

# *Update from the Fair Work Ombudsman: Key insights for employers on compliance*

**Association of Corporate Counsel  
Melbourne**

**Date: 14 March 2019**

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Work Ombudsman**

# Overview

1. Who is the Fair Work Ombudsman?
2. What are the functions of the FWO?
3. Take home messages from recent cases
  - Accessorial liability
  - Gig economy
4. What can you do as in house Counsel:  
compliance health check

# 1. Who is the Fair Work Ombudsman?

- An independent statutory agency created by the *Fair Work Act 2009*
- Sandra Parker is the Fair Work Ombudsman (15 July 2018)
- In all capital cities and 18 regional locations
- Promotes harmonious, productive and cooperative workplace relations
- Single point of contact for reliable and timely information about Australia's workplace relations system
- Assesses complaints of suspected breaches of workplace law and conducts litigation to enforce workplace laws and promote a culture of compliance



## **FWO Legal Group**

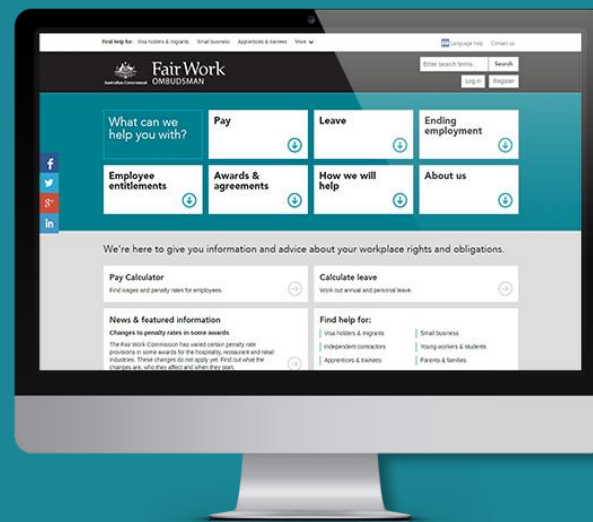
- **Janine Dennis - Chief Counsel (A/g) for the Fair Work Ombudsman**
- **Leads a team of approx. 55 lawyers**
- **Lawyers based in Sydney, Melbourne, Brisbane and Adelaide**

## 2. What are the functions of the FWO?

### ✓ Information and advice

- Website

- [www.fairwork.gov.au](http://www.fairwork.gov.au)
- My Account
- Online tools and apps
- Online learning centre
- Library
- Anonymous tip off



