the FWO's areas of concern?

The FWO is responsible for bringing about compliance with various federal workplace laws. The key areas of concern for the FWO are:

- the National Employment Standards, which includes entitlements such as annual leave, personal leave, parental leave, notice of termination and redundancy pay;
- Modern Awards and Enterprise Agreements, which can include entitlements such as minimum rates of pay, penalty rates and rostering requirements; and
- General Protections issues, including unlawful discrimination, sham contracting and coercion.

The FWO is less likely to be concerned about employment entitlements that are purely contractual, such as performance incentive payments.

What will trigger the attention of the FWO?

A common way for an employer to come to the attention of the FWO is for one of its employees to make a complaint. In the 2015-16 financial year, the FWO received nearly 30,000 complaints of alleged non-compliance.[1] However, it is not necessary for an employee to have made a complaint. The FWO may act on information received from other sources, such as media reports. It may also take an interest in an employer as part of an industry-wide compliance campaign.

Early intervention (FWO as Good Cop)

When a complaint is made to the FWO about an employer, or the FWO otherwise suspects that an employer has engaged in non-compliance, the FWO will generally begin by using an "early intervention" approach to resolve the dispute and/or bring about compliance with the relevant laws. This approach is characterised by an emphasis on education, conciliation and voluntary correction. It usually involves advising the parties on their rights and obligations and offering to act as a mediator where there is a dispute.

[1] Fair Work Ombudsman, *Annual Report* 2015-16, at p. 17.

During this phase, the FWO relies on the parties to:

- provide relevant information (records of hours worked, wages etc.);
- attend discussions and consider options for resolutions (eg, mediation); and
- take steps to resolve any compliance issues (eg, making backpayment and committing to take steps going forward).

This means that the FWO does not exercise its powers under the *Fair Work Act 2009* (Cth) ("**FW Act**") and parties are not legally compelled to cooperate or take any action.

The FWO considers that an "early intervention" approach is often successful in resolving workplace disputes and bringing about compliance. In 2015-16, the FWO conducted over 10,000 "early interventions", resulting in the backpayment of over $4.3 million in wages.[2] In the same period, the FWO finalised over 4,500 workplace disputes by mediation, resulting in the backpayment of over $7 million in wages.[3]

Investigation

Generally speaking, the FWO may decide to conduct an investigation where the available information suggests there is:

- exploitation of vulnerable workers;
- significant public interest or concern (e.g. gender discrimination);
- blatant disregard for the law; and/or
- an opportunity to provide an educative or deterrent effect.

The FWO has a range of investigation powers under the FW Act. Importantly, an inspector may enter a workplace without the permission of the employer or the occupant of the premises. While on the premises, the inspector may:

- inspect any work, process or object;
- require a person to tell them who has, or who can access, a record or document;
- require the person with access to a record or document to hand it over while the inspector is on the premises or within a specific timeframe;
- inspect and make copies of any record or document kept on the premises (hardcopy or on computer); and
- take samples of any goods or substances after informing the owner or other relevant person in charge of the goods or substances.

The exercise of these powers is subject to certain conditions and limitations. For example:

- an inspector must not use force to enter the workplace or premises;
- an inspector must show his or her identity card to the employer or the occupier of the premises;
- an inspector must only interview a person if the person consents;
- an inspector must reasonably believe that the FW Act applies to the work performed at the workplace, or that there are records at the premises that are relevant for compliance purposes; and
- an inspector must enter the workplace or premises during working hours, unless the inspector believes that it is necessary for compliance purposes to enter outside of working hours.

FWO inspectors also have powers to require people to produce documents and provide their name and address.

The FWO expects that, during an investigation, all parties will:

- always tell the truth;
- fully disclose all relevant matters from the outset of the investigation;
- provide relevant information as it comes to hand; and
- respond in a timely manner to requests.

At the completion of an investigation, the FWO will provide the employer with a letter setting out its findings. This letter will also set out any steps that the FWO would like the parties to take, and any steps that it may intend on taking.

[2] Fair Work Ombudsman, *Annual Report* 2015-16, at p. 18.

[3] Fair Work Ombudsman, *Annual Report* 2015-16, at p. 18.

Enforcement (FWO as Bad Cop)

If the FWO is not satisfied with the outcome of the investigation phase, or if the FWO is concerned that the employer may engage in further non-compliance in the future, the FWO can use one of its enforcement options, including prosecution for breach of the FW Act.

