

MAKING SENSE OF THE COMPENSATION REMEDY IN CASES OF ACCESSORIAL LIABILITY UNDER THE FAIR WORK ACT

HELEN ANDERSON* AND JOHN HOWE†

[The Fair Work Act 2009 (Cth) substantially reorganised and altered the law relating to civil penalty provisions as it existed in the Workplace Relations Act 1996 (Cth). However, there is uncertainty as to the availability of the compensation remedy against persons involved as accessories in a civil remedy breach by a corporate employer. Clarification of the availability of this remedy is important for employees seeking recovery of unpaid wages, reducing reliance on the taxpayer-funded safety net scheme. It should also act as an effective deterrent against directors 'phoenixing' companies deliberately to escape payment of accrued entitlements. Existing penalties, even if paid to the employees, are generally smaller than the amount of unpaid entitlements and therefore less effective either as deterrents or as compensation.]

* LLB (Melb), LLM, GradDipBus, PhD (Monash); Associate Professor, Melbourne Law School, The University of Melbourne; Senior Research Fellow, Department of Business Law and Taxation, Monash University. This author thanks the Australian Research Council for its generous support for this research through its grant of \$144 000 over three years (DP1092474, 'Reform of the Personal Liability of Directors for Unpaid Employee Entitlements', 2010–12).

† BA, LLB (Monash), LLM (Temple), PhD (Melb); Associate Professor, Melbourne Law School, The University of Melbourne; Director, Centre for Employment and Labour Relations Law. This author's research concerning the operation of the Fair Work Ombudsman is funded by the Australian Research Council (LP09990298, 'New Initiatives in Enforcing Employment Standards: Assessing the Effectiveness of Federal Government Compliance Strategies', 2009–12). We thank the two anonymous referees for their helpful comments. We also thank Tess Hardy, PhD candidate; Leigh Johns, Chief Executive of Fair Work Building and Construction; and Janine Webster, Chief Counsel of the Fair Work Ombudsman, for their helpful comments on earlier drafts of the article.

CONTENTS

I	Introduction.....	336
II	Justifications for an Award of Compensation	340
III	The Development of Remedy Provisions under Federal Labour Legislation..	343
IV	Specific Actions under the <i>Workplace Relations Act</i>	348
	A Breaches of Awards and Agreements	349
	B Unlawful Termination	353
	C Freedom of Association.....	356
V	Compensation and Accessorial Liability under the <i>Fair Work Act</i>	358
VI	Commentary.....	363
VII	Conclusion	368

I INTRODUCTION

This article seeks to make sense of the rights of applicants to seek compensation from corporate employers¹ and other parties, usually company directors, named in actions for breaches of the *Fair Work Act 2009* (Cth) (*'FW Act'*). The *FW Act* provides that courts with jurisdiction have the power to 'make any order the court considers appropriate' in relation to the breach of a civil remedy provision under the Act,² including orders 'awarding compensation for loss that a person has suffered' because of that breach.³ We argue that where there is a sufficient degree of involvement, directors can be considered accessories to their company's breach of the Act and ought therefore to be liable to pay compensation to the company's employees.

Given that many contraventions of working conditions are breaches of civil remedy provisions, including breaches of awards, enterprise agreements and a national minimum wage order, the *FW Act* provisions significantly broaden the availability of compensation when compared to previous federal labour legislation. For example, the legislation that the *FW Act* replaced, the *Workplace Relations Act 1996* (Cth) (*'WR Act'*), contained no provision that allowed recovery of damages or compensation for breach of an award or collective enterprise agreement, although in practice it was possible to seek recovery of wage underpayments. While the *WR Act* did allow for compensa-

¹ The Fair Work Ombudsman also has jurisdiction over non-corporate employers but this article concentrates on the liability of those who are liable as accessories to the breaches of corporate employers.

² *FW Act* s 545(1).

³ *Ibid* s 545(2)(b).

tion to be sought in relation to other types of contravention, such as breaches of provisions protecting freedom of association and prohibiting unlawful termination, these remedy provisions were scattered throughout the legislation in an ad hoc manner. The *FW Act* has maintained the availability of compensation as a remedy in relation to these breaches, and extended it to a range of other contraventions where loss has been suffered as a result of the breach in question. This extension is the basis of our argument that directors, as accessories, are now within the reach of a compensation order.

The *FW Act* provides that the parties against whom compensation may be sought include, in the case of corporate employers, the employer company's directors or officers where they are found to be 'a person who is involved' in civil remedy breaches of the Act by the company,⁴ as well as others who may be required by particular provisions to remedy the breach. The right to pursue a party *other* than the employer company under this provision for accessorial liability is particularly important in the insolvency context because proceedings against a company in liquidation are stayed,⁵ and in the absence of another party to sue, no penalty or remedy will be forthcoming. However, liability is not based solely on the fact of being a director. Rather, it is the person's degree of involvement in the company's own breach that invokes accessory liability.⁶ This reflects the origins of accessory liability in the criminal law.

The liability of parties other than corporate employers as accessories to breaches of federal labour legislation has been a particularly live issue in recent years. This is largely due to the fact that since 2006, the federal agency responsible for enforcement of federal labour relations legislation — now called the Fair Work Ombudsman ('FWO') — has been highly active and highly successful in bringing legal proceedings against employers, both corporate and otherwise, who have breached the law.⁷ In particular, the FWO

⁴ Ibid s 550.

⁵ This is as a result of s 471B of the *Corporations Act 2001* (Cth), which imposes a stay on existing proceedings and prevents new proceedings being issued, except with leave of the court.

⁶ The requirements for accessory liability in relation to underpayments by an employer company were examined in *Brennan v Plumbing Services Australia Pty Ltd* [2012] FMCA 3 (9 March 2012) [24]–[47] (Driver FM).

⁷ See FWO, *2012–2013 Litigation Outcomes* (30 August 2012) <<http://www.fairwork.gov.au/about-us/legal/pages/default.aspx>>; John Howe, Nicole Yazbek and Sean Cooney, 'Study on Labour Inspection Sanctions and Remedies: The Case of Australia' (Working Document No 14, Labour Administration and Inspection Programme (LAB/ADMIN), International Labour Organization, March 2011) 28–9.

has not been afraid to seek penalties against directors of corporate employers to actions for breach of the *WR Act*, particularly in cases involving insolvent corporate employers.⁸

However, the FWO considers that it is not open to it to apply for compensation orders against parties other than the corporate employer itself. In relation to breaches of the *WR Act*, as amended by the 2006 Work Choices legislation ('*Work Choices*'),⁹ compensation orders were not sought, or when sought, were not awarded against persons other than the corporate employer on the basis that the *WR Act* did not allow for it.¹⁰ As the discussion below will show, this interpretation is debatable, but regardless of whether or not it was correct, it is our contention that under the *FW Act*, any obstacle to a compensation order under the *WR Act* has been removed. As a result, compensation may be sought against persons involved as accessories in any contravention of civil remedy provisions. Yet to date, such applications have been rare, and in the FWO's case the reasons for this are largely founded on a statement in the Explanatory Memorandum ('EM') to the Fair Work Bill 2008 (Cth) denying the existence of the compensation remedy against parties other than the employer.¹¹ However, the EM statement is contradicted by the express and unambiguous terms of the *FW Act* itself. In addition, the Full Court of the Federal Court has recently confirmed, in a different context, that the conferral of powers on a court to make orders for compensation should be read widely.¹²

Recognition of the *FW Act*'s expanded range of orders is important for three reasons. First, it should allow for recovery of compensation for breach of a variety of employee entitlements from directors of insolvent companies, relieving pressure on the taxpayer-funded General Employee Entitlements and Redundancy Scheme ('GEERS'). Second, more applications to seek compensation in this context may have the secondary effect of discouraging

⁸ See discussion in Part IV below. The FWO has also been active in accepting enforceable undertakings from directors, managers and other company employees in relation to breaches of the *FW Act* admitted by solvent corporate employers. See, eg, FWO, *Enforceable Undertaking Given by Fueltown Motors Pty Ltd to Commonwealth* (24 May 2011). Due to space constraints this article will only consider circumstances where litigation has been brought by the FWO.

⁹ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

¹⁰ See discussion in Part III below.

¹¹ Explanatory Memorandum, Fair Work Bill 2008 (Cth) 332 [2177]. See further discussion in Part V below.

¹² *Transport Workers Union of Australia v Qantas Airways Ltd* (2012) 199 FCR 190, 192 [4] (Gray J), 202 [51]–[52] (Buchanan and McKerracher JJ). This is discussed further below.

the ‘phoenixing’ of companies to avoid liability for breaches of workplace laws. The federal government has stepped up its campaign against phoenix activity with a major report in 2009¹³ and new legislation proposed for 2012,¹⁴ which claims to ‘stop directors from exploiting the limited liability protections in the corporations law’.¹⁵ Third, confirming the availability of the compensation remedy against directors as soon as possible is vital given the extent of litigation in this area.¹⁶

This article will therefore explore the availability of compensation in relation to breaches of awards and agreements, freedom of association and unlawful termination under the *FW Act* with particular regard to the liability of persons involved in contraventions of the Act in circumstances where a corporate employer is insolvent. These types of contravention have been chosen as they show contrasting means by which compensation may be sought, and because there have been recent decisions dealing with such claims.

