Accessorial liability in Australian and in New Zealand workplace laws

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Abstract

Workplace laws in Australia and New Zealand prescribe responsibility for those involved in breaches of those laws by others, typically employers. However, the New Zealand regime, which followed and was modelled on the Australian regime, departs from the largely settled operation of these provisions.

This paper outlines the nature of this liability by reference to its history, its developments and assesses the practical difficulties that the New Zealand regime may face given its departure from the Australian model.

I. Introduction

In Australia, the open access to accessorial liability provisions in the Fair Work Act 2009 (Cth) (FW Act) has been extremely useful in recovering compensation from parties involved in underpayment and other contraventions. This remedial scheme also serves as a deterrent in addition to the pecuniary penalties potentially available against those accessories.

In New Zealand, the Employment Relations Act 2000 (NZ) (ER Act), whilst defining accessorial liability in an identical manner, provides for a very different structure thereafter. Importantly, the remedies that can be imposed against a person who is involved, and when, is limited under the ER Act; the right to seek sanctions against a person involved is limited further and defences are available.

This paper will examine the origins of involvement in each jurisdiction and will then examine the practical effects of the different regimes. Given the use of accessorial liability in Australia to extend liability beyond the binary employment relationship, this paper also comments on the utility of broad involvement provisions to increase access to justice. Lastly, this paper concludes that clear and broad involvement provisions strengthens the deterrent purpose of pecuniary penalty regimes and suggests the ER Act may be amended to effect this purpose.

II. Liability for breaches of the law

Accessorial liability, the focus of this paper, is one method by which a person can be held liable for breaches of the law. It is useful to set out the different avenues of liability and illustrate the differences between primary liability and secondary liability, both of which are critical to the enforcement of workplace laws.

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Primary liability is the kind of liability a person has for breaches of their own obligations, including duties owed by them to others that cannot be delegated or as a result of their own conduct falling short of a set requirement. In workplace laws, for example, an employer has a primary liability to pay in accordance with the minimum standards set by law. That kind of primary liability is assessed as strict liability, comparing what needed to be done with what was actually done by that person. Another common test for primary liability of an employer is its vicarious liability. Vicarious liability, in an employment relationship, is defined in the general law as well as in different subject matter statutes.[1] Vicarious liability will attach liability to the employer for the conduct of its employees within the course of their employment, or completing acts incidental to those duties.[2]

Secondary liability is an auxiliary method of determining liability for a wrong. Unlike primary liability (whatever method is used to assess that liability), secondary liability relies on the primary wrongdoer being engaged in actionable conduct before secondary liability can be considered. This is because secondary liability, also known as derivative liability, arises because of the different type of conduct, knowledge and position of the person engaged in conduct that could attract secondary liability. This is explored in further detail below, given its central nature to the statutory provision dealt with in this paper.

The question of who bears the legal responsibility and in what way for wrongful conduct is an evolving consideration in modern, statutory regulatory regimes.

III. The Starting Point: the Provision Itself in Current Law

The FW Act and the ER Act provide an identical test for a person's involvement in a contravention of those laws,[3] if the person:

a) has aided, abetted, counselled, or procured a breach (or contravention); or
b) has induced, whether by threats or promises or otherwise, a breach; or
c) has been, in any way, directly or indirectly, knowingly concerned in or party to a breach; or
d) has conspired with others to effect a breach.

The liability created by this provision, once established, is personal to the accessory. The law sees the accessory in the same way as the primary wrongdoer. However, accessorial liability hinges on that primary wrong and is derivative from it. For example, where a body corporate is vicariously liable for the wrongful conduct of its employee or agent, that employee or agent would be held liable as an accessory on the basis of their own conduct (depending upon the statutory regime at play).[4] This has been described as:[5]

> … the logical consequence of Salomon's Case … that the company, being a legal entity apart from its members, is also a legal person apart from the legal

[1] See, for example, *Dye v Commonwealth Securities Limited* [2012] FCA 242 at [631].
[2] *Morton v Commonwealth Scientific and Industrial Research Organisation (No 2)* [2019] FCA 1754 at [78].
[3] See s 550 of the FW Act and s 142W of the ER Act.
[4] Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* [ALRC 2002 Report] (2002) ALRC 95 at 8.26. This general principle was established in *Mallan v Lee* (1949) 80 CLR 198 26 and was affirmed in the trade practices context in *Wright v Wheeler Grace & Pierucci Pty Ltd* [1988] FCA 129.
[5] *Hamilton v Whitehead* (1988) 166 CLR 121 at 128.

