

THE FRANCHISE REVIEW

Foodco's
Natalie Brennan:
Woman of the Year 2016

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How to play fair
under the new
unfair contract laws



KEEPING YOUR FRANCHISE ON
THE RIGHT SIDE OF THE LAW:
WHAT YOU NEED TO KNOW



The Fair Work Ombudsman is pursuing directors, HR managers, contractors and franchisors

BY LISA ANAF, PARTNER – WORKPLACE RELATIONS, EMPLOYMENT AND SAFETY, MILLS OAKLEY

In a speech to a New South Wales Australian Human Resources Institute network, the Fair Work Ombudsman (FWO), Natalie James, spoke candidly about the Ombudsman's 'active and evolving approach to accessorial liability' for breaches of workplace laws¹.

In accordance with section 550 of the *Fair Work Act 2009* (Cth), individuals and companies can be found responsible in the breaches of others if they are also 'involved' in the contravention (or put another way, if they act as an accessory to a contravention).

Involvement in a contravention can happen in a number of ways, such as by:

- aiding, abetting, counselling, procuring or inducing a contravention
- being in any way knowingly concerned in, or party to, the contravention
- conspiring with others to effect the contravention.

Although the FWO has traditionally used accessorial liability as a useful backup in situations where an employer is thought to be at risk of going under and leaving employee entitlements unpaid, the FWO has stepped up its use of the provisions and, in the last financial year, it has sought orders against accessories in 92 per cent of court proceedings. In 2015–2016, this included accountants and human resources managers.

In deciding whether to issue proceedings directly against an accessory, James said that the FWO looks for what she called 'classic criteria', being the involvement of vulnerable employees, a deliberate attempt to 'exploit the legal framework to avoid paying employees their entitlements', and a history of non-compliance.



Lisa Anaf, Partner – Workplace Relations, Employment and Safety, Mills Oakley

James spoke of situations where the FWO has:

- successfully obtained orders for penalties and underpayments in excess of \$70,000 directly from the former director of a company that had been wound up
- issued proceedings against an accounting firm that processed wage payments for a fast-food restaurant in circumstances where the FWO alleges that the firm had 'explicit knowledge that those payments were well below the award rate'
- issued proceedings against a frozen yoghurt outlet for underpayments, and joined other accessories in the franchise network, including the head company master franchisor, the payroll company and a manager of the head company for their alleged involvement in the underpayment.

Since commencing its proceedings against the frozen yoghurt outlet, for the first time, the FWO was successful in securing



substantial penalties against the master franchisor for its involvement in the exploitative practices of one of its associated entities. The reasons given for extending the accessorial liability to include the master franchisor was that they were said to have had 'knowledge of, and participated in, establishing rates of pay, making payment of wages, determining hours of work and dealing with employment-related matters'. It was also intended to have a deterrent effect.

It is also important to remember that one of the Turnbull Government's election promises was to commit to increase penalties for serious contraventions of workplace laws, expand existing laws by capturing franchisors and parent companies who fail to deal with exploitation by their franchisees, and strengthen the FWO's powers so that it can compel individuals to produce information and answer questions.

If those commitments find their way into law (and it is expected that they will), and assuming that the FWO continues down its path of joining accessories involved in contraventions to its proceedings, then individuals who play a role in setting and overseeing employee terms and conditions within businesses should heed James's warning: '...there has never been a better time to ensure [that] you are giving holistic and sound advice about compliance with workplace laws'.

The launch of the Anonymous Report tool

To assist the FWO in its endeavours to ensure that employers cannot outsource their non-compliance or hide from their obligations, in April 2016, the FWO also launched its online Anonymous Report tool. This portal enables members of the community, whether they be workers, consumers, concerned citizens, businesses or competitor businesses, to alert them of any potential non-compliance on an anonymous basis.

In the FWO's annual 2015–2016 report, it was confirmed that in the first three months, the FWO received 1713 anonymous complaints. Of those complaints, 77 per cent raised concerns about rates of pay – predominantly underpayment of hourly rates, non-payment of wages and penalty rates.

The data is then used to identify trends and patterns, which, in turn, generates leads for education, compliance and presumably targeted campaigns.

So, how do individuals directly working in a franchise business minimise the risk to them personally?

The FWO is sending a clear signal to all levels of business (and in particular, employees) that just because they are not the director or party to a franchise arrangement, does not mean they are immune from prosecution.

It has therefore never been more important for legal counsel, HR managers, advisors and franchisees to satisfy themselves that their business is meeting its minimum legal obligations to employees. This may mean conducting semi-regular audits of pay, conditions and record-keeping obligations both of your business and of any third-party contractor you may engage. Such audits are important, particularly in industries that engage vulnerable and low-paid employees, where the difference between compliance and non-compliance may be as innocent as a delay in passing on an increase to the minimum wage.

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If an audit identifies underpayments or other irregularities, then of course the next step for those individuals would be to immediately take steps to remedy that situation, and ensure that the business is compliant in the future.

If you are a franchisor, or other advisor or service provider, your situation is somewhat more complicated and may depend on what knowledge you have about the business in question. What is clear, however, is that franchisors and other service providers cannot turn a blind eye if they become aware of a breach in their network or their clients' business. ● ● ●

Whatever your specific situation, if you would like any advice or general assistance (or even assistance in setting up an appropriate internal audit process), please contact Lisa Anaf, Partner – Workplace Relations, Employment and Safety, for further assistance on 03 9605 0857.

1. 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, Wednesday, 27 July 2016.