Part II sets the scene by considering why compensation may be a legitimate remedy to seek from directors in circumstances where corporate employers have contravened the employment rights and entitlements of their workers. Part III charts some of the developments in the remedies provisions over the past two decades and explains the legislative framework, as a mechanism to understand present entitlements to seek compensation under the *FW Act*. The right to seek a penalty, and to apply for that penalty to be paid to the employee or their representative — arguably a *de facto* form of

¹³ The Treasury (Cth), *Action against Fraudulent Phoenix Activity: Proposals Paper* (November 2009).

¹⁴ *Corporations Amendment (Phoenixing and Other Measures) Act 2012* (Cth) and the exposure draft of the Corporations Amendment (Similar Names) Bill 2012. In addition, the director penalty notice provisions governing the remittance of PAYG instalments to the Australian Taxation Office and of superannuation contributions to employees’ funds have been tightened to address phoenix activity: *Tax Laws Amendment (2012 Measures No 2) Act 2012* (Cth) sch 1; *Pay as You Go Withholding Non-Compliance Tax Act 2012* (Cth).

¹⁵ David Bradbury, ‘Gillard Government Releases Draft Laws to Crack Down on “Phoenixing”’ (Media Release, No 66, 20 December 2011).

¹⁶ It is not just the FWO that is active in bringing proceedings against accessories for breach of federal labour legislation where the corporate employer is insolvent. A leading trade union is seeking compensation of approximately \$2 million in unpaid entitlements from the director of an alleged phoenix company in relation to breaches of the *FW Act*, and the matter is being vigorously defended by the director on the basis that the only remedy available against him is a pecuniary penalty: *Automotive Food Metals Engineering Printing and Kindred Industries Union v Beynon* (Proceeding No VID466/2010, Federal Court of Australia, commenced 15 June 2010). See ‘Unions Pursuing Director over \$2m in Unpaid Entitlements’, *Workplace Express* (online), 23 June 2010.

compensation — will also be noted. Part IV examines the three types of action noted above. Part V aims to make sense of the compensation remedy provisions of the *FW Act*. Part VI comments on the earlier discussion, and argues for recognition of the availability of the compensation remedy under the *FW Act*. Part VII concludes the discussion.

II JUSTIFICATIONS FOR AN AWARD OF COMPENSATION

Criminal and civil remedies, including the modern hybrid, the civil penalty, generally serve the twin objectives of deterrence and compensation. However, these objectives are not mutually exclusive. Penalties imposed by courts to deter criminal or civil penalty breaches of the law may in some circumstances be payable to the victim of the breach. More commonly, an award of restitution, damages or compensation acts both as a remedy for the loss caused by the particular behaviour, as well as specific and general deterrence of that kind of behaviour in the future.

In the tort context, damages awards are readily acknowledged for their deterrence benefits.¹⁷ In the labour law context, where penalties are specified under applicable legislation, there is a tendency to separate the functions of deterrence and compensation. The court may impose on the employer a fine payable to the Commonwealth to achieve the former,¹⁸ and make an award, for example, of unpaid wages, payable to the employee to achieve the latter. This works effectively where the employer company is solvent and where both types of award may be made. However, where the company goes into liquidation, the employee becomes a creditor of the company and may not recover what the court has ordered. Even if the court exercises its power under s 471B of the *Corporations Act 2001* (Cth) (*'Corporations Act'*) to allow proceedings

¹⁷ See, eg, John C P Goldberg, 'Twentieth-Century Tort Theory' (2003) 91 *Georgetown Law Journal* 513, 525, who says:

the nature of the compensatory remedy demonstrates that the ad hoc legislation undertaken within tort cases is inherently capable of promoting only two goals: deterrence of antisocial conduct and compensation for those who have been injured. Because they have the power to order defendants to pay damages, courts can, in principle, deter the defendant and other similarly situated actors from engaging in conduct they deem undesirable; at least insofar as the threat of damages awards affects actors' decisions and the court can rely on future courts to permit or impose sanctions on such actors. Likewise, courts can compensate at least some injured persons.

¹⁸ See *CPSU, the Community and Public Sector Union v Telstra Corporation Ltd* (2001) 108 IR 228, 230–1 [9] (Finkelstein J) regarding the importance of general deterrence. See also *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140 (16 February 2007) [51] (Lloyd-Jones FM); *Flattery v The Italian Eatery* (2007) 163 IR 14, 28–9 [63]–[66] (Mowbray FM).

for unpaid wages to be commenced against the insolvent employer, the employees would only recover the same amount that they could have proved, as priority unsecured creditors, in the company's liquidation.¹⁹

It is understandable, therefore, that where the employer company is insolvent, the party suffering loss should look to the individual responsible for the company's conduct for appropriate compensation. The immediate reaction to that notion is often an argument that company controllers are protected by the veil of incorporation, the separate legal entity of the company and the principle of limited liability. However, this is not a valid response. Limited liability is a concept protecting shareholders from being required to make further contributions of capital, and the separate legal entity of the company is no bar to the personal liability of its servants or agents for their own crimes or their own wrongs.²⁰ In addition, the *Corporations Act* and numerous other pieces of legislation²¹ contain provisions imposing a range of criminal, civil and civil penalty liability on directors and others responsible for *corporate* behaviour.²²

However, in the context of unpaid or underpaid wages under industrial legislation, this article demonstrates that there has been some doubt over whether an award of damages or compensation may be made against the persons responsible for the employer company's behaviour. It is important that courts are able to order that accessories to the company's breach must pay compensation to the victims of their behaviour. Where an order for compensation is made against the company only, directors may have an incentive to place their companies in liquidation to avoid it being required to pay com-

¹⁹ *Corporations Act* ss 556(1)(e)–(h).

²⁰ It is true to say, however, that courts frequently find difficulty in imposing liability on directors for corporate crimes and wrongs based on a misunderstanding of the doctrine of identification. This doctrine works to attribute to the company the intentions of the company's directing mind and will, as a basis for the company's liability. It was never intended to relieve the director of liability for their own wrongs: see Andrew Willekes and Susan Watson, 'Economic Loss and Directors' Negligence' [2001] *Journal of Business Law* 217, 218; Jennifer Payne, 'The Attribution of Tortious Liability between Director and Company' [1998] *Journal of Business Law* 153, 159; Helen Anderson, 'The Theory of the Corporation and Its Relevance to Directors' Tortious Liability to Creditors' (2004) 16 *Australian Journal of Corporate Law* 73.

²¹ For example, environment protection laws and workplace health and safety laws: see Mark Byrne, 'Directors' Fear of Derivative Liability and Occupational Health and Safety Laws' (2011) 29 *Company and Securities Law Journal* 213. The ability to seek damages against those involved in *Corporations Act* breaches is examined further below.

²² For an overview of the various approaches to attributing liability for corporate fault to individuals, see Corporations and Markets Advisory Committee, Parliament of Australia, *Personal Liability for Corporate Fault: Report* (2006).

pensation.²³ This can have a detrimental effect not only on the victim of the particular breach of the law, but on other creditors and stakeholders of that company. Furthermore, restricting the court's ability to order compensation against the perpetrators of the behaviour may interfere with achieving deterrence. The amounts of penalty applicable to various breaches of the law are relatively low and are limited by the relevant Act, and in every circumstance are considerably less for individuals than they are for companies.²⁴ For companies, the maximum penalty per contravention is \$33 000 and for individuals it is \$6600. This again makes liquidation an attractive option for miscreants. The liquidation of the company and the low personal penalties may be seen as 'the cost of doing business,' and a new company may be registered and created from the remnants of the former company.²⁵ The ability to have multiple breaches arising from the same course of conduct punished as one breach may also encourage directors to 'get their money's worth'²⁶ from their improper behaviour.²⁷

A compensation remedy payable by the person who caused the company to breach the law overcomes these objections, and can be important for both specific and general deterrence, particularly in combination with the imposi-

²³ See generally David B Noakes, 'Measuring the Impact of Strategic Insolvency on Employees' (2003) 11 *Insolvency Law Journal* 91; Michael Gronow, 'Insolvent Corporate Groups and Their Employees: The Case for Further Reform' (2003) 21 *Company and Securities Law Journal* 188.

²⁴ Note the following comment by Gyles J in *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 (3 October 2007) [19]:

if the law is breached the business community should not get the idea that they can take the risk of underpaying and then buy their way out of it with a modest penalty. The penalty must be imposed at a meaningful level and, in a sense, the respondent must begin to actually hurt.