> personality of the individual controller of the company, and that he in his personal capacity can aid and abet what the company speaking through his mouth or acting through his hand may have done.

The origins of the provision are conspicuously of the criminal law. This informs our thinking about accessorial liability regimes. In particular, there is to be a practical connection between the accessory and the breach. Regardless of the exact words of the statute, accessorial liability depends upon the accessory associating themselves with the contravening conduct, such that they are "linked in purpose" and "must participate in, or assent to, the contravention".[6] They must have actual knowledge, beyond suspicion or negligence, of the essential elements of the contravention; but the accessory need not know that those elements amount to a breach of the law.[7]

The purpose of an accessorial liability provision is to create secondary liability for the same offence, but separate conduct associated with the primary wrongdoing. The object of these provisions is to create a sanction for the associated conduct, assessed under a different test of liability than the primary wrongdoing. The purpose is not, or at least was not initially, to substitute the accessory's liability for the primary wrongdoer's liability.

IV. The landscape in Australia

It is convenient and chronological to commence this part of the paper with the history of pecuniary penalty regimes and accessorial liability in Australia.

A. The Development of the Legislative Position in Australia

Australia's federal laws have always contained pecuniary penalty mechanisms, commencing with the Customs Act 1901 (Cth). In 1974, the then Trade Practices Act 1974 (Cth) introduced a modern pecuniary penalty regime "to avoid criminalisation of the types of commercial activity it governed".[8] This was, in contrast, to the consumer protection provisions concerning false or fraudulent representations. The then Attorney-General drew the distinction between conduct made unlawful by the Trade Practices Act which "is more commercial conduct dealing with competitors, driving them out of business and so forth. An endeavour has been made to treat this area in the civil sense."[9] Pecuniary penalties, resulting from civil litigation and not criminal prosecution, were advantageous by achieving deterrence of unlawful conduct and establishing norms of compliance within a newly regulated business community.

In 1977, amendments to the Trade Practices Act created the continuing form of accessorial liability in legislation today. The new provisions were transposed from existing sections of the Trade Practices Act that dealt with criminal liability; those sections were, in turn, based on the

[6] *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456 at [227] and [278] citing, amongst other authorities, *Construction, Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87, (2007) 59 AILR ¶100–686, 164 IR 299 at [26]. See also T Hardy "Who Should Be Held Liable for Workplace Contraventions and on What Basis?" (2016) 29(1) AJLL 78 at 87.

[7] *Yorke v Lucas* [1985] HCA 65, 158 CLR 661.

[8] ALRC 2002 Report, above n 4, at 2.54.

[9] Commonwealth of Australia *Parliamentary Debates* Senate (15 August 1974) 984–5.

Crimes Act 1914 (Cth).[10] The statutory criminal law dealing with accessories was longstanding at that time, and declaratory of the common law.[11]

From that time, a significant amount of diverse federal legislation incorporated pecuniary penalty provisions.[12] The accessorial liability provision in the Trade Practices Act has also appeared in workplace laws for some time, including the predecessor to the FW Act, the Workplace Relations Act 1996 (Cth). The effect of that provision was to allow pecuniary penalties to be imposed against accessories. However, there was no power for a court to order compensation to make good an underpayment other than against the employer.[13]

In 2009, when the FW Act was being enacted, Parliament intended the purpose and form of accessorial liability as it had existed to be replicated. The Government stated that the FW Act provision:[14]

> [2176] … means that a pecuniary penalty for a contravention of a civil remedy provision can also be imposed on a person involved in a contravention. For example, where a company contravenes a civil remedy provision, a pecuniary penalty can also be imposed on a director, manager, employee or agent of the company.
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> [2177] However, while a penalty may be imposed on a person involved in a contravention, the clause does not result in a person involved in a contravention being personally liable to remedy the effects of the contravention. For example, where a company has failed to pay, or has underpaid, an employee wages under a fair work instrument, the director is not personally liable to pay that amount to the employee.