(a) Compliance Notices

A Compliance Notice is a written notice that legally requires a person to take certain steps to remedy a breach of workplace laws. Compliance Notices are typically issued where the FWO suspects that the employer will not voluntarily rectify an alleged breach.

In 2015–16, the FWO issued over 180 compliance notices.[4] Failure to comply can result in financial penalties of up to $27,000 for a company and $5,400 for an individual.

(b) Enforceable Undertakings

Enforceable undertakings are legally-binding documents that set out an employer's commitment to addressing contraventions and preventing future breaches. This is can include:

- back-payment of wages;
- training sessions for managers;
- independent wage audits; and
- announcements to media.

An employer will usually enter an enforceable undertaking under the threat of prosecution. In 2015–16, over 40 employers entered enforceable undertakings with the FWO.

(c) Prosecution

The FWO will generally only take legal action in the most serious instances of non-compliance. Cases typically involve deliberate exploitation of vulnerable workers, refusal of an employer to cooperate with the FWO, or a significant history of non-compliance. In 2015–16, the FWO initiated 50 civil penalty litigations.[5]

Tips for engaging with the FWO

If the FWO seeks to engage with your business in relation to a compliance issue, we recommend you consider the following tips:

- **Don't take it personally.** It is not uncommon for management to take offence when contact is made by the FWO with the organisation. By not reacting defensively, you will be better able to develop an appropriate strategy for managing the engagement.
- **Ask yourself: Why is the FWO interested in our organisation?** This will not only help you to resolve the immediate issue, but will also help you to understand what it was that resulted in the FWO's interest in the first place.
- **Ask yourself: What is the FWO asking us to do?** The FWO may be asking your organisation to take some action voluntarily, in which case there may be some flexibility about how and when these acts are done. However, if the FWO is exercising its powers under the FW Act, you need to be mindful of the consequence of any non-compliance.
- **Don't be afraid to play by the rules**. You should not be afraid to request that the FWO only exercises its powers in accordance with the FW Act. For example, you can request that an FWO inspector present his or her identity card before entering the workplace. At the same time, do not attempt to interfere with or prevent the lawful exercise of powers by the FWO. If you are not sure how the rules apply, you should consider seeking legal advice.
- **Keep the ball rolling.** Do not seek to resist or delay when you are required to deal with the FWO. You should develop a strategy early on for managing the engagement, involving planned and active compliance, rather than ad hoc appeasement.
- **Don't defend the indefensible.** If your organisation has issues with compliance, you should move to address these issues as soon as possible. It is clear from the way the FWO exercises its powers that organisations that assist the FWO and rectify any issues are dealt with more favourably in the long term. On the other hand, organisations that attempt to conceal and obfuscate are more likely to end up feeling the full force of the law.

[4] Fair Work Ombudsman, *Annual Report* 2015-16, at p. 21.

[5] Fair Work Ombudsman, *Annual Report* 2015-16, at p. 22.

Is that sexual harassment?

Everything you wanted to know about sexual harassment but were too afraid to ask

Erin Lynch, ASSOCIATE DIRECTOR

Employers focus a lot on sexual harassment. This is largely due to its prevalence and the impact it can have on an organisation. The Australian Human Rights Commission conducted a national survey in 2012 which found that, over the previous five year period, one in four women and one in six men were sexually harassed in the course of their employment.[1]

In terms of the impact on an organisation, sexual harassment can lead to:

- emotional and physical damage;
- a hostile working environment;
- criminal liability;
- vicarious liability; and
- public scrutiny.

Given the focus on sexual harassment and our knowledge about its impact, what are the questions we have always wanted to ask, but were too afraid?

Appearance, dress and personality, do they lead to sexual harassment?

It is not uncommon in discussions around allegations of sexual harassment to hear phrases such as "*did you see what he or she was wearing*" or "*but they never said they didn't like it*".

The case law tells us that while a person's appearance, dress, personality or conduct may be factors that are considered when allegations of sexual harassment arise, they will not ultimately determine whether a finding of

[1] Working without fear: Results of the 2012 sexual harassment national telephone survey, Australian Human Rights Commission, 2012

sexual harassment is made. What needs to be determined is whether the perpetrator's conduct amounted to sexual harassment. The legal elements of sexual harassment are not based on how the alleged harasser saw the situation or the factors that influenced his or her views.