For a discussion of specific and general deterrence in relation to penalties, see *Fair Work Ombudsman v Melland Pty Ltd* [2012] FMCA 645 (31 July 2012) [43]–[74] (Lindsay FM).

²⁵ See, eg, *Fair Work Ombudsman v Security Protection Services Pty Ltd* (2010) 194 IR 96. See also *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 ('*Ramsey*'), which involved a decade of liquidations, interposed labour hire companies and allegedly sham arrangements.

²⁶ This sentiment is also captured by the saying 'might as well be hung for a sheep as a lamb'.

²⁷ See *WR Act* s 719(2), which provides that 'where (a) 2 or more breaches of an applicable provision are committed by the same person; and (b) the breaches arose out of a course of conduct by the person; the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term.' For the interpretation of this provision, see *Fair Work Ombudsman v Aussie Junk Pty Ltd (in liq)* [2011] FMCA 391 (31 May 2011) [54]–[60] (Neville FM) and cases cited therein.

tion of a fine.²⁸ In addition, it has the capacity to reflect exactly the extent of the damage done. Most importantly, it allows for an injection of further funds in settlement of the debts owed by the insolvent company to its employees. This would relieve the burden on the taxpayer-funded GEERS, which in any event is subject to a statutory cap on the payment of entitlements, leaving some employee claimants uncompensated.²⁹ It would also allow for more of the insolvent company's remaining assets to be paid to other unsecured creditors. Employees are at their most vulnerable when their employer closes its business and liquidates, as they lose their jobs as well as their accrued entitlements.³⁰ Where possible, therefore, incentives to liquidate should be removed, and directors of companies should be deterred from causing their companies to breach the law, under threat of both penalties and compensation awards being made against them.

III THE DEVELOPMENT OF REMEDY PROVISIONS UNDER FEDERAL LABOUR LEGISLATION³¹

To accept the importance of compensation as a remedy, and to assist in interpreting the scope of the current suite of remedies provided by the *FW Act*, it is helpful to consider the historical incidence and development of remedies under the federal legislation prior to the commencement of that Act and their availability against parties other than an employer company. For

²⁸ For a discussion of the policy rationale behind the imposition of liability on individuals in respect of corporate fault, see Corporations and Markets Advisory Committee, above n 22, 26–7. See also Timothy P Glynn, 'Taking Self-Regulation Seriously: High-Ranking Officer Sanctions for Work-Law Violations' (2011) 32 *Berkeley Journal of Employment & Labor Law* 279, 327–33, who argues that imposing personal liability on high-ranking corporate officers ensures that they approach their company's compliance obligations with more enthusiasm.

²⁹ For a discussion of the extent of claims against GEERS and the limitations of the program, see Helen Anderson, 'Phoenix Activity and the Recovery of Unpaid Employee Entitlements — 10 Years On' (2011) 24 *Australian Journal of Labour Law* 141, 148–52. For an earlier discussion of GEERS and its limitations, see Joellen Riley, 'Protection for Employment Entitlements: A Legal Perspective' (2003) 29 *Australian Bulletin of Labour* 31.

³⁰ See generally, Kevin Davis and Geoff Burrows, 'Protecting Employee Entitlements' (2003) 36 *Australian Economic Review* 173; David B Noakes, 'The Recovery of Employee Entitlements in Insolvency' in Ian M Ramsay (ed), *Company Directors' Liability for Insolvent Trading* (CCH Australia, 2000) 129; Paul Halpern, Michael Trebilcock and Stuart Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 *University of Toronto Law Journal* 117, 149; Ronald B Davis, 'The Bonding Effects of Directors' Statutory Wage Liability: An Interactive Corporate Governance Explanation' (2002) 24 *Law & Policy* 403, 412.

³¹ Particular acknowledgement is made here of the helpful comments of Professor Andrew Stewart, Adelaide Law School, University of Adelaide, in the preparation of this Part.

much of last century, the entitlements of most workers covered by the federal industrial relations legislation were set by awards made by the federal industrial tribunal.³² The legislation was therefore chiefly concerned with the enforcement of awards, and provided for two remedies in circumstances where an award had been breached: first, the imposition of a penalty and second, an order for payment of unpaid wages or other money due to the employee under the terms of the award. Under the *WR Act* as amended by *Work Choices*, the operative provisions concerning the imposition of penalties and recovery of damages against employers for breach of employment conditions were ss 719–20, which were largely the equivalent of provisions going back to the commencement of conciliation and arbitration in 1904.³³

Although in theory the remedy of compensation was not available under these provisions, in practice, the courts would sometimes order the payment of penalties to parties other than the Commonwealth — a de facto form of compensation. This was permitted by the federal legislation, which authorised payment of the penalty to a person or an organisation as an alternative to payment to the Commonwealth.³⁴ For example, where an action for enforcement of an award is successfully brought by an applicant other than the Commonwealth, such as a trade union, the courts will frequently direct that the penalty be paid to the applicant instead of into consolidated revenue.³⁵ Such a direction is a positive incentive for unions to bring matters to court, and operates in lieu of an order that the losing party pay the winner's legal costs, as under federal labour legislation each party is required to bear their own legal costs except in limited circumstances.³⁶

During the 1990s and 2000s, the federal legislation was amended to prohibit wrongful or inappropriate conduct other than breach of award condi-

³² The federal tribunal has had a number of different names since its establishment in 1904, but over the two decades prior to the creation of Fair Work Australia by the *FW Act* it was called the Australian Industrial Relations Commission.

³³ The origins of ss 719–20 of the *WR Act* can be found in ss 178–9 of the *Industrial Relations Act 1988* (Cth) and before that, in ss 119–23 of the *Conciliation and Arbitration Act 1904* (Cth). For consideration of the historical evolution of these provisions, see further Marilyn Pittard, 'The *Conciliation and Arbitration Act*: The Prevention of Strikes and the Recovery of Wages' (Paper presented at Australian Conciliation and Arbitration after 75 Years: The Federal Arbitration Process, Present Problems and Future Trends Seminar, Melbourne, 14 July 1979); W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials* (Law Book, 2nd ed, 1993) 813–20 [24.1]–[24.21].

³⁴ *WR Act* s 841. This is still the case under the *FW Act* s 546(3).

³⁵ See, eg, *Australian Federation of Air Pilots v Leach Aero Services Pty Ltd* [1988] AILR ¶388; *Printing and Kindred Industries Union v Vista Paper Products Pty Ltd* (1994) 127 ALR 673.

³⁶ The relevant provision in the current legislation is s 570 of the *FW Act*.

tions (for example, unfair dismissal, unlawful termination, various forms of victimisation, coercion or misrepresentation, and so on). New remedies for contravention of these provisions were added in an ad hoc fashion, including the right to seek compensation. For example, s 298U(c) of the pre-*Work Choices WR Act* allowed for compensation for breach of the freedom of association protections set out in pt XA of that legislation, while s 170CR allowed for compensation in relation to breach of provisions providing for a right of action where employment had been terminated on discriminatory grounds (the unlawful termination provisions).³⁷ However, there was never any suggestion of a power to award compensation to an employee for consequential loss suffered as the result of the breach of an award in circumstances other than where money was due as a debt, such as failure to follow a disciplinary procedure. Where an employee could show that their employer had breached an express promise in their employment contract to comply with an award obligation, then the employee could seek damages for breach of contract — but only in the case of express incorporation.³⁸

When first enacted, the *WR Act* did provide for an order for damages for breach of an Australian Workplace Agreement ('AWA'), but not collective enterprise (certified) agreements or awards. This inconsistency has been attributed to the 'ambiguous' status of AWAs as a hybrid of contract, industrial award and collective agreement, with the availability of damages seen as analogous to breach of contract (or tort).³⁹

The *Work Choices* amendments to the *WR Act* in 2006 included an attempt to give the remedy provisions a face lift by rationalising some of them in div 3 of pt 14, which had the heading 'General Provisions relating to Civil Remedies'. However, the changes fell well short of achieving a comprehensive and coherent reworking of the remedies available under the Act as the remedies set out in div 3 of pt 14 were far from exhaustive. For example, the provisions empowering the courts to impose penalties and other remedies for breach of civil remedy provisions dealing with freedom of association did not appear in div 3 of pt 14, but instead appeared in the part of the Act specifically

³⁷ The unlawful termination provisions were distinct from the right of a dismissed employee to seek remedies including compensation from the industrial tribunal for 'unfair dismissal' on the ground that termination of employment was 'harsh, unfair or unreasonable'. See, eg, Anna Chapman, 'Termination of Employment under the *Workplace Relations Act 1996* (Cth)' (1997) 10 *Australian Journal of Labour Law* 89.

³⁸ As a result of the High Court decision in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, a breach of an award is not to be impliedly treated as a breach of employment contract.

³⁹ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 4th ed, 2005) 269–70 [10.12]–[10.15].

concerned with freedom of association, pt 16 (which replaced pt XA of the previous legislation).