Clearly, the status quo in limiting remedies against accessories to pecuniary penalties was to be maintained. Because of this, before 2016, there was a limited appetite for compensatory remedies from accessories in Australia,[15] despite clear commentary expressing the availability of recovery of unpaid wages from accessories under the FW Act.[16] For the reasons set out below, and critically for a comparative analysis of the two regimes, the text of the FW Act and

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[10] Michael Pearce "Accessorial liability for misleading or deceptive conduct" 80 ALJ 104. See also *Fencott v Muller* (1983) 152 CLR 570 at 583, saying the Trade Practices Act's accessorial liability provisions "closely resemble those of s 5 of the Crimes Act [1914 (Cth)], although, of course, the former section refers to civil and the latter to criminal liability, a circumstances which provides no ground of distinction for present purposes".

[11] *Giorgianni v The Queen* (1985) 156 CLR 473 at 480 (Gibbs CJ), 490 (Mason J). See also *Yorke v Lucas*, above n 7, at 677: "[t]he term adds little to the more specific terms to be found in s 5 of the Crimes Act, but it ensures that none is omitted from the net of criminal liability whom the common law would include" (Brennan J).

[12] See, for example, s 301 of the *Navigation Act 2012* (Cth); s 352 of the *Commonwealth Electoral Act 1918* (Cth); and s 174 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). There are also other forms of involvement or derivative liability provisions in Australia: for example, s 105 of the *Sex Discrimination Act 1984* (Cth).

[13] See the discussion of *Fair Work Ombudsman v AM Retail Solutions Pty Ltd [No 5]* [2010] FMCA 981, a case discussing the availability of compensation remedies against a director of the employing entity under the predecessor legislation, in Helen Anderson and John Howe, "Making Sense of the Compensation Remedy in Cases of Accessorial Liability under the Fair Work Act" (2012) 36(2) Melbourne University Law Review 335.

[14] Explanatory Memorandum to the Fair Work Bill 2008 (Cth).

[15] *Scotto v Scala Bros Pty Ltd* [2014] FCCA 2374; *Sponza v Coal Face Resources Pty Ltd* [2015] FCCA 1140; *Fair Work Ombudsman v Windaroo Medical Surgery Pty Ltd* [2016] FCCA 2505; *Fair Work Ombudsman v Chia Tung Development Corp Ltd* [2016] FCCA 2777 (concerning a compliance notice issued by a Fair Work Inspector); *Clarke v Elite Systems Australia Pty Ltd (No 2)* [2016] FCCA 2864.

[16] See Anderson and Howe, above n 13.

effect of the provision did not reflect that intention. The current position has developed since that time.

B. The Application of S 550 of the FW Act by Australian Courts

In 2016, *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd* (*Step Ahead*)[17] was handed down. This was the first case brought by the Fair Work Ombudsman (the federal agency responsible for enforcing the FW Act) that proactively sought compensatory remedies from a director. The regulator was successful, with the Court providing a considered approach to s 550. The Court found that it had power to order individuals involved in the primary contravention to remedy the effects of that primary contravention, where appropriate.[18]

The facts of *Step Ahead* are relevant to the issue pressed in this paper. The director of the employer had previously come to the attention of the regulator, being responsible for the underpayment of employees across several failed businesses. Relevantly, the director was an officer of the company and had ultimate responsibility for its affairs, being its controlling will and mind.[19] The employing entity was in liquidation and, thereby, protected from being ordered by the Court to pay employees monies owing to them.

The Court determined that the director, as an accessory to the employer's underpayment contraventions, was liable to pay both compensation to the employees as well as penalties. In doing so, the explanatory memorandum to the FW Act was effectively ignored, or at least read down as not consistent with the plain language of the FW Act, particularly the broad powers of federal courts to make orders thought appropriate.[20]

Compensation orders against accessories were not described in *Step Ahead* as automatic on a finding of being an accessory. The Court sketched out some parameters:[21]

- It is not necessary for an applicant to establish that an act or acts of an accessory caused the relevant loss or contravention. This is because of the accessory is taken to have committed the contravention; in that sense, there is no different contravention.
- Whether or not a court should make orders, other than penalty orders against an accessory, will depend up the following non-exhaustive considerations:
    - whether such an order is unnecessary given the capacity of the employer to make the compensation payments;
    - the nature and extent of the accessory's involvement in the contravention, and their ability to pay;
    - any relevant public policy reasons; and
    - the nature of the order sought, including whether the accessory is to be made solely liable, or jointly liable.