- Fair Work InfoLine and Small Business HelpLine

## ✓ Education and dispute resolution



**More than 9 in every 10**

**FWO disputes are resolved without  
using formal compliance action  
(let alone enforcement tools)**

## ✓ Compliance outcomes / Enforcement tools

Infringement  
Notices

Compliance  
Notices

Letter of  
Caution

Enforceable  
Undertakings

Small Claims

Litigation

## Litigation

### When/Why we litigate:

- Reasonable Prospects
- Public Interest

### Litigation Outcomes:

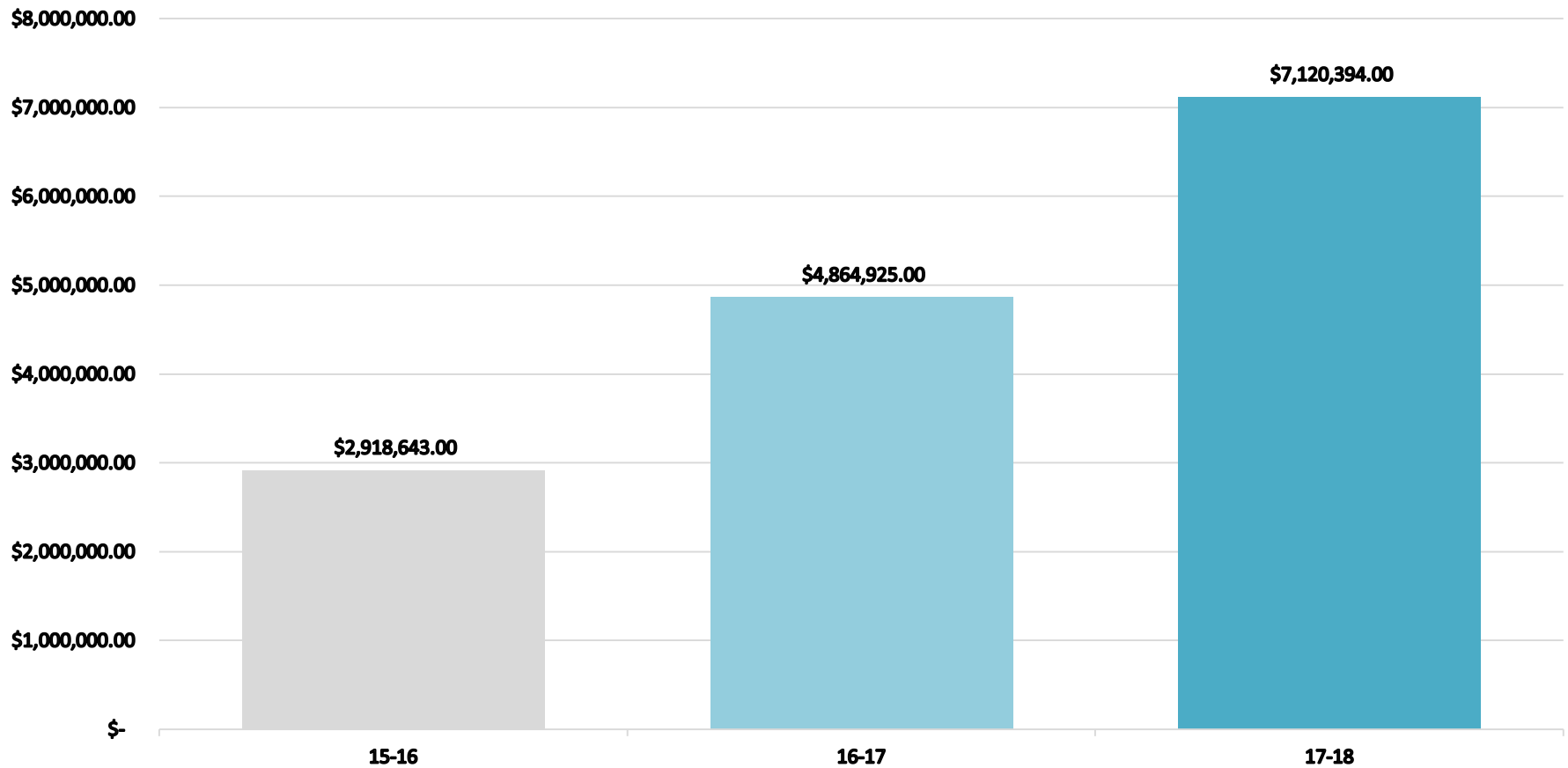
- Rectification of underpayments
- Compensation
- Penalties
- Novel Orders (freezing orders, training, audits, notification or workplace notices)





# Litigation Overview: 2017/2018

Total penalties by financial year



## 3. Recent cases – accessorial liability

### *You don't have to be the employer to be liable*

Involvement in a contravention is treated in the same way as an actual contravention

#### s.550 of the *Fair Work Act 2009*

550 (2) A person is **involved in** a contravention ... 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.



**ACCOUNTANTS**



**DIRECTORS**



**HR ADVISORS**



**CONSULTANTS**



**EMPLOYERS**



**FRANCHISEES**



**FRANCHISORS**



**LAWYERS**



**MANAGERS**

## Accessories can be liable for backpay

### *FWO v Step Ahead Security P/L & Anor* [2016] FCCA 1482

**'Calculating'  
boss pays  
high penalty**

“  
...Both Step Ahead Security and Mr Jennings have demonstrated **calculated & deliberate conduct** which plainly amounts to a blatant disregard for Australia's workplace laws...Mr Jennings was the controlling mind of Step Ahead Security Services.  
”

Judge Jarrett  
Federal Circuit Court  
Brisbane

Directors Beware - Australian Fair Work Ombudsman unafraid to pierce the corporate veil

Step Ahead Security Services gets record \$308,000 penalty

**No more hiding behind the corporate veil**

31 October 2016

In a recent precedent setting case Judge Jarrett of the Federal Circuit Court ordered Owen Jennings, the sole director and controlling mind of Step Ahead Security to personally back-pay eight employees who were underpaid by his security guard company.