Moreover, there was nothing in the amended *WR Act* that specifically prohibited the breach of an award or a collective agreement. Sections 719–20 did provide remedies if a term of an award or agreement was breached. In relation to awards, s 719(1) of the *WR Act* allowed for penalties against a ‘person’ bound by an applicable provision that breached the provision. The provisions empowering the court to order compensation in the form of underpayments or superannuation said that ‘the court *may order the employer to pay*’ to the employee or the superannuation fund the amount of the underpayment or the unpaid contribution respectively.⁴⁰ In addition, s 720 permitted the employee to sue the employer for wages or superannuation due and unpaid. However, the failure to pay was not on the face of it a breach of any civil remedy provision.

Another substantial change to the remedy regime under the *WR Act* introduced by the *Work Choices* legislation was the inclusion of accessorial liability for breach of civil remedy provisions, adapted from criminal law. This was a significant development in relation to liability for breach of federal labour law that appears to have received very little academic consideration.⁴¹ Accessorial liability is the mechanism by which the law holds a third party responsible for a breach of the law caused by the principal’s wrong, such that the accessory is liable to the same or a similar degree as the principal wrongdoer.⁴²

Section 728 of the *WR Act* as amended by *Work Choices* provided that:

- (1) A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.
- (2) For this purpose, a person is *involved in*⁴³ a contravention of a civil remedy provision if, and only if, the person:
 - (a) has aided, abetted, counselled or procured the contravention; or

⁴⁰ *WR Act* ss 719(6), (8) (emphasis added).

⁴¹ Cf Tess Hardy, ‘A Changing of the Guard: Enforcement of Workplace Relations Laws since Work Choices and Beyond’ in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 75, 84; Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) 133–4.

⁴² Joachim Dietrich, ‘The Liability of Accessories under Statute, in Equity, and in Criminal Law: Some Common Problems and (Perhaps) Common Solutions’ (2010) 34 *Melbourne University Law Review* 106, 109.

⁴³ Emphasis in original.

- (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.

This section appears to be based on similar provisions in the *Corporations Act* and the *Trade Practices Act 1974* (Cth) (as it was at the time),⁴⁴ an approach which had also been adopted in the labour regulation context by the *Building and Construction Industry Improvement Act 2005* (Cth).⁴⁵ The new accessorial liability provision was much broader than accessorial liability provided for by the *WR Act* and preceding federal labour legislation, which was only available in relation to breaches of the Act where ‘conduct’ was an element of the breach.⁴⁶ It appears to have largely been directed at extending liability from trade unions to trade union officials and members in relation to unlawful industrial action.⁴⁷

However, it was only by a broad interpretation of s 727 that provisions such as s 728 could even apply to a breach of an award. Section 728 made a person involved in a contravention of a *civil remedy provision* liable for contravention of that provision, and we have noted that breach of an award did not necessarily constitute such a breach. However, s 727 defined civil remedy provisions as being s 719 and other provisions of the Act declared to be civil remedy provisions. Section 719 allowed the court to ‘impose a penalty in accordance with this Division on a person’ if the person is bound by, and breaches, an applicable provision. Section 717 included in the definition of an applicable provision a term of an award that applied to the person.

In sum, there was no provision in the *WR Act* that provided for compensation or damages for breach of an award or collective agreement, even though the compensation remedy was available for breach of statutory individual agreements and the freedom of association provisions in pt 16. Although the

⁴⁴ See also Dietrich, above n 42, 119. In *Dowling v Kirk* [2007] FMCA 2106 (20 December 2007), Cameron FM observed that s 728 ‘is drawn in terms very similar to those of s 75B of the *Trade Practices Act 1974*’: at [24].

⁴⁵ *Building and Construction Industry Improvement Act 2005* (Cth) s 48(2).

⁴⁶ See, eg, s 4(5) of the pre-*Work Choices WR Act*, which provided that any reference to ‘engaging in conduct’ in the Act included ‘a reference to being, whether directly or indirectly, a party to or concerned in the conduct’.

⁴⁷ See also McCrystal, above n 41, 133–4. McCrystal observes that while s 728 is potentially broader than the pre-*Work Choices* provisions, the courts have not construed them broadly in cases against trade unions: at 134.

Federal Magistrates Court has general powers under s 15 of the *Federal Magistrates Act 1999* (Cth) to 'make orders of such kinds, including interlocutory orders, as the Federal Magistrates Court thinks appropriate' where the Court has jurisdiction, it is unclear whether this allowed remedies that the more specific provisions in the *WR Act* stipulated were applicable only to particular breaches.⁴⁸

Notwithstanding the apparent expansion of accessorial liability under the *Work Choices* amendments, one limitation that became apparent concerned the consequences where 'persons involved' were found by the Courts to have breached the *WR Act*. The next Part demonstrates that while the courts have been quite willing to impose penalties on the directors of both solvent and insolvent companies for breach of the *WR Act*, they have been unwilling for various reasons to order compensation against accessories. In the subsequent Part, we contrast the terms of the *WR Act* with those of the *FW Act* to argue that these cases may be decided differently under the present legislation.

IV SPECIFIC ACTIONS UNDER THE *WORKPLACE RELATIONS ACT*

In this Part, we consider the courts' application of compensation or compensation-like remedies available under the *WR Act* in relation to parties other than corporate employers. As noted above, in addition to the longstanding provisions in the federal legislation concerning breach of awards, various other forms of prohibited conduct had been added to the legislation in the latter part of the 20th century, along with associated remedies. We confine our discussion to cases from the Federal Court and Federal Magistrates Court over the past five years involving breach of awards and agreements, breach of the unlawful termination provisions, and breach of the provisions protecting freedom of association — three areas where there have been a number of court decisions in recent years.⁴⁹ Most of these have been the result of litigation brought by the FWO.

⁴⁸ See further discussion in Part IV below.

⁴⁹ Some of these decisions have come after the commencement of the *FW Act* on 1 July 2009. This is due to transitional arrangements under the *FW Act*. In relation to breaches of the *WR Act* occurring prior to 1 July 2009, s 11(1) of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) provides that the *WR Act* continues to apply on or after 1 July 2009 in relation to conduct that occurred before that date.

A Breaches of Awards and Agreements

None of the provisions of the *WR Act* discussed in Part III definitively rule out the possibility of recovering underpayments of wages from someone other than the employer. This is especially when read in conjunction with the broad terms of the *Federal Magistrates Act 1999* (Cth), also mentioned above, which empower the Court to make such orders as it thinks appropriate. However, the Court does not seem to have accepted this broad view. Whether this is due to the Court's own interpretation of the provisions, or the reluctance of the parties to raise these provisions in argument, is unclear.

In the cases brought under the *WR Act* for breach of awards and enterprise agreements that we examined, the courts have been willing to order penalties against directors involved in the employer's breach of the Act, whether or not the company was in liquidation.⁵⁰ For example, in *Cotis v Macpherson*⁵¹ a penalty was imposed on the director of a company in liquidation, despite the fact that the director was himself bankrupt.⁵² In his decision, Driver FM commented that 'employers should not and cannot regard insolvency, either personal or corporate, as a refuge from their responsibilities under the *Workplace Relations Act*.'⁵³ This observation expresses some of the policy objectives behind accessorial liability — to prevent the corporate structure from being used as a shield by those who should be personally liable for harmful corporate activity, and to censure the action or inaction of individual corporate officers in relation to breach of the law.⁵⁴

⁵⁰ See eg, *Fair Work Ombudsman v Kentwood Industries Pty Ltd [No 3]* [2011] FCA 579 (31 May 2011), where penalties and back-payment of entitlements were ordered against the solvent employer, and penalties were ordered against the director; *Fair Work Ombudsman v Love* [2011] FMCA 671 (31 August 2011); *Jones v RWH Parcel Delivery Pty Ltd [No 2]* [2008] FMCA 1153 (12 August 2008).

⁵¹ (2007) 169 IR 30.

⁵² *Ibid* 39 [10] (Driver FM):

the penalties sought by the applicant in this proceeding are penalties for fines imposed by a court in respect of an offence against a law of the Commonwealth and hence are not provable in bankruptcy. It follows that s 58(3) of the *Bankruptcy Act* provides no bar to the present proceeding. It also follows that any penalties imposed by the Court would remain payable after the discharge of Mr Macpherson from bankruptcy, and that bankruptcy provides no release in respect of them.

Other matters involving bankrupts include *Fair Work Ombudsman v Mineeff* [2012] FMCA 232 (27 March 2012); *Fair Work Ombudsman v Francis* [2011] FMCA 1005 (19 December 2011); *Fair Work Ombudsman v Bundy Market Meats Pty Ltd* (2009) 190 IR 180; *Fair Work Ombudsman v Simdo Pty Ltd* [2010] SAIRC 20 (1 April 2010).

⁵³ (2007) 169 IR 30, 40 [12].

⁵⁴ Corporations and Markets Advisory Committee, above n 22, 26–7.