For example, in *Collins v Smith (Human Rights)* [2015] VCAT 1029, an alleged change in the victim's behaviour, and a suggestion that by continuing to place herself in close proximity to the perpetrator (including requesting meetings with him after hours), the victim had herself engaged in behaviour that was not consistent with the conduct she alleged against the perpetrator, were addressed. While accepted as relevant considerations, it was noted that *"it is not appropriate to criticise the employee on the basis that she should have handled the sexual harassment better or should have stormed out of the room or escaped from the harasser earlier".*

Further, in *Trolan v WD Gelle Insurance and Finance Brokers Pty Ltd* [2014] NSWDC, the defendant's submissions sought to criticise the plaintiff's credit and focussed on what the Court considered to be irrelevant matters. These centred around the perpetrator's after hours visits to the complainant's home for business purposes and a suggestion that she was shown in photographs (taken at the home) to have been wearing a short dress well above knee height.

Can a customer or client sexually harass an employee?

If you walked into most workplaces today, you would find policies and procedures around discriminatory behaviour and sexual harassment by employees. But you are far less likely to find policies and procedures that address situations and potential liability where a customer or client acts in a discriminatory or harassing manner towards an organisation's employees.

Under the *Sex Discrimination Act 1984* (Cth) ("**SD Act**") it is unlawful for any person to sexually harass another in the course of seeking or receiving the provision of goods, services or facilities from another person. This creates an obligation on a customer or client to refrain from sexually harassing employees. Additionally, employers who "cause, instruct, induce, aid or permit" another person to do an act that is unlawful under the SD Act may be found liable for the conduct.

This means that if an employer has knowledge of sexually harassing behaviour by a customer or client that affects their employees and does not take all reasonable steps to stop that behaviour, then it may be "permitting" the person to engage in acts that are unlawful under the SD Act.

Personal relationships at work – how should they be treated?

In recent months we have seen a number of media headlines commenting on office romances, for example, when the Seven Network sought an urgent court order in the New South Wales Supreme Court to stop a former executive assistant disclosing details about her relationship with the company's CEO, and the QBE CEO forfeiting part of his STI bonus for delaying the disclosure of a personal relationship with an employee.

In the Seven Network proceedings, while much of the media attention (and also the comments on social media by the former executive assistant) centred around the office romance, there was no judicial comment about an employer's role relating to work colleagues conducting a consensual, personal relationship.

However, what the Fair Work Commission has recently said about an employer's ability to govern personal relationships at work is as follows:

"Employers cannot stop their employees forming romantic relationships. However, in certain circumstances, such relationships have the potential to create conflicts of interest. This is most obviously the case where a manager forms a romantic relationship with a subordinate especially where the manager directly supervises the subordinate. It is virtually impossible in such circumstances to avoid at the very least the perception that the manager will favour the subordinate with whom they are in a romantic relationship when it comes to issues such as performance appraisals, the allocation of work, and promotional opportunities".

Further:

"Employers have a reasonable expectation that employees will disclose any potential conflicts of interest, so that they can be appropriately managed".

So, how do organisations ensure that personal relationships are adequately addressed and do not negatively impact upon the organisation and its working relationships?

While unlikely to be adopted in Australia, in the United States, it is common for employers to require workers to disclose any intimate relationships with colleagues. This often involves entering into a written agreement commonly called a "love contract". This "love contract" usually contains:

- an acknowledgment that the relationship is consensual;
- what happens if the relationship ceases to be consensual;
- an acknowledgment that the employees are aware of the company's policies on sexual harassment and workplace ethics; and
- an understanding of the consequences of failure to follow those policies.

What is more commonplace in the Australian employment environment is a conflict of interest policy or something similar, which details occasions when personal relationships must be disclosed.

When considering a conflict of interest policy and addressing personal relationships at work, employers need to address questions such as:

- what constitutes an "office romance"?;
- when must an "office romance" be disclosed?;
- will the policy address "affairs"?;
- what confidentiality mechanisms will be in place?;
- what disciplinary action will be enforced (if any) for a failure to disclose?; and
- is there going to be a blanket rule against "office romance"?

It seems that consideration of personal relationships by employers will become more and more prevalent as survey data shows that almost 85% of 18 – 29 years old would engage in a romantic relationship with a co-worker.[2]

[2] Millennials More Likely to be Smitten with Superiors, Co-Workers, Workplace Options, 2012, *http://www.workplaceoptions.com/polls/millennials-more-likely-to-be-smitten-with-superiors-co-workers-2/*

Do I have an obligation to report?