## Ignoring the warning signs

### ✓ *EZY Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134

- Accounting firm liable as accessory to underpayment contraventions of client
- Underpayment contraventions for one employee, admitted by employer.
- Prior to the contraventions occurring an audit findings letter was sent to EZY Accounting 123 regarding its client's previous non-compliance.
- EZY Accounting 123 Accounting firm, EZY Accounting 123, held at first instance and on appeal to be involved in the underpayment contraventions
- Knowledge of a system of non-compliance

*"...we don't question the pay rate ... we don't raise questions. We just process what we are given."*

## “Following instructions” not a valid defence

- *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown and Ors [2017] FCA 1301.*
- Underpayment of over \$580,000 to 85 employees.
- Penalties:
  - Employer - \$301,920
  - Sole director/shareholder - \$54,672
  - HR Manager - \$21,760
  - Store Manager - \$18,496

*“... There is nothing wrong with sending the message that an employee should indeed resign if that is the only alternative to continuing to participate knowingly in illegal activity, ideally coupled with reporting the conduct, in a case such as this, to the FWO.”*



## Take home messages from recent accessorial liability cases

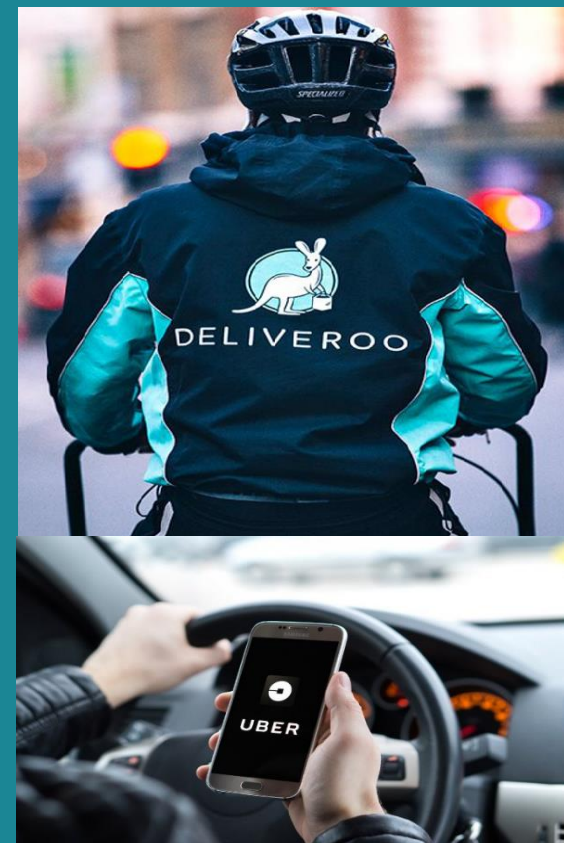
- ✓ Don't turn a blind eye
- ✓ Accessories can be liable for backpay
- ✓ "Following instructions" is not a valid defence

## Things to consider to reduce your risk

- ✓ Raise any concerns you have
- ✓ Seek advice from the FWO
- ✓ Implement changes quickly to ensure compliance
- ✓ Conduct a review of your compliance workplace health
- ✓ Stay up to date and informed of changes in legislation and modern awards
- ✓ Provide your company with informed advice

## 3. Recent cases - Gig Economy

- Derived from rise of casual work
- Advancements in technology and innovative ways of doing business
- Peer-to-peer arrangements where companies create online platforms which pair workers with jobs. E.g. Airtasker, Uber and Deliveroo