However, in all of the cases we reviewed but one, where proceedings were brought against companies and directors for breach of awards and agreements under the *WR Act*, a remedy was not sought, nor was it ordered, against employer company directors. The exception was the 2009 case of *Workplace Ombudsman v Dracook International Pty Ltd*,⁵⁵ where the FWO's predecessor, the Workplace Ombudsman ('WO'), brought proceedings against a company and its sole director in relation to the company's failure to pay wages and other entitlements to a number of its staff. In that case, the WO did not seek a contribution to the underpayments from the director in its original statement of claim. However, after discussions during the trial with the Federal Magistrate hearing the case, Burnett FM, the WO amended its claim to allow for that outcome. After finding that the director was liable as an accessory to the corporate employer's breach, Burnett FM ordered that the employer company's director was joint and severally liable to reimburse the former employees with the employer company.

It appears that after that case, the WO, and later the FWO, decided that it would no longer seek compensation from directors. The case of *Workplace Ombudsman v Huang*⁵⁶ is more representative of the cases we reviewed. In that case, two companies (China Huge International Pty Ltd and Chi Telecom Pty Ltd) underpaid seven workers over \$90 000. After the employees complained to the WO, the employer companies were placed into liquidation. The WO then successfully prosecuted Frank Huang, director and sole shareholder of both companies, pursuant to s 728 of the *WR Act* as a person involved in the company's contraventions. In deciding the case, Hart CIM said it was

difficult to imagine a more thoughtless, selfish, greed-driven or reprehensible attitude to employees ...

In my view, it is not overstating the position to say that the Defendant had no qualms about deliberately defrauding and cheating his employees over an extended period of time.⁵⁷

Penalties totalling \$52 000 were imposed against Huang, payable to the Commonwealth. No compensation was ordered, but in that case, the WO only sought a penalty against Huang. It had instead assisted the underpaid employees to recover 'most of their entitlements' through GEERS.⁵⁸

⁵⁵ [2009] FMCA 1318 (5 August 2009).

⁵⁶ (Unreported, Chief Industrial Magistrate's Court, Hart CIM, 21 October 2009).

⁵⁷ *Ibid* [13], [15].

⁵⁸ This was reported by the Fair Work Ombudsman, 'Court Fines "Thoughtless, Selfish, Greed-Driven Businessman" Who Underpaid Staff but Gambled and Lost Millions' (Media Release,

However, an application for a compensation order would have been unsuccessful in any event. In a later decision, *Fair Work Ombudsman v GO Plumbing Pty Ltd*, Hart CIM said:

I would add for the record that having looked at the provisions of s 728 and other relevant provisions in the legislation I am satisfied that whilst the court would have had the requisite jurisdiction to order the first defendant to pay restitution to the employee, Danny Baddock, there is no such jurisdiction where a person appears before the court pursuant to s 728. The court can impose a penalty but there is no provision in the legislation for a restitution order to be made in addition to that penalty. In those circumstances it may be tempting to utilise the provision of 841(b) as a type of informal restitution order, however, in my view that would be an inappropriate use of that particular provision and the court adopts the view that if the Parliament had wished to provide a restitution power in relation to persons before the court pursuant to s 728 that would have been provided in express terms. I can also add that had I had the power to make a restitution order in addition to the penalty I would have done so in this case.⁵⁹

In other cases, the courts have been willing to exercise their discretion under s 841 of the *WR Act* to direct that penalties be paid to the applicant/employees instead of the Crown, even where employees have since been paid their entitlements. In *Curyer v Bizpro SA Pty Ltd*,⁶⁰ the Magistrate exercised his discretion under s 841 to have part of the penalty paid to the employees as interest on the late payment of their entitlements.⁶¹

However, the courts have not been consistent in exercising the discretion to direct that penalties be paid to employees, appearing to be concerned that employees could recover their entitlements more than once. In *Fair Work Ombudsman v Centennial Financial Services Pty Ltd*,⁶² a case concerned with sham contracting resulting in wage underpayments, the Court ordered that the penalties against the directors (and a human resources manager) as accessories be paid to the employees, but only on the basis of evidence by the liquidator that there was no money in the liquidated company for these

25 October 2009) <<http://www.fairwork.gov.au/media-centre/media-releases/2009/10/pages/20091025-Hunag-fine.aspx>>.

⁵⁹ (Unreported, Chief Industrial Magistrate's Court, 21 May 2010).

⁶⁰ [2009] FMCA 30 (29 January 2009).

⁶¹ *Ibid* [36] (Simpson FM).

⁶² [2011] FMCA 459 (21 June 2011).

entitlements, and that no claim had been made to GEERS.⁶³ In *Fair Work Ombudsman v AM Retail Solutions Pty Ltd [No 5]* ('AM Retail')⁶⁴ the Court imposed penalties totalling \$82 100 for what the Court found to be a case of 'conscious disregard of the legal entitlements of vulnerable employees'.⁶⁵ The FWO sought a direction that the penalties be distributed to employees as compensation for their underpaid entitlements.⁶⁶ However, Smith FM said:

I am not persuaded that I should give the direction sought in the present case, even putting aside a doubt whether this would be within the intended scope of the power in s 841 to direct the application of penalties. In the present case the penalties are being imposed on a director and not on the employer.⁶⁷ The power to give relief under ss 719(6) and (7) and 722, by ordering 'an employer' to remedy the underpayments with interest, is not available against [the director], and the Court has no power to order him personally to compensate the employees for any loss of entitlements ...⁶⁸ There is no evidence as to the inability of AM Retail to pay outstanding entitlements in the course of its liquidation, and no evidence as to the extent to which the aggrieved employees may already have proven in the insolvency or have sought relief from the Commonwealth under [GEERS]. ...

The most I am prepared to do is to recommend to the Commonwealth that it should consider exercising its *ex gratia* powers to apply penalties received from [the director] to the affected employees of AM Retail, whether under the GEERS scheme guidelines, or by a flexible application of those guidelines, or otherwise with the assistance of the [FWO].⁶⁹

⁶³ Ibid [66] (Cameron FM). Other decisions where the court ordered that the penalty be paid directly to the employees include *Fair Work Ombudsman v Pucci* [2011] FMCA 997 (16 December 2011); *Fair Work Ombudsman v Baruch* [2011] FMCA 1007 (7 December 2011); *Fair Work Ombudsman v Aussie Little Auction Houses Pty Ltd* (2010) 200 IR 293. For decisions where penalties were directed to be paid to the FWO for subsequent distribution to employees, see *Fair Work Ombudsman v Aussie Junk Pty Ltd (in liq)* [2011] FMCA 391 (31 May 2011); *Fair Work Ombudsman v Contracting Plus Pty Ltd* (2011) 205 IR 281.

⁶⁴ [2010] FMCA 981 (23 December 2010).

⁶⁵ Ibid [37] (Smith FM).

⁶⁶ Ibid [40].

⁶⁷ Interestingly, in *Fair Work Ombudsman v Bosen Pty Ltd* (Unreported, Magistrates Court of Victoria, Magistrate Hawkins, 21 April 2011), the Court ordered the employer company's penalty of \$120 000 to be paid to the Government, but the directors' penalties totalling \$30 000 to be paid to the employees. Approximately \$100 000 was owed to the employees.

⁶⁸ *Torpia v Empire Printing (Australia) Pty Ltd* (2009) 234 FLR 103, 117 [69] (Barnes FM). This case is discussed at length below.

⁶⁹ *AM Retail* [2010] FMCA 981 (23 December 2010) [42].

Three separate matters are dealt with in this quote — the ability of the court to order penalties to be paid to employees, the ability of the court to order compensation to be paid by someone other than the employer, and the possibility that the company itself would have funds to meet the employees' entitlements from its own resources. The first and third of these are easily dealt with by an order that the penalty be paid to the liquidator, thus ensuring that there is no 'double dipping' or 'triple dipping' on the part of employees receiving funds from a penalty, GEERS and the corporate estate. Any money paid by GEERS is refunded by the liquidator to the government pursuant to its right of subrogation.⁷⁰ The 'worst' that could happen as a result of an order under s 841 would be that the liquidator would then have additional funds that could be applied to the debts of other unsecured creditors of the company. It is not clear why the issue of application of penalty under s 841 was conflated by the Court in *AM Retail* with the inability of courts to order directors to pay compensation under s 719(6).

B *Unlawful Termination*

Under the *WR Act*, a number of remedies were made available specifically in relation to a breach of the prohibition against unlawful termination of employment in s 659 of the Act.⁷¹ Section 665(1) of the *WR Act* allowed both penalties and compensation orders against the employer for breach of s 659. Unlike the remedy provisions in relation to the breach of awards and agreements, s 665(1) also empowered the court to impose '(d) any other order that the Court thinks necessary to remedy the effect of such a termination' and '(e) any other consequential orders'.

