

ACCESSORIAL LIABILITY FOR FAIR WORK ACT BREACHES

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The Fair Work Act has provisions in respect of holding persons in an employer's organisation or outside advisors personally liable for breach of the Fair Work Act, if they were aware of the contravention.

Accessorial liability extends to such persons as company directors, human resource managers, other managers and accountants. The persons that can be held liable may not just be limited to those examples.

Persons in management or advising an employer need to be aware of the potential liability under the Fair Work Act as accessorial liability may be "sheeted home" to anyone involved in a contravention of the Fair Work Act.

For the accessorial liability provisions to be triggered, a person must be involved in a Fair Work Act contravention. To be involved in any such contravention, the person must have intentionally participated in the contravention. This requires actual knowledge of the essential matters involved in the contravention. It is conceivable that actual knowledge may be inferred if that person "turned a blind eye" to the contravention. Accessorial liability may also be activated even if the person involved did not appreciate that there was a breach of the Fair Work Act. It may also not be necessary to prove actual knowledge of each instance of non-compliance if the person had actual knowledge of the "system" of non-compliance. Accessorial liability will not be "sheeted home" if the person only acquired knowledge of non-compliance after the fact.

Accordingly, accessorial liability may be "sheeted home" if a person deliberately abstains from asking questions or making enquiries if they believe there has been a breach or potential breach of the Fair Work Act. In addition, actual knowledge may be inferred from a combination of a person's knowledge of any suspicious circumstances and the decision by that person not to make enquiries to alleviate any such suspicions. However, not every deliberate failure to make enquiries will support an inference of actual knowledge.

Of course, each case will depend upon its own facts and circumstances.

To avoid accessorial liability under the Fair Work Act, company directors, internal human resources managers/officers and any external advisors should:-

- Be aware of obligations arising under the Fair Work Act and Regulations including the application of any relevant Modern Award, Enterprise Agreement and the National Employment Standards. Ignorance of the law will not be a defence.
- Make enquiries to confirm compliance with the Fair Work Act and Regulations.
- Not "turn a blind eye" to possible contraventions of the Fair Work Act and Regulations etc.
- If the person is aware of any potential breaches, consider seeking advice from a person higher in the management level of the employer organisation or appropriate external advisor/s.

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