[17] *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd* [*Step Ahead*] [2016] FCCA 1482 per Judge Jarrett.
[18] See, in particular, at [47] to [77].
[19] At [33] to [36].
[20] This power is found in s 545 of the FW Act.
[21] *Step Ahead*, above n 17, at [67] to [72].

Where an accessory was not in a position to influence whether the employer brought about the loss, then compensation orders would be a less likely order of the Court.[22]

Since this decision, there has been an increase in the utilisation of s 550 of the FW Act to seek compensatory relief against accessories, beyond directors of the employing company. The advantages gained by the ability to name and pursue third parties to the employment relationship before and during litigation are self-evident. The category of persons who may be liable under the FW Act is an open one.[23] This is because s 550 of the FW Act acts "to protect the public by making each entity or person that is responsible for the unlawful conduct accountable for their conduct and separately penalised".[24] Non-director accessories may occupy a position of any description. The Courts have made orders against human resources managers,[25] payroll employees,[26] and other management or supervisory staff.[27] There is also a growing interest in corporate accessories being held liable.[28] There is little judicial discussion in these cases about the appropriateness of compensation orders against accessories.[29]

However, there is also broad agreement that the available remedies in the FW Act are not effective enough in deterring contraventions. The federal parliament has acknowledged that s 550 of the FW Act falls *"*short in addressing the range of ways that workers are exploited" and "there is more to be done to provide a more comprehensive solution to the deliberate and systematic exploitation of vulnerable workers that occurs in some Australian workplaces".[30] At that time, the views of Australian labour law academics to incorporate a test of control and influence, coupled with a reasonable steps test similar to vicarious liability defences in Australian anti-discrimination law, were endorsed as an appropriate test for non-employer third parties.[31] More generally, there has also been scrutiny of the disparate legislative mechanisms to improve recovery of outstanding employees' entitlements beyond the direct employer.[32]

This view persists even after the significant expansion in maximum penalties under a new "serious contraventions" regime and an evolution of other enforcement mechanisms (such as a

[22] At [73].

[23] Goodwin and Donaghey *General Protections Under the Fair Work Act* (Lexis Nexis, Chatswood (NSW), 2019) at 8.70.

[24] *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown* [2017] FCA 1301 [*New Shanghai*] at [154] per Bromwich J.

[25] *New Shanghai*, above n 24; *Fair Work Ombudsman v Oz Staff Career Services Pty Ltd & Ors (No 2)* [2016] FCCA 2594; and *Fair Work Ombudsman v Centennial Financial Services Pty Ltd* [2010] FMCA 863, (2010) 63 AILR 101–27.

[26] *Fair Work Ombudsman v WY Pty Ltd & Ors* [2016] FCCA 3432; and *Fair Work Ombudsman v Ross Geri Pty Ltd* [2014] FCCA 959.

[27] *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034, (2016) 152 ALD 209, being a chief operating officer; and *Fair Work Ombudsman v Jay Group Services Pty Ltd* [2014] FCCA 2869, being a group operations manager and a recruitment manager .

[28] *EZY Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134.

[29] In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 92 ALJR 219, 273 IR 211, [2018] HCA 3, a majority, at [110], noted that the allowing orders to be made against accessories (and all other parties) "is limited to making appropriate preventative, remedial and compensatory orders and as such does not include a power to make penal orders" (per Keane, Nettle and Gordon JJ).

[30] Senate Education and Employment References Commission, Parliament of Australia *Wage theft? What wage theft?! The exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies* (Report, November 2018) at 50, [5.32] and [5.33].

[31] At 50, [5.32] and [5.33].