As with other areas of the *WR Act*, a key issue has been the availability of compensation as a remedy in relation to proceedings against parties other than a corporate employer in relation to an alleged unlawful termination. A leading authority on this question is *Torpia v Empire Printing (Australia) Pty Ltd* ('*Torpia*'),⁷² decided in 2009. In *Torpia*, the company terminated the applicant's employment due to illness in breach of s 659 of the *WR Act*. Given that the company was insolvent at the time of the legal action taken by Mr Torpia, the legal issue was whether orders could be made under s 665

⁷⁰ This is discussed further in Part VI below.

⁷¹ We do not consider the provisions concerning *unfair* dismissal in the *WR Act*, which provided for remedies by the federal tribunal, the Australian Industrial Relations Commission.

⁷² (2009) 234 FLR 103.

against a person other than the employer, namely the sole director of the corporate employer, Mr Zarfati.

In proceedings brought in the Federal Magistrates Court, the applicant initially alleged that s 659 was a civil remedy provision, allowing him to take action against Mr Zarfati as an accessory to the company's breach pursuant to s 728 of the *WR Act*. This argument was unsuccessful as the Court did not accept that either ss 665 or 659 were civil penalty provisions.⁷³

This left the issue of whether the Court could make compensatory orders pursuant to its powers under s 665(1)(d) against an individual who was not technically the employer of Mr Torpia. The Court relied on the High Court decision *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* ('Patrick')⁷⁴ in holding that s 665(1)(d) should be taken to allow orders to be made against persons other than an employer who are parties to proceedings in which the court is satisfied that an employer has contravened s 659 in relation to the termination of employment of an employee.

The *Patrick* case concerned a breach of the freedom of association provisions of the *WR Act* prior to its amendment by *Work Choices*, which are discussed in further detail below. One of the issues considered by the High Court was the Federal Court's powers under s 298U(e) of that Act to make orders including 'any other orders, that the court thinks necessary to stop the conduct or remedy its effects'. The High Court held that s 298U(e) empowered the Federal Court to make an order against a person other than the employer.⁷⁵ Thus the Court in *Torpia* found:

While the provisions in question in this case are not identical to those considered in *Patrick Stevedores*, the reasoning of the High Court is highly persuasive in relation to the scope and application of s 665(1)(d) of the Act. On this basis I am satisfied that the similarly broad power in s 665(1)(d) should be taken to allow orders to be made against persons other than an employer who are parties to proceedings in which the court is satisfied that an employer has contravened s 659 in relation to the termination of employment of an employee, if such orders are 'necessary to remedy the effect of such a termination' notwithstanding

⁷³ Ibid [25] (Barnes FM).

⁷⁴ (1998) 195 CLR 1. For commentary on the *Patrick* dispute and subsequent litigation, including the High Court's decision, see Graeme Orr, 'Conspiracy on the Waterfront' (1998) 11 *Australian Journal of Labour Law* 159.

⁷⁵ *Patrick* (1998) 195 CLR 1, 28 [26] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ). Gaudron J agreed: at 57 [112].

that the conduct of such persons is not alleged to be in contravention of Pt 12 of the Act. I note also that the Court has power under s 15 of the *Federal Magistrates Act 1999* (Cth) to make orders of such kinds as it considers appropriate.⁷⁶

Consequently, the Court made compensation orders against Mr Zarfati, who was 'on the unchallenged evidence of Mr Torpia, responsible for the conduct in contravention of s 659.'⁷⁷

The *Torpia* case also illustrates the contrast between the unlawful termination remedy provisions in the *WR Act* and the provisions concerning breach of awards and agreements. In addition to his claims of unlawful termination, Mr Torpia had also alleged a failure to pay over \$16 500 worth of redundancy pay and a failure to give notice in accordance with the applicable award, in breach of s 719 of the Act. The issue then arose whether liability should be imposed on Mr Zarfati by virtue of s 728 of the *WR Act*, which was applicable to this particular claim as it related to civil remedy provisions. As noted in Part III above, the liability mechanism here is not straightforward. Nonetheless, the Court found that the company's liquidation and its removal from the proceedings was not a bar to action against Mr Zarfati as a person involved in the company's contravention.⁷⁸ Mr Zarfati's role as the only director, the Chief Executive Officer and the owner of Empire Printing, as well as his action in giving Mr Torpia notice, clearly satisfied the test of involvement for the purposes of s 728. Mr Zarfati was thus found to be in breach of s 719 and liable to pay a penalty.⁷⁹

In terms of recovering the unpaid redundancy money, Mr Torpia then had to content with s 719(6), noted above, which provided that 'the court may order *the employer* to pay to the employee the amount of the underpayment.'⁸⁰ The Court held that the fact that Mr Zarfati had been found to be an accessory to a civil remedy breach did not enliven the compensation provision in s 719(6), as there was no scope, as there had been in s 665(1)(d), for compensatory orders to be made against a person other than the employer.⁸¹ Since an order for compensation could not be made, the Court ordered that the

⁷⁶ (2009) 234 FLR 103, 111 [38] (Barnes FM) (emphasis added). The *Federal Magistrates Act 1999* (Cth) s 15 is outlined in Part III above.

⁷⁷ (2009) 234 FLR 103, 112 [39] (Barnes FM).

⁷⁸ *Ibid* 116 [65].

⁷⁹ *Ibid* 116–17 [66]–[67].

⁸⁰ Emphasis added.

⁸¹ *Torpia* (2009) 234 FLR 103, 117 [69] (Barnes FM).

penalty of \$6000 should be paid to Mr Torpia pursuant to s 841 of the Act, a sum representing less than half of the amount owed to him.⁸²

The *Torpia* case demonstrates the limitations placed on the availability of compensation against parties to proceedings other than corporate employers by the wording of the provisions under the *WR Act*. Although the courts have from time to time been willing to circumvent these limitations through the direction that penalties be paid to the applicant, there is inconsistency in the use of this discretion. In many cases, there is also a significant shortfall between the penalty amount and the amount lost by the employees that would otherwise be sought as compensation.

C Freedom of Association

Part 16 of the *WR Act* as amended by *Work Choices* prohibited conduct in breach of an individual's 'freedom of association', that is their right to belong or not to belong to a trade union. These provisions were largely equivalent to Part XA of the *WR Act* when it was enacted in 1996, the provisions that were in issue in the *Patrick* case cited above.⁸³ While such conduct might include termination of employment for prohibited reasons, thus overlapping with unlawful termination, it also extended to other forms of conduct, including changes in working arrangements. These provisions were deemed to be civil remedy provisions, and a breach of the provisions would bring into play the enforcement provisions in div 9 of pt 16 of the *WR Act*. In particular, s 807 of the *WR Act* allowed the court to order a pecuniary penalty, compensation or 'any other order that the court considered appropriate against the person who has contravened a civil remedy provision of that Part'. To further stress its breadth, s 807(3) allowed the Court to make 'any other orders that the Court considers necessary to stop the conduct or remedy its effects.'

In addition, the fact that these provisions were civil remedy provisions also meant that s 728 was applicable, as this operated to impose liability for contravention of a civil remedy provision on a person involved in the employer's contravention, thus allowing a court to order compensation to be

⁸² Ibid 123 [103]–[105].

⁸³ See also David Quinn, 'To Be or Not to Be a Member — Is That the Only Question? Freedom of Association under the *Workplace Relations Act*' (2004) 17 *Australian Journal of Labour Law* 1; Colin Fenwick and John Howe, 'Union Security after *Work Choices*' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 164.

payable by a company's director for the company's breach of a freedom of association provision, such as s 792(1).⁸⁴

Two cases brought by the FWO under these provisions illustrate their operation. They suggest a willingness on the part of the courts to order that compensation is payable by individuals held to have been involved in a breach with a corporate employer, if such an order is sought. For example, in *Fair Work Ombudsman v Maleha Newaz Pty Ltd*⁸⁵ an employee was obliged by her employer to resign her employment because the employee had asked that she be given a wage increase to bring her pay into line with her legal entitlements under the relevant award. The employer's conduct was in breach of s 792(1) of the *WR Act* which prohibited an employer from terminating, threatening to terminate or altering an employee's employment to their prejudice because the employee had made an inquiry or complaint about their rights under an industrial instrument. Pecuniary penalties were awarded against the company and also the second respondent, the company secretary, who was held to be a person involved in the employer company's contravention in accordance with s 728(2). The company secretary was therefore also in breach of s 792(1) of the Act. The Court also held that the breach enlivened the operation of s 807(1)(b), and made an order for compensation to be paid by the company 'and/or' the employer company secretary in favour of the employee.