Under section 316 of the *Crimes Act 1900* (NSW) ("**Crimes Act**") if a person has committed a "serious indictable offence", and another person, who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension, prosecution or conviction of the offender, fails without reasonable excuse to bring that information to the attention of a member of the police force or other appropriate authority, that other person is liable to imprisonment for up to two years.

A serious indictable offence is one for which a person may be imprisoned for five years or more, for example, sexual assault. When considering sexual harassment, consideration must therefore be given to whether the organisation needs to bring findings of sexual harassment (that amount to sexual assault) to the attention of the police or other appropriate authority.

What is key to determining this obligation is having "knowledge or belief" that the offence has been committed. Belief is not defined by the Crimes Act, but has been considered to be a state of mind which can be reached as the result of a mix of knowledge which an offender has come to possess, as well as suspicions and opinions which he or she has come to hold and conclusions which he or she has reached. It therefore follows that under section 316, what must be established is that the person actually came to hold the alleged belief. The obligation does not apply to mere suspicion of an offence.[3]

Key takeaways

1. A person's appearance, dress, personality or conduct are unlikely to be determining factors in a finding of sexual harassment.
2. A customer or client has an obligation to refrain from sexually harassing employees.
3. Employers who "cause, instruct, induce, aid or permit" another person (for example, a customer, client or employee) to do an act that is unlawful under the SD Act may be found liable for the conduct.
4. Organisations will need to consider how they intend to address personal relationships at work as the prevalence of office romances continues to grow.
5. When findings of sexual harassment are made, consider whether you may have an obligation to report the conduct to the police or another authority.

[3] *Wilson v Department of Public Prosecutions (NSW)* [2016] NSWSC 1458

Hook, line and sinker

Accessorial liability under the Fair Work regime

Bree Woodhouse, SENIOR ASSOCIATE

Regulatory agencies such as the Fair Work Ombudsman ("**FWO**") are increasingly interested in seeking to hold third parties accountable for their involvement in contraventions of the *Fair Work Act 2009* (Cth) (the "**FW Act**"). Over the past few years' prosecutions by the FWO have held various individuals accountable for their involvement in breaches of the FW Act. When reviewing non-compliance, the FWO has looked past the corporate veil to those who orchestrated the breaches, such as Directors. This article looks at other categories of individuals who may be at risk of being found to be accessories to breaches by an employer, including external and internal advisers.

In the 2015/2016 financial year the FWO sought orders against accessories in 92% of the cases filed in court. This is an increase from the prior year of only 72%.[1] It is now emerging that the FWO is willing to scrutinise both internal and external advisers as to their involvement in breaches of the FW Act, and to hold them accountable for their part in the breaches.

In an October 2016 media release, Natalie James, of the FWO, stated that *"We are prepared to use the accessorial liability provisions of the Fair Work Act, where it is in the public interest to hold anyone to account for their involvement in exploiting workers."*[2]

[1] Natalie James, Fair Work Ombudsman "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, 27 July 2016

[2] Fair Work Ombudsman media release "Penalties for "appalling" conduct in unlawfully deducting $130 000 from cleaners' wages" 24 October 2016. https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/october-2016/20161024-oz-staff-penalty

The degree of involvement

Under the FW Act, involvement in a contravention is treated in the same way as an actual contravention. The most common form of involvement relied on in enforcement proceedings is being "*... knowingly concerned in or party to the contravention".* Turning a blind eye to conduct constituting a contravention can amount to "wilful blindness", and thereby satisfy the knowledge aspect. Borrowing from the criminal law concept, "wilful blindness" can arise "*where 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 might learn the truth, he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring*".[3]

External advisers

External advisers such as accountants, business consultants and the "head office" of franchised companies are being closely watched by the FWO as to the degree of involvement that these third parties have in any non-compliance. If these external advisers have been 'knowingly concerned in or party to the contravention' or alternatively have engaged in 'wilful blindness' regarding their client's obligations, the FWO may take action against these third-party businesses.

In a recent case the Federal Circuit Court of Australia found that an accountancy firm was liable as an accessory in its client's underpayment of staff. In *Fair Work Ombudsman v Blue Impression Pty Ltd* the Court found that the Victorian accountancy firm Ezy Accounting 123 Pty Ltd ("**Ezy**") had "*deliberately shut its eyes*" to breaches by its client when it provided bookkeeping services to its client Blue Impression.