[32] See Helen Anderson "*Determining Secondary Liability: In Search of Legislative Coherence*" (2019) 43(1) MULR 1.

reverse onus of proof where record keeping is deficient).[33] Together with the view that the form and utilisation of accessorial liability in the FW Act is lacking, discussions in Australia have now turned to whether or not criminal sanctions for deliberate wrongdoing are needed,[34] including to those outside of the employment relationship.[35] These proposals demonstrate some symmetry with the origins of accessorial liability in the Trade Practices Act.

V. The Landscape in New Zealand

Accessorial liability provisions in New Zealand laws have, similarly to Australia, mirrored the criminal law for the same reasons outlined above. In *New Zealand Bus Ltd v Commerce Commission* (*New Zealand Bus Ltd*), concerning accessorial liability provisions under the Commerce Act 1986 (NZ), the Court of Appeal said:[36]

> [127] It will be apparent from the way this case was approached by counsel and the Judge in the High Court that there was an acceptance that this subject area of the law is closely analogous to the criminal law relating to accessory liability, requiring both an actus reus and a degree of intention based on knowledge. Accordingly, the argument was as to the extent of the required knowledge which the alleged accessory must be shown to have possessed.
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> [128] It is true that much of the language of s 83 mirrors the language in s 66 of the Crimes Act 1961, relating to parties to offences.

As in Australia, New Zealand has increasingly adopted pecuniary penalty regimes as a central part of its regulatory framework.[37] The majority of these regimes have been introduced since 2000.[38] From 2014,[39] amendments to the ER Act were contemplated to capture broader accessorial liability provisions and create a new pecuniary penalty regime to be effected in the Employment Court.[40]

A substantive cabinet paper,[41] which lead to the Employment Standards Legislation Bill 2016 (NZ), outlined the reasons for the amendments. It was noted that:

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[33] These reforms were enacted in Fair Work (Protecting Vulnerable Workers) Act 2017 (Cth), in effect from 20 September 2017.

[34] Australian Government, Attorney-General's Department consultation *Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance* (September 2019).

[35] *Report of the Migrant Workers Taskforce* (Commonwealth of Australia, March 2019) at Recommendation 11.

[36] *New Zealand Bus Ltd v Commerce Commission* [*New Zealand Bus Ltd*] (2008) 12 TCLR 69, [2008] 3 NZLR 433.

[37] Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC 133, 2014) at 14.

[38] At 15.

[39] On 9 June 2014, Cabinet agreed to the release of the discussion document *Playing by the Rules – Strengthening Enforcement of Employment Standards* to seek views on a number of high-level options to address the issues identified above: Cabinet Paper 'Strengthening Enforcement of Employment Standards' (28 July 2015) (2015) Cabinet Report) at [19].

[40] Section 134 of the ER Act provides that a person who "incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority", which concerns a claim of a different nature and has existed in labour laws in New Zealand historically. This paper is concerned with pecuniary penalties enforceable in the Employment Court only as enacted from the Employment Standards Legislation Bill 2016 (NZ).

[41] (28 July 2015) 2015 Cabinet Report. See also at [76].

- "the ability for directors and other individuals to avoid accountability, including commonly winding up a company to avoid paying arrears when they are found to have breached employment standards" was a contributor to the low levels of compliance with employment standards;
- "sanctions that are appropriate for most breaches but are not adequate to deter serious and systematic non-compliance";
- "resourcing constraints in the employment standards regulatory system has contributed to the system struggling to adequately respond to the pressures emerging at the more serious end (such as migrant exploitation) and at the less serious end (such as employers needing information and advice)";
- the Labour Inspectorate was, at the relevant time, investigating a growing number of serious breaches of employment standards, such as serious breaches involving migrants and other vulnerable groups and systemic breaches (where breaches are aggregated over a large number of employees); and
- the amendments were intended to enhance the ability to hold persons other than the employer accountable for breaches.