In *Fair Work Ombudsman v Aussie Junk Pty Ltd (in liq)*,⁸⁶ a number of employees of a waste management company were terminated from their employment after making complaints about wage underpayments and other breaches of minimum employment standards to the FWO and to the Transport Workers Union. The FWO brought proceedings seeking penalties against both Aussie Junk and a director of the company, a Mr Richter, in relation to the underpayments (totalling \$259 315.06) and related breaches, but also on the basis that the employees had been unlawfully terminated. The company was subsequently declared insolvent. The Court held that Mr Richter was a person involved in the breach of numerous provisions of the

⁸⁴ Similarly, s 298U(e) of the Act authorised the court to make orders including 'any other orders, that the court thinks necessary to stop the conduct or remedy its effects', in relation to a breach of s 298K. Note this provision was repealed effective from 27 March 2006 by *Work Choices*. Part XA of the pre-*Work Choices WR Act* was replaced with a new pt 16, and ss 298K–298L of the Act were re-enacted as ss 792–3. There were a number of changes, with the insertion of a 'sole or dominant reason' test being inserted in s 792(4) and the removal of the 'reverse onus' at the interim injunction stage. See also Fenwick and Howe, above n 83, 178.

⁸⁵ (2010) 197 IR 71.

⁸⁶ [2011] FMCA 391 (31 May 2011).

Act, including s 792 in pt 16 of the *WR Act*. Penalties totalling \$72 000 were ordered against the director, payable to the FWO, but with a court direction that it then be paid to the employees 'according to the percentage amount owed to each employee and what that amount represents as a percentage of the total sum owing to all the employees.'⁸⁷ Notwithstanding that the case involved a breach of s 792(1), no compensation order was sought by the FWO. However, it is of interest that in a footnote to the reasons for judgment, Neville FM observed that s 807(1) authorised the Court to make an order for payment of compensation by a defendant to another person in addition to any penalty awarded against the defendant.⁸⁸

In contrast with breaches of awards and agreements or other forms of unlawful termination, seeking compensation against accessories of corporate employers appears to be more straightforward under the freedom of association provisions in the *WR Act*, albeit under-utilised. This highlights the inconsistency and uncertainty under the *WR Act* in relation to the availability of compensation against accessories, and perhaps explains the reluctance of applicants to seek compensation when it is available. In the following Part, we explain how these inconsistencies seem to have been removed by the *FW Act*, suggesting that seeking compensation against the directors and officers of corporate employers will be more straightforward under the current legislation.

V COMPENSATION AND ACCESSORIAL LIABILITY UNDER THE *FAIR WORK ACT*

The *FW Act* achieved substantial reform of the availability and organisation of remedies under federal labour regulation, in contrast to previous statutes.⁸⁹ With the principal exception of unfair dismissal claims,⁹⁰ the remedy provisions were rationalised and consolidated. Most forms of wrongdoing are now breaches of civil remedy provisions, including breaches of modern awards⁹¹

⁸⁷ Ibid [94] (Neville FM).

⁸⁸ Ibid [28] n 10.

⁸⁹ See Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 503–18 [16.12]–[16.46].

⁹⁰ In contrast to unlawful termination under the *WR Act*, there is no scope for an order for compensation in relation to unfair dismissal against an employer company's director under the *FW Act*. Section 392(1) of the *FW Act* provides that '[a]n order for the payment of compensation to a person *must* be an order that the person's *employer* at the time of the dismissal pay compensation to the person in lieu of reinstatement' (emphasis added).

⁹¹ *FW Act* s 45.

and enterprise agreements.⁹² The *FW Act* also retains prohibitions against unlawful termination and breach of freedom of association. However, under the *FW Act* these provisions are now grouped together within pt 3-1 of the Act, the 'General Protections', and the Act makes it clear they are also civil remedy provisions.

Chapter 4 is almost a complete code for the enforcement of the *FW Act*.⁹³ In particular, pt 4-1 provides that a number of civil remedies may be sought in relation to contraventions of civil remedy provisions. Within pt 4-1, s 546 allows for the making of pecuniary penalty orders against employers, and like the previous legislation, gives the court discretion to order payment to the Commonwealth, a particular organisation or a particular person.⁹⁴ However, of particular interest is s 545, which provides that:

- (1) The Federal Court or the Federal Magistrates Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.
- (2) Without limiting subsection (1), orders the Federal Court or Federal Magistrates Court may make include the following:
 - (a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;
 - (b) an order awarding compensation for loss that a person has suffered because of the contravention;
 - (c) an order for reinstatement of a person.⁹⁵

It appears that the provisions allow for the award of compensation in relation to any contravention of a civil remedy provision, and may extend beyond monies owing in the form of underpaid wages, such as, for example, damages for breach of a disciplinary procedure in a modern award or enterprise agreement.⁹⁶ Such orders can be made on application of the parties or at the court's own initiative.

⁹² *Ibid* s 50.

⁹³ There are some exceptions, such as the unfair dismissal provisions, which are in *ibid* pt 3-2, and provision for a reverse burden of proof in applications relating to contraventions of the 'general protections' claims: at s 361.

⁹⁴ *FW Act* s 546(3).

⁹⁵ Citations omitted.

⁹⁶ For comment, see Carolyn Sappideen et al, *Macken's Law of Employment* (Lawbook, 7th ed, 2011) 404 [11.90]. See, eg, *Van Effereen v CMA Corporation Ltd* (2009) 183 IR 319.

The effect of this rationalisation is that a wide range of remedies has become available which were not available under the *WR Act*, thus constituting a significant expansion of the remedies available under federal labour legislation. For example, the Act extends the remedies for breaches of awards and agreements beyond wage recovery and penalties to include compensation and injunctions, neither of which were available for such breaches under previous legislative regimes. In relation to unlawful termination, the equivalent of the operative provision under the *WR Act* that was in issue in the *Torpia* case is s 352 of the *FW Act*.⁹⁷ Unlike the *WR Act* provision, the *FW Act* specifies that this section is a civil remedy provision, and that a range of civil remedies may be sought for its breach. These remedies can only be sought from the Federal Court or the Federal Magistrates Court, with the exception of orders relating to recovery of underpayments, which can still be sought from an eligible state court.⁹⁸

The *FW Act* has also extended the capacity of the courts to award remedies in cases of accessory liability for a breach of the Act. Section 550(1) imposes accessory liability on persons involved in the company's breach of the civil remedy provision, by providing that '[a] person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.'⁹⁹ Together, therefore, ss 545(2)(b) and 550 ensure that employees may recover compensation from company controllers who were involved in their failure to be paid their entitlements. This is of particular importance for employees of insolvent employers who have no other avenues of redress.

⁹⁷ 'An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations': *FW Act* s 352.

⁹⁸ Sections 566–7 of the *FW Act* give the Fair Work Division of the Federal Magistrates Court jurisdiction in relation to any civil matter arising under that Act.

⁹⁹ Under s 550(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 (emphasis altered).

Involvement, therefore, requires much more than merely being a director or officer of the company at the time of the company's breach.

Curiously, the EM says that accessory liability for the purpose of the civil penalty action does not allow a claim against directors for compensation.¹⁰⁰ It states:

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.¹⁰¹

However, there is nothing in the legislation itself that distinguishes between primary and accessorial liability in relation to the remedies available. That is, both s 545 (which provides that the Federal Court and Federal Magistrates Court may make orders including compensation and injunctions) and s 546 (which provides for the making of pecuniary penalty orders) provide that the orders can be made *against any person* who has contravened a civil remedy provision. Given that there does not appear to be any ambiguity in the Act, it would not be necessary for courts to refer to the EM for interpretation of these provisions. Moreover, in *Transport Workers Union of Australia v Qantas Airways Ltd*¹⁰² the Full Court of the Federal Court confirmed that the conferral of powers on a court to make orders for compensation should be read widely. It was not a case dealing with an application by the FWO in relation to an underpayment of entitlements, but rather an application by an employer against a trade union with respect to contravention of the *WR Act* arising from stoppages of work. Nonetheless, the Court looked at the interpretation of orders provisions generally and concluded that '[a] grant of power in wide terms does not render the grant of power ambiguous.'¹⁰³ Justice Gray said '[o]rdinarily, the conferral on a court of a statutory power to make orders should be construed broadly, not confined by implications not apparent from the words of the conferral themselves'.¹⁰⁴

It is therefore difficult to see why a director or other party to a proceeding who is 'involved' in a contravention by the corporate employer within the meaning of s 550 may not be the subject of any of those orders. There is no

¹⁰⁰ Explanatory Memorandum, Fair Work Bill 2009 (Cth) [2177].

¹⁰¹ *Ibid.*

¹⁰² (2012) 199 FCR 190.

¹⁰³ *Ibid* 202 [52] (Buchanan and McKerracher JJ).

¹⁰⁴ *Ibid* 192 [4] (citations omitted).

equivalent to the old s 719(6),¹⁰⁵ since there is no longer a separate set of remedies for breaches of awards or agreements. This means that the reasoning in *Torpia* is not a barrier to the award of compensation in these circumstances.