The alleged underpayment by the employer (Blue Impression), which ran a Japanese fast-food outlet in Melbourne, related to the failure to pay the correct minimum hourly rate and related loadings and allowances in breach of the *Fast Food Industry Award 2010*. Ezy claimed that it was no more than a service provider and was dependent on the information provided to it by its client. It claimed it had no knowledge of the specific circumstances of any of the employees, their duties, their hours of work, the applicable penalty rates and loadings or the relevant modern award. The bookkeeper at Ezy tasked with providing the payroll and bookkeeping services to Blue Impression gave evidence that her role was limited to purely "data entry" and that she "*did not think twice"* about the information regarding hourly rates provided to her. When providing evidence to the court the bookkeeper stated: "*It was not my business to know whether or not the rates complied with any award. That was a matter for the employer*".

The Court found that EZY "*had at their fingertips all the necessary information that confirmed the failure to meet the Award obligations by the first respondent and nonetheless persisted with the maintenance of its (payroll) system with the inevitable result that the Award breaches occurred."*

Ezy faces penalties of up to $51,000 per breach for seven breaches of the FW Act, with the hearing regarding this penalty to be heard at a later date.

A further example of external third party liability is the case of *Fair Work Ombudsman v Yogurberry World Square Pty Ltd*. This is the first case in which a master franchisor has been found liable for the contraventions of its franchisees. When reviewing the matter the Court found widespread underpayments and imposed fines of $146,000 on the companies in the Yogurberry group, including the master franchisor and CL Group, the Yogurberry payroll company. The court found that the companies within the group had "*knowledge of, and participated in, establishing rates of pay, making payment of wages, determining hours of work and dealing with employment related matters*", and therefore had the requisite knowledge of the contraventions.

[3] *Giorgianni v R* (1985) 156 CLR 473.

Internal advisers

The category of internal advisers extends to those individuals who have knowledge of, and make decisions regarding, the working conditions of employees. By virtue of their positions, managers and others senior personnel have the authority to influence compliance regarding working conditions.

In *Fair Work Ombudsman v Crystal Carwash Café Pty Ltd* both the director and a manager of the company were found to be involved in the contraventions on the basis that they were responsible for setting the terms and conditions of employment, including wages and working hours, and were involved in breaching the obligation to pay minimum wages for the shifts employees worked. In addition to the back pay due to the employees, the company was fined $70,000 and the director and manager were each fined $10,000 for their role in the breaches.

In the cleaning services industry, in *Fair Work Ombudsman v Jooine (Investment) Pty Ltd* the Court considered how the company's director (who was also the company's internal workplace adviser) was knowingly involved in breaching the FW Act through the use of sham contracting. The matter involved the underpayment of a foreign worker who was engaged by the company in a sham contracting arrangement. Both the company and its director/internal workplace adviser were found liable for the contravention. The Court commented that the director/adviser who had prepared the contracting documents did so "*with a deliberate intention to circumvent the legislative framework that has been put in place to protect vulnerable individuals from exploitation.*" The Court further foreshadowed the need to deter advisers (internal and external) from assisting businesses evade their obligations under the FW Act: *"The deterrent should also extend to the advisors who have facilitated the orchestration of these scams, to prevent their further proliferation of such advice and facilitation."*

A Human Resources Manager was found to have contravened the FW Act in *Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Ors.* This was based on the HR Manager's involvement in setting up sham contractor arrangements. The HR Manager was initially involved in employing the employees and

preparing their contracts of employment. At a later point in time the HR Manager terminated the contracts of employment and prepared "Consultant Agreements" to replace the contracts. The HR Manager did this on the instructions of the employer. The "Consultant Agreements" were to perform the same duties in the same positions, with the only substantive difference being that the individuals would be paid commission only rather than wages. The Court found that the knowledge of the terms of the employment agreement and the terms of the consultant agreement was sufficient for the HR Manager to be "knowingly concerned in" the contravention, and cautioned HR professionals with regards to following directions from "higher up" as not being a defence to breaches of the FW Act. In this context, the Court observed that "*as Human Resources Manager, he should have been aware of, and at least attempted to give advice on, Centennial's obligations under the WRA*".

Key takeaways

1. Both internal and external advisers need to be mindful of the accuracy of information provided to them.
2. Inquiries should be made to confirm compliance with minimum statutory obligations.
3. Where the information gives rise to doubts, a strategy of deliberately refraining from inquiring presents significant risks.

Events

Key Breakfast Briefing

In May PCS hosted its sixth annual Key Breakfast Briefing.

