Australian
Labour & Employment

Message from the Editor

by Adam Salter, Sydney Office

In this edition of the *Update*, we report on the recent filing of proceedings against Foodora, a food delivery business, for sham contracting arrangements with its delivery drivers. We then discuss the Fair Work Ombudsman's ("FWO") guide for franchisors regarding reasonable steps that can be taken to ensure that franchisees comply with workplace laws. We also outline the key provisions of the recently passed *Modern Slavery Act 2018* (NSW). Finally, we outline the recent decision of *Fair Work Ombudsman v Hu (No 2)* FCA [2018] 1034.

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In the Pipeline—Highlighting Changes of Interest to Employers in Australia

Fair Work Ombudsman Takes Foodora to Court over Sham Contracting

On 12 June 2018, the FWO filed proceedings against Foodora, a food delivery business, alleging sham contracting arrangements were used to engage its delivery drivers. The FWO claimed that Foodora drivers have been incorrectly classified as independent contractors when they are in fact employees of Foodora.

Foodora delivery drivers are engaged under an independent contractor arrangement and are required to sign an "Independent Contractor Agreement" when they commence work. However, the FWO is of the view that the delivery drivers are employees for the following reasons:

- the high level of control exercised by Foodora over its workers' hours, location and manner of work;
- the requirement to wear a Foodora-branded shirt and use Foodora-branded food storage boxes and/or bike racks;
- drivers receiving fixed hourly rates and/or amounts per delivery, and workers not being able to negotiate their rates of pay; and
- the workers not genuinely conducting their own business as they did not advertise or promote their availability to perform delivery duties and they did not have their own customer base, business premise or insurance.

If the FWO is successful in the proceedings, then Foodora may be liable to pay penalties and compensation for various breaches of the *Fair Work Act 2009* (Cth), including failure to pay superannuation, underpayment of wages and sham contracting. The breaches carry penalties of up to $54,000 per contravention.

These proceedings are likely to have significant consequences for employees in the gig economy as it seeks to test the legal boundaries of employment that is established through a mobile platform. Other food delivery businesses should be cautious about the way in which they classify employees to ensure that the classification accurately reflects the working relationship.

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FWO Releases Guide on "Reasonable Steps" for Franchisors to Ensure Compliance with Workplace Laws

The FWO has released a "Guide to Promoting Compliance in Your Franchise Network" ("Reasonable Steps Guide") to assist franchisors to comply with the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth) ("Protecting Vulnerable Workers Bill") that was passed on 15 September 2017. These changes were brought into effect on 27 October 2017. Since that date, there have been no prosecutions against franchisors for contraventions under the new provisions.

Under the Protecting Vulnerable Workers Bill, responsible franchisors can be found liable for contraventions of the FW Act by franchisees in their franchise network. A franchisor will not be liable for an underpayment where the franchisor has taken "reasonable steps" to prevent the contravention from occurring. The legislation does not provide any guidance about what is considered to be a reasonable step.

The Reasonable Steps Guide provides guidance to franchisors about the types of processes they can implement within their franchise network to improve compliance with workplace laws. What is likely to be considered reasonable by the Fair Work Commission ("Commission") will depend on the business itself and the size and resources of the organisation.

The FWO encourages franchisors to develop a culture of compliance by taking the following preliminary steps:

- encouraging prospective franchisees to spend time with existing franchisees to develop an understanding of their workplace obligations prior to joining the franchise network;
- encouraging prospective franchisees to conduct accurate and extensive due diligence of the operating costs of the franchise, including labour costs;
- ensuring that compliance with workplace law is a term of the franchise agreement and including information regarding monitoring activities such as audits, and highlighting the potential consequences for failure to comply;
- requiring franchisees to acknowledge in writing that they will comply with workplace laws; and
- ensuring that the franchise business model is realistic, and providing disclosure documents that accurately take into account the cost of employing adequate numbers of staff.

The FWO also emphasises the importance of educating franchisees about compliance with workplace laws, for example by offering induction training to franchisees, assisting franchisees to access advice about workplace laws, communicating to franchisees about any relevant changes to workplace laws, establishing channels of communication between the franchisor and employees, and providing franchisees with resources and information so they can improve their workplace practices.