## FWO v Foodora Australia Pty Ltd



## Gig economy: The FWO's interest

- **Concerned with sham contracting only:**
  - **Section 357 – Misrepresenting employment as independent contracting arrangement**
  - **Section 358 – Dismissing to engage as independent contractor**
  - **Section 359 – Misrepresentation to engage as independent contractor**
- **Sham contracting (knowing or reckless acts) vs misclassification**

# Compliance Health Check

- ✓ **What should you consider?:**
  - ✓ **Are you in compliance with all obligations under the *Fair Work Act 2009* and *Fair Work Regulations 2009* (eg. National Employment Standards and record keeping)?**
  - ✓ **Are you in compliance with all obligations under the relevant Modern Award or Enterprise Agreement?**
  - ✓ **Is your organisation going through any structural changes that might attract additional obligations under workplace laws?**
  - ✓ **Does your organisation possess the required knowledge internally to ensure compliance with workplace laws?**

## Gig economy: Employer considerations

- **Structure of the company/model employed:**
  - Franchise
  - Outsourcing of labour
- **Important to know if worker is a contractor or employee**

• <http://www.fairwork.gov.au>



**Pay slip**

Date of payment: <insert date>  
Pay period: <insert date> to <insert date>

Employer's name: <insert>  
ABN: <insert>  
Employer's name: <insert>  
Employment status: \* <insert status e.g. full-time, part-time, casual>  
Name of <Award/Agreement>: \* <insert>  
Classification under the <Award/Agreement>: \* <insert>  
Hourly rate: \$00.00 Annual Salary: \$00,000  
Bank details: \* <insert employee's bank details>  
Annual leave entitlement: <xx days/hrs> as at <insert last date of current pay period>  
Personal/carer's leave entitlement: <xx days/hrs> as at <insert last day of current pay period>  
You should modify this table according to your employee's entitlements. You can add extra lines if required.

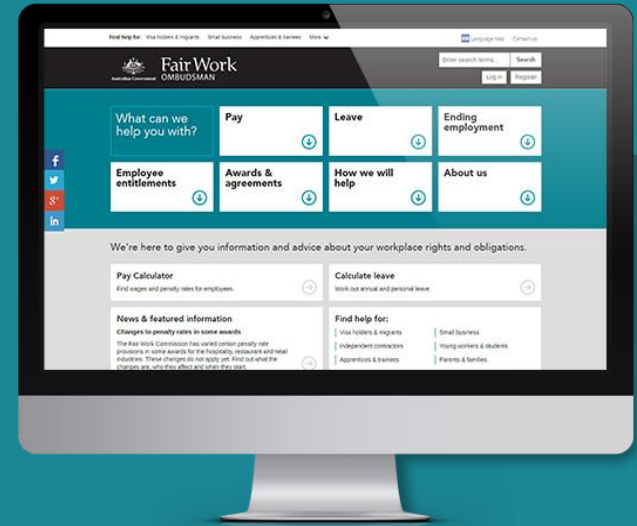
Entitlements	Unit	Rate	Total
Wages for ordinary hours worked	00 hours	\$00.00	\$00.00
<insert any leave taken during the pay period>	00 hours*	\$00.00*	\$00.00
TOTAL ORDINARY HOURS = <xx> hours any leave taken should also be included here			
<insert name of entitlement>	00 hours*	\$00.00*	\$00.00
<insert name of entitlement>	00 hours*	\$00.00*	\$00.00
Gross payment			\$00.00

Entitlements can include loadings, penalty rates, shiftwork allowances, overtime, allowances, incentive based payments, termination entitlements and any other separately identifiable amount.

Deductions	Amount
Taxation	\$00.00
<insert any other deductions> Each deduction needs to be listed separately. You can add extra lines to this table if required.	\$00.00
Total deductions	\$00.00
Net payment	\$00.00

Employer superannuation contribution – <insert superannuation contribution>  
<insert account/fund name for name and number of fund>  
Contribution \$00.00

Note: Pay slips must be issued to employees within one working day of the day they are paid.  
\* The Fair Work Ombudsman acknowledges that the inclusion of information marked with an asterisk (\*) is not a requirement under the Fair Work Regulations 2009, effective 1 July 2009. This template is provided as a best practice model.





# Questions





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