What would become s 142W of the ER Act was taken from both s 550 of the FW Act and a number of pieces of legislation in New Zealand.[42] Given that New Zealand's adoption of pecuniary penalty regimes has been strongly influenced by practice in Australia,[43] this is not unusual. It was intended that Australian case law concerning accessorial liability would be relied upon in interpreting and application the new provision,[44] which is also a usual feature of Trans-Tasman judicial reasoning.[45]

Section 142W of the ER Act was introduced in 2016 as part of a broader reform of the ER Act.[46] Other labour laws in New Zealand contain involvement provisions but are all referable to this primary test.[47] The 2016 amendments are framed around the serious breaches of minimum entitlement provisions, allowing declaratory, penalty and compensation orders to be sought by a Labour Inspector.[48]

However, with the introduction of the amendments to the ER Act, additional provisions were incorporated that go beyond the accessorial liability provisions known to Australian law and which cannot be found in the FW Act. In response to concerns raised that accessorial liability could capture "innocent or even negligent participation" such that "individuals could be unwittingly caught" by the new provisions,[49] the category of persons who could be involved in a contravention was restricted. This restriction is despite the requirement at law for a court to conclude that an accessory had sufficient knowledge of the essential elements of the breach, and was practically connected with the commission of the breach. Only officers of corporate employers and those in positions of seniority to exercise significant influence within the

[42] At [43].
[43] NZLCR, above n 37, at [4.4] and [5.2].
[44] 2015 Cabinet Report, above n 41, at [45].
[45] There is a degree of comity between Australian and New Zealand courts in the application of similar laws. See *New Zealand Bus Ltd*, above n 36 (a case concerning the liability of accessories for pecuniary penalties) at [135], citing *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 at 700: "real respect is to be accorded to the Australian authorities, and there is much to be said for trans-Tasman uniformity in this area".
[46] Employment Relations Amendment Act 2016 (NZ).
[47] See subs 13(3) of the Wages Protection Act 1983 (NZ); subs 10(4) of the *Minimum Wages Act 2016* (NZ); and subs 75(3) of the Holidays Act 2003 (NZ).
[48] See subs 142A(1) of the ER Act.
[49] 2015 Cabinet Paper at [46].

employer's business could be involved. Further, "in order to guard against excessive and/or vexatious claims",[50] employees who were affected by the serious breaches do not have standing to pursue pecuniary penalties. Those novel departures from accessorial liability provisions in Australia and New Zealand became law.[51]

Perhaps the furthest departure from the developed position in Australia and New Zealand in this space, the ER Act also introduced the concept of a defence to accessorial liability.[52] A defence to an order to pay compensation was inserted to remove liability for wages or other monies owed if the defence is established.

VI. Discussion of the Differences Between the FW Act and the ER Act

The key differences between the FW Act and the ER Act are the category of persons who can be involved as an accessory, what can be sought against those persons, the identity of those with standing to bring relevant proceedings and the fact of available defences are critical.

Those differences are relevant to the practice of the law but are, more importantly, significant in how the regulated community is liable for breaches of the ER Act. The extent of liability is relevant to the level of deterrence being effected by the ER Act's accessorial liability provisions. The legislature clearly contemplated that the 2016 amendments were intended to increase access to justice, strengthen enforcement options and activity, highlight the need for deterrence and to do this in a manner aligned with existing, and well understood, accessorial liability regimes in New Zealand and the FW Act. However, as the differences between the FW Act and the ER Act were borne from policy considerations outside of the normative practices surrounding accessorial liability, the effectiveness of the ER Act may be hindered by the conceptual and legal conflicts created by those carve outs. The ER Act's regime is also, on any view, more complicated, difficult to navigate and produces less certain outcomes. A contrasting view, explored below, is that the outcomes achieved are not dissimilar but that the two jurisdictions have alternative approaches to accessorial liability within pecuniary penalty regimes.

A. A Different Emphasis on the Role of the Courts

In Australia, the FW Act does not extend beyond stating the test to be met in finding accessorial liability and requiring orders made by relevant Courts to be, in the Court's view, "appropriate". The rest is up to the Courts, drawing on a long history of judicial authority and reasoning, as exhibited in *Step Ahead*.

In New Zealand, much is prescribed in the ER Act itself. The Court can only entertain claims, for example, against directors or those senior enough to have significant control and influence over the employing entity. Compensation can only be sought against an accessory to the extent that the employer cannot make good the wages or other money owing. Should involvement be determined, orders against an accessory for compensation to make good the underpayment may be refused if a defence is made out. The Courts are provided with a clear roadmap for their decision making.