The third aspect that the FWO encourages franchisors to focus on is monitoring compliance within its network and taking action where appropriate. This includes both encouraging franchisees to conduct self-audits of their business and conducting annual audits of the entire franchise network to ensure compliance. Franchisors could also include a term in the franchise agreement that requires franchisees to self-audit their businesses.
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NSW Passes the First Australian Anti-Slavery Bill

On 23 June 2018, the NSW Parliament passed the *Modern Slavery Act 2018* (NSW) ("Act"). The Act defines "modern slavery" to be any conduct involving the use of any form of slavery, servitude or forced labour to exploit children or other persons taking place in the supply chains of government agencies or non-government agencies.

The Act provides for the appointment of an Anti-Slavery Commissioner who has a number of functions, including:

- advocating for, and promoting, action to combat modern slavery and identifying and providing assistance to victims of modern slavery;
- making recommendations and providing information, advice, education and training about action to prevent, detect, investigate and prosecute offences involving modern slavery;
- cooperating with or working jointly with government and non-government agencies to combat modern slavery;
- monitoring the effectiveness of legislation and governmental policies in combating modern slavery; and
- raising community awareness of modern slavery.

Under the Act, companies that have a turnover of more than $50 million must prepare a modern slavery statement in accordance with the regulations. The statement must contain information regarding the organisation's structure, business and supply chains; its due diligence processes in relation to modern slavery in its business; the parts of its business and supply chains where there is a risk of modern slavery taking place; and the steps taken to monitor that risk and the training about modern slavery available to its employees.

The Act also allows for victims of modern slavery to access compensation under the *Victims Rights and Support Act 2013* (NSW).
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Hot off the Bench—Decisions of Interest from the Australian Courts

FWO Fails to Show that Company Director Had Knowledge of Unlawful Work Conditions

Fair Work Ombudsman v Hu (No 2) **FCA [2018] 1034**

Factual Background. Ms Hu was the sole director and shareholder of labour-hire agency HRS Country Ptd Ltd. HRS Country had entered into a written agreement with Marland Mushrooms Qld Pty Ltd to supply labourers to pick mushrooms. HRS Country subsequently entered into numerous written and oral agreements with employees that required employees to pick mushrooms at a piecework rate for payment per kilogram.

The FWO alleged HRS Country contravened clause 15 of the *Horticulture Award 2010* (Cth) by entering into agreements with employees at impermissibly low rates that did not allow employees to earn the minimum hourly rate prescribed under the Award. This, in turn, caused contraventions of the civil penalty provision under s 45 of the FW Act. The sole director of HRS Country admitted to these allegations. However, Mr Marland, the sole director of Marland Mushrooms, denied these allegations on behalf of both himself and his company on the basis that he had not been aware of the contraventions.

Legal Background. Clause 15 of the Award allows an employer to enter into an agreement with employees for payment at a piecework rate provided that at least the minimum piecework rate is fixed. Section 45 of the FW Act provides that a person must not contravene a term of an award, while s 550 provides that a person who had been involved in a contravention of s 45 is effectively taken to have contravened that provision himself.

Two primary issues arose for Rangiah J to determine: First, whether HRS Country contravened clause 15 of the Award and thereby s 45 of the FW Act, and secondly, whether Mr Marland and Marland Mushrooms were knowingly involved in any such contraventions for the purposes of s 550.

Decision. Justice Rangiah was satisfied that HRS Country had breached the award on 329 occasions by including inadequate rates in agreements. His Honour took into account that the piecework rates in HRS Country's agreements would not enable the average competent employee to earn at least the minimum hourly rate prescribed under the Award.

However, his Honour refused to find that Marland Mushrooms or Mr Marland was liable because it could not be proved that Mr Marland had either seen the contracts or known that the rates fell short of hourly minimums. His Honour specified that in order for Mr Marland and Marland Mushrooms to be liable, the FWO would have to show that Mr Marland had known of the contraventions at the time the agreements between HRS and the relevant employees had been entered into.

Lessons for Employers. This case demonstrates the high standard imposed by s 550 to show that a person is an accessory to a contravention. Employers who are concerned about the risk that related parties and members of their supply chain may be involved in contraventions of the FW Act should be very careful in engaging in any action that might cause them to have direct knowledge of such contravention.
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