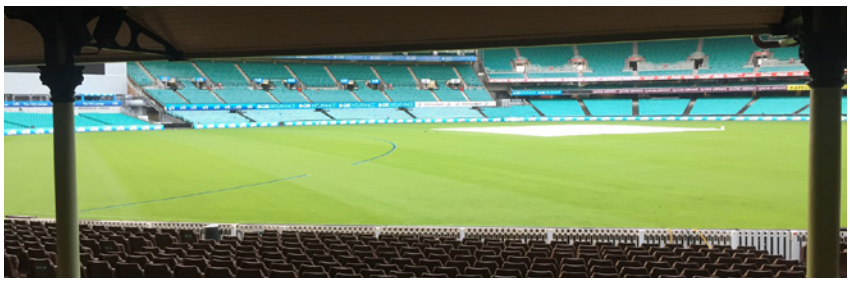
Joydeep Hor, Founder and Managing Principal addressed attendees on his pioneering methodology of the "People Management Quadrants", encouraging employers to adopt a holistic approach that allows them to address all people issues in a strategic way, while still maintaining agility.

We were also delighted to announce our partnership with Packemin Productions whose Neil Gooding joined PCS Ambassador Alicia Quirk for an enthusiastic panel session facilitated by Kathryn Dent.

Events

PCS IN HOUSE COUNSEL BREAKFAST

PCS hosted an exclusive breakfast at the SCG where Joydeep Hor discussed "The Top 5 HR Headaches for In-House Counsel". His address centered around recognising the critical responsibility PCS has to keep our "in-house lawyer" clients acutely aware of the work that we are doing, and also alerting them to potential HR or people-related risks.



PCS FAMILY DAY

The PCS team is absolutely delighted at the outstanding start the Manly Marlins Rugby team (who are sponsored by PCS) have had to the 2017 Shute Shield season (having won their first nine games of the season). We were out in force supporting the team at the PCS Family Day.

Proud Sponsors

The PCS team is very pleased to be sponsoring Packemin Productions as they bring some of the world's best-loved musicals to Sydney audiences. We look forward to hosting clients and friends at one of the upcoming performances of Miss Saigon at Riverside Theatre Parramatta.

packemin PRODUCTIONS

PCourseS – Online Education

PCS has developed a range of online training programs that have been carefully designed to discharge risk management obligations but also to give insights into best practice in various areas of people management. The programs have each been validated by PCS Founder and Managing Principal (and one of Australia's leading employment lawyers) Joydeep Hor who has incorporated his significant experience in conducting these workshops in person across Australia and around the world.

Workplace Law Fundamentals

- Understand the evolution of Australia's workplace relations systems
- What are awards, enterprise agreements?
- What claims can be brought in employment law?

Conducting Workplace Investigations

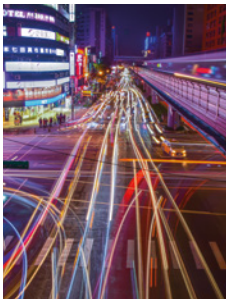
- Identify the circumstances in which a workplace investigation should be instigated and the requirements of each stage of the process
- Identify potential issues that may be encountered
- Understand best practice methods of dealing with issues

Behaviour and Culture for Managers and HR Practitioners

- Provides guidance in relation to the often talked about topics of bullying, discrimination and sexual harassment
- Understand the meanings of key concepts including "reasonable management action" and "unlawful"
- Understand the role of the Fair Work Commission and Australian Human Rights Commission

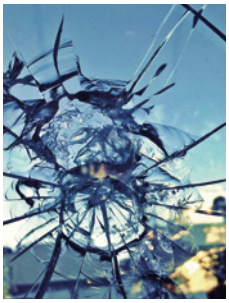
Risk Management in Termination of Employment

- Provides an overview of the considerations surrounding different methods of termination
- Identify the circumstances in which an organisation might consider termination of employment
- Identify how legal risks associated with termination can be managed



Performance Management

- Understanding holistic performance management concepts
- Define, align and communicate your organisation's approach to performance management
- Identify and manage risks associated with performance management within a disciplinary context



Work Health and Safety

- Guidance on the key basic duties and obligations under health and safety laws for businesses, officers and workers
- Identify when to consult with other businesses and workers, and when to report incidents
- Best practice in managing psychological and emotional health and wellbeing

Each of the PCourseS is for individual completion with relevant login details to be provided after the product has been purchased through our dedicated online portal. Upon completion of a relevant course, a completion certificate can be printed. Full pricing details are available at **peopleculture.com.au/PCourseS**. Terms and conditions apply.

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