[50] 2015 Cabinet Paper at [47].
[51] See s 142W and s 142X of the ER Act, respectively.
[52] See s 142ZD of the ER Act

In many ways, the *Step Ahead* decision and the reasoning helpfully set out by the Court in that case illustrate a similar liability framework. To compare the ER Act and the comments made in *Step Ahead*, it can be seen that there is a high degree of convergence.

The ER Act	**The FW Act's application re *Step Ahead***
Identity of an accessory: who can be involved as an accessory?	
An officer of an entity. If the breach is by a company, partnership or sole trader, only an "officer of the entity", being a director, partner, a person occupying a position comparable to a director or a position with significant influence over the management or administration of the entity, can be a person involved in a breach	The category is unlimited. However, accessorial liability requires a practical connection between the accessory and the primary wrong. Accessories must have actual knowledge of the essential elements of the contravention. A person adjacent to wrongdoing that is not an intentional participant is not an accessory.
Nature of the order for compensation: solely liable, joint and several liability or proportionate liability	
An accessory involved in a contravention is shielded from making good an underpayment or other loss where an employer is "able" to pay. The assessment of this ability is unclear, other than in previous cases where the company is in liquidation.	Whatever is appropriate; the Court will have regard to the form of the order in determining whether compensation should be ordered against the accessory.
Standing: who can bring a claim for penalties in the Court?	
Only a Labour Inspector	The regulator, the employee, employee organisations (unions) on behalf of an employee and, if concerning an enterprise agreement, an employee organisation

Reflecting on the facts of the *Step Ahead* case, it is unlikely that the case would have resulted in a different outcome had it also been brought by the New Zealand regulator.

This reflects, perhaps, a difference of perspective between the countries about the role of the courts in determining the scope and application of the law. By analogy, Australian and New Zealand courts are subject to different legislative direction in the consideration and assessment of pecuniary penalties. In Australia, the power to order pecuniary penalties under the FW Act is contained in s 546, but the penalty factors are a creature of the courts, having regard to principles of sentencing.[53] These considerations have been relevant for decades in Australia and were used to assess penalties imposed under earlier legislation.[54] In New Zealand, s 133A of the ER Act demonstrates a prescriptive approach on penalty,[55] codifying most of the matters that the Court is to consider.[56]

B. A Different Emphasis on the Purpose of Accessorial Liability

[53] *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 per Tracey J at [14], adopting *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7.

[54] For example, *Gregory v Philip Morris Limited* (1988) 80 ALR 455, concerning the *Industrial Relations Act 1988* (Cth).

[55] This is also a feature of other pecuniary penalty regimes in New Zealand: see subsection 83(2) of the *Commerce Act 1986* (NZ).

[56] *Boorsboom v Preet PVT Ltd* [2016] NZEmpC 143, (2016) 10 NZELC 79-072.

Both Australia and New Zealand's legislatures acknowledge that the objective of pecuniary penalty regimes is deterrence.[57] Deterrence simply means the public interest in compliance. Pecuniary penalties put a price on breaches so that it is not considered as an acceptable cost of doing business.[58] Pecuniary penalties, including as ordered against accessories, counteract the financial gain from any breach.[59] These considerations arise from the civil nature of pecuniary penalty regimes and are unlike the purposes of the criminal law.

It is less certain that the purpose of pecuniary penalty regimes is to have a person involved in a contravention substitute for the primary wrongdoer's liability. As was described earlier in this paper, the assessment of accessorial liability is different and separate to the primary wrong, but an accessory is taken to have contravened the law themselves. Conceptually, that an accessory may themselves have gained financially as a third party to the primary breach is relevant in this discussion.[60] In this analysis, the consideration in *Step Ahead* is instructive.

Allowing court action to require individuals sitting behind a corporate structure, who have caused the loss to arise, to rectify that loss can be important for both specific and general deterrence, especially when combined with a pecuniary penalty.[61] That has been recognised by the courts in Australia.[62] The ER Act is divergent in its construction of the identity of an accessory and the compensation available (including the availability of a defence, explored below). What remedies are available against accessories and in what circumstances reflects on the underlying purpose of the pecuniary penalty regime itself. On this point, it appears that the regimes in Australia and New Zealand pursue similar but not the same objectives. Importantly, the access to and availability of broad remedies against accessories impact upon the ability of aggrieved employees to pursue wrongdoers. A reduced ability to do so departs from the hopes of the legislature, stated prior to the 2016 amendments, that increasing non-compliance and exploitation could be combatted by strengthening enforcement levers and opening up remedies against parties who had previously not been accountable.

