

# ADVISOR DAY 2020

HR DISASTERS

| HOW CAN ADVISORS HELP?

Presented by

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LAWYERS

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My client has a HR or employment question – how do I help?

DON'T!!!!

# Why do HR/employment issues often end in disasters?

- ever changing legislation
- complication legislation
- complicated system of Awards governing employment
- new court decision updating and amending the workplace landscape
- improper advice

# Common HR issues faced by advisors?

- Compliance with current laws in relation to workplaces and employees
- Restructuring and management changes, including redundancy
- Underpayment of employees
- Drafting of employment and business contracts

# What are the consequences of giving incorrect workplace advice

- professional negligence claims;
  - \* loss of money
  - \* loss of time
  - \* loss of client
  - \* impact to reputation
- accessorial liability claims
  - \* incur individual penalty up to \$12,300.00

# Importance of Trusted Business Advisor

- external advisor one of most trusted person utilised by a business
- generally, first person to come to with question, even if not within field of expertise

*“The GP is often the primary source of contact. I see the accountant in the same way. They are a primary source of contact and a trusted advisor and people go to them for problem solving on issues from the law to employment regulations. Even if they are not the person who gives the final answer they often give guidance on where the small business owner can go next.”*





# Accessorial Liability - Implications for Advisors

Advisors are being held liable for their client's breaches more so than ever before.

*“There must be a clear consequence 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.”*

- Fair Work Ombudsman 2016.

# What is accessorial liability?

- when an employer breaches the:-

- Fair Work Act,
- National Employment Standards; or
- the Modern Slavery Act,

a director or manager of that business and professional advisors to the business, can be held personally liable for the breach as an “accessory”.

- That is -.

# The Law

## **FAIR WORK ACT 2009 - SECT 550**

### ***Involvement in contravention treated in same way as actual contravention***

(1) A person who is involved in a contravention of a **civil remedy provision** is taken to have contravened that provision.

*Note:* If a person (the involved person) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).

(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.

# What is a civil remedy provision?

Some of the civil remedy provisions, under s 539, include:

- obligations to comply with the NES, modern awards and enterprise agreements;
- the general protection, or adverse action, provisions;
- the unfair dismissal provisions;
- the sham contracting provision;
- rights of entry provisions;
- industrial action provisions;
- payment of minimum wages provisions;
- workers being bullied at work provisions; and
- corona virus economic response provisions.

Breach of civil penalty - personal penalty of up to \$12,600.00

# What is being “involved”?

Advisor must have:

- knowledge - some or all of the facts; and
- either contributed to, or failed to, prevent the breach from occurring.

“Knowledge”

Courts have held that the advisor must have actual knowledge:

- directly knows about the facts of the breach; or
- “implied knowledge” by:
  - suspicion of breach but deliberately not ask questions
  - actual knowledge of a system of non-compliance.

# Internal and External Advisors

## Internal Advisors

- employees who give advise to their employer are also liable for the breach when had “knowledge” of breach
- following employer instructions in breaching will not be a defence

## External Advisors

- courts are actively pursuing external advisors
- following instructions of client will also not be a defence.

# Limitations of Accessorial Liability

- Only applies to advice given to workplace laws which result in breaches of a civil remedy provision
- You must have been involved in intentionally, by your conduct or lack of, and have knowledge of the contravention at the time of the breach
- You must be aware that the conduct is a breach of a workplace entitlement – be careful!!

# What should I do?

- Speak with a lawyer before providing advise - however casual
- If you have any questions about client conduct - ask
- Only work within your professional capabilities
- Have open and frank discussions with your clients regarding the need for external advice - don't try to be the jack of all trades when in doing so can result in disastrous outcomes for you, your client and your business.
- Be aware of general FWA and employee entitlements



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