C. The Availability of a Defence to Accessorial Liability

In New Zealand, the utility of the defence to accessorial liability arises from avoiding compensation orders being made personally against accessories. Under the ER Act, an accessory who demonstrates a reasonable reliance on information supplied by an external person or who took all reasonable and proper steps to ensure compliance will avoid a remedy against them. There is no defence to the imposition of a penalty.

This concept is not known to the law in Australia for accessorial liability in this form. The defence mirrors similar provisions in vicarious liability provisions in some Australian anti-discrimination law. Those provisions require those potentially vicariously liable (such as employers for the actions of their employees) to demonstrate reasonable steps were taken to

[57] See *New Zealand Bus Ltd*, above n 36, at [193]; and *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 90 ALJR 113, 225 IR 87, [2015] HCA 46 at [55].
[58] See *Trade Practices Commission v CSR Ltd* [1990] FCA 521(1991) 13 ATPR ¶41-076 at [40]; and *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 659 [66], [2013] HCA 54.
[59] NZLCR, above n 37, at [1.09].
[60] ALRC 2002 Report at [2.118].
[61] Anderson and Howe, above n 13, at 342–343.
[62] *Zhu v The Treasurer of New South Wales* (2004) 218 CLR 530 at [121]; referred to in *Step Ahead*, above n 17, at [76].

avoid the wrong.[63] However, that is problematic, as vicarious liability is not the same kind of creature as accessorial liability; vicarious liability is direct liability, based on another's conduct, whereas accessorial liability is derivative liability, based on the accessory's conduct that is associated with the primary wrong. This also is likely to cause further confusion, as an examination of a person's reliance on information or reasonable steps may displace the court's analysis (required in any deployment of accessorial liability provisions) that the person had actual knowledge of the essential elements of the contravention or had a sufficient practical connection to the wrongdoing. A further complication may be the adoption of facts more properly suited to the sentencing assessment completed at a penalty stage of proceedings, where the nature and extent of the wrongdoer's conduct and the circumstances of the breach is taken into account in setting an appropriate remedy. It is unlikely, given the complexity, that the provisions will be uniformly applied and may not represent a reliable course of action for an accessory or their advisors to contemplate. Review of the ER Act in due course may consider, as is suggested in Australia, that the form of the defence better suits the ER Act as the test for liability of third parties to the employment relationship.[64]

Finally, allowing an accessory who is involved in a breach to avoid liability to make good the underpayment ignores the very likely fact that accessories have personally benefited from the wrongdoing. Perversely, in New Zealand, the restriction on naming an officer of the employing entity increases the likelihood of this scenario. Pecuniary penalty regimes may not have set out to substitute the primary wrongdoer's liabilities to an accessory in full. As the law is now understood, it is consistent with the accessory being taken to have contravened the law themselves and the desire to discourage financial and other gain by accessories in wrongdoing to do so, where appropriate. Both compensation and penalty remedies against accessories aid in the promotion of deterrence and simple open access to these remedies increases this. By allowing a defence to compensation, which is already a difficult path for affected employees to access, the ER Act has departed the furthest from the objectives and understanding of the FW Act provisions transposed into it in 2016.

VII. Conclusion

This paper has outlined the background and development of accessorial liability provisions in the FW Act and the ER Act. These provisions diverge by placing different emphasis on the role of the courts to determine for themselves what is appropriate. This is likely to impact on the accessibility of the ER Act's regime and its effectiveness in creating deterrence, which this paper argues is achieved both through penalty and compensation orders against accessories. Further differences in the ER Act, particularly the availability of defences to accessorial liability, are likely to upset the application of the existing law. These issues may require amendment of the ER Act in the future.

[63] See s 106 of the Sex Discrimination Act 1984 (Cth).

[64] New Zealand has recently expanded the right for employees who work under the control and direction of another business or organisation to allege a personal grievance against that party, who is not their employer: Employment Relations (Triangular Employment) Amendment Bill 2019 (NZ).