To date, there has been only one relevant decision addressing this compensation issue under the *FW Act*. In *Fair Work Ombudsman v Proplas Industries Pty Ltd*¹⁰⁶ the Court found the director of Blacklight Industries, Mr Leppard, was knowingly concerned in the company's failure to comply with minimum standards relating to pay rates and record-keeping, resulting in breaches of ss 44(1), 45 and 712(3) of the *FW Act*. As such, he was found to have contravened each of the relevant provisions by reason of the operation of s 550(1). The Court ordered Mr Leppard to pay compensation to the employees in respect of their wages. The case was heard alongside another action by the FWO against Proplas Industries Pty Ltd, of which Mr Leppard was also a director and knowingly concerned in its breaches. However, no order was made against him in that matter. The only distinguishing factor between the two cases is that Proplas was solvent and Blacklight Investments had been deregistered. Unfortunately, the decision has no discussion whatsoever about the compensation order, so it is not possible to draw any conclusions as to the future availability of the compensation remedy against directors from this single decision.¹⁰⁷

Other recent decisions have failed to address the issue. For example, in *Fair Work Ombudsman v Baruch*¹⁰⁸ where the period of employment straddled both the *FW Act* and the *WR Act*, the Court relied on s 550 of the *FW Act* to award substantial penalties against the director of Linkwizz Pty Ltd, on the basis of his involvement in the company's contraventions. Some of these penalties were payable to the affected employees, with an additional award to the FWO. There was no reference in the decision of the Court to a genuine compensation remedy.¹⁰⁹ In *Fair Work Ombudsman v Drivecam Pty Ltd*¹¹⁰ the

¹⁰⁵ See above n 80 and accompanying text.

¹⁰⁶ [2011] FMCA 506 (13 July 2011).

¹⁰⁷ A later hearing of this case *Fair Work Ombudsman v Proplas Industries Pty Ltd* [2012] FMCA 130 (2 March 2012) was concerned with the setting of penalties and the awarding of costs. Reference was made to the earlier compensation order but there was no discussion of its basis.

¹⁰⁸ [2011] FMCA 1007 (7 December 2011).

¹⁰⁹ See also *Fair Work Ombudsman v Francis* [2011] FMCA 1005 (19 December 2011); *Fair Work Ombudsman v Praglowski* (2010) 200 IR 406; *Fair Work Ombudsman v Pucci* [2011] FMCA 997 (16 December 2011).

¹¹⁰ (2011) 208 IR 79.

employer company, which had engaged in discrimination against the employee, was still solvent. Pecuniary penalties, payable to the FWO, were ordered against the company and the director who was knowingly concerned in the breach. In addition, the Court noted the agreement of the company to pay compensation for the employee's economic loss but there was no other discussion of the availability of the compensation remedy. In *Fair Work Ombudsman v Wongtas Pty Ltd [No 2]*¹¹¹ the Federal Court ordered compensation to be paid by the company directors pursuant to an order under s 545(2)(b) of the *FW Act*, but this was based on a prior agreement between the directors and the employee, and was not founded on an application by the FWO to the Court.

In light of these cases, it will be interesting to see the outcome of an application by the Australian Manufacturing Workers Union ('AMWU') against the director of Forgecast Pty Ltd, alleging that the director was involved in a breach of the *FW Act* under s 550(1) when the company failed to pay employee entitlements after it went into liquidation.¹¹² The case is directly on point in that in addition to seeking a penalty, the AMWU has sought an order that the director pay compensation to the employees of the employer company under s 546(2)(b) if he is found to have been involved in the breach of the Act. The order has been sought in circumstances where the workers concerned have received some of their entitlements through GEERS. The Court will therefore need to consider the extent to which this fact should be taken into account in determining compensation for any breaches of the *FW Act*. If the unions' claim is successful, it will open up a new avenue for enforcement by non-state actors, with the capacity to supplement the FWO's efforts.

VI COMMENTARY

The cases discussed above show a willingness on the part of the FWO and the courts to punish errant companies and directors. By widely permitting penalties to be awarded against directors, the *WR Act* and now the *FW Act* facilitate the imposition of liability on the person behind the corporate facade. The company is legally the employer but the law acknowledges that it is the company's human actors who in fact control the decision-making and behaviour of the company. These are the individuals who need to be deterred

¹¹¹ [2012] FCA 30 (2 February 2012).

¹¹² *Automotive Food Metals Engineering Printing and Kindred Industries Union v Beynon* (Proceeding No VID466/2010, Federal Court of Australia, commenced 15 June 2010).

from breaching the legislation and punished if they do so. This punishment may take the form of a payment of money. In addition to this, the power of courts to order that penalties be paid to employees recognises that employees may be out of pocket as a result of these decisions and actions, and in need of redress. In light of this, it is difficult to understand why the *WR Act* allowed for the recovery of compensation in relation to some breaches, but not others. It is also apparent that there was some reluctance on the part of both applicants and the courts to order compensation against ‘a person who is involved’ in breaches of the *WR Act* by corporate employers even under the provisions where the remedy was available.

The FWO’s own Litigation Policy provides that ‘holding individuals accountable for contraventions in which they are involved in [sic] is an appropriate compliance tool’.¹¹³ As noted above, the agency has been extremely active in bringing proceedings against company directors and officers in furtherance of this objective, and in seeking penalties against these individuals as a form of specific and general deterrence.¹¹⁴ The agency has also been innovative in securing employee entitlements in cases involving phoenix companies.¹¹⁵ However, it appears from discussions with representatives of the FWO that the organisation believes itself to be legally unable to seek compensation from the director, based on the principles that underpin the court’s discretion to make orders. The logic apparently underlying this reasoning is that as the director had not personally received the benefit of the labour while the company was a going concern, there is no debt to the employee owed by the director personally.¹¹⁶

¹¹³ FWO, *Guidance Note No 1 — Litigation Policy of the Office of the Fair Work Ombudsman*, 20 July 2011, [6.3].

¹¹⁴ See, eg, FWO, ‘Director Fined \$5000 over Workplace Breach’ (Media Release, 24 May 2011) <<http://www.fairwork.gov.au/media-centre/media-releases/2011/05/pages/20110524-Neave-penalty.aspx>>, where the then Executive Director of FWO stated: ‘the penalty [in the case of *Fair Work Ombudsman v Neave* [2011] FMCA 373 (23 May 2011)] sends a clear message to company directors that they can be held accountable for the failures of their businesses to provide workers with their full entitlements.’

¹¹⁵ In proceedings related to the matter of *Ramsey*, the FWO secured an agreement by the owner and director of an abattoir company to put \$1.5 million into trust to guarantee that more than 200 redundant employees would receive their severance, annual leave and long service entitlements in circumstances where the owner of the abattoir had threatened to close the business: *Fair Work Ombudsman v Ramsey* (Proceeding No NSD1915/2011, Federal Court of Australia, discontinued 1 February 2012). See also ‘Ramsey Group to Put \$1.5 Million in Trust to Secure Entitlements’, *Workplace Express* (online), 17 November 2011.

¹¹⁶ Interview with Janine Webster, Chief Counsel and Murray Furlong, Executive Director, Workplace Relations, Policy and Education, Office of the Fair Work Ombudsman (Melbourne, 23 August 2011).

In Part V, we have explained that there is no inconsistency or ambiguity in the approach taken to this issue by the *FW Act*. This is despite the express comment in the EM to the contrary. The few relevant cases decided under the *FW Act* have not settled the matter. However, the lack of compensation orders against company directors in the cases dealing with civil remedy breaches of the *FW Act* does not necessarily mean that this remedy would not be awarded by the court. This is particularly so if the company is in liquidation and where the amount of loss suffered by the employees is greatly in excess of the penalties that may be awarded. What is needed are applications for compensation orders.

The attitude of the FWO may change given that the terms of the *FW Act* now make it clear that compensation is one of the available remedies for civil penalty breaches that may be awarded against parties other than the employer.¹¹⁷ As *Fair Work Ombudsman v Maleha Newaz Pty Ltd*,¹¹⁸ discussed above, shows, the court is willing to order compensation against a company secretary where the unambiguous provisions of the *WR Act* allowed for it. It is also important to recognise that in most of the cases considered above, the person against whom the order is made is also the sole or principal shareholder of the company. They did in fact receive, via their dividend and other distributions, all or most of the benefits of the company's successful trading, and it is therefore not inappropriate that they be called upon to compensate the company's employees where they have been involved in the company's failure to pay their entitlements.

If, however, the redirection of penalty monies to the employees is to continue as a form of de facto compensation for lost entitlements where the employer is insolvent and cannot be ordered to remedy underpayments, there needs to be a clarification to the principles under which an application to the court is made, and under which an order is granted. As noted above, in *Curyer v Bizpro SA Pty Ltd*,¹¹⁹ the Court took a generous approach in ordering that part of the penalty be paid to the employees as notional interest on the late payment of their wages. In *Fair Work Ombudsman v Centennial*

¹¹⁷ It appears that the compensation remedy is being interpreted more liberally with respect to the employer as well. *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526 is the first case in which the Court has not only found an employer guilty of breaching the adverse action provisions of the *FW Act* in this way, but has also awarded \$85 000 compensation for lost wages including compensation for hurt and humiliation.

¹¹⁸ (2010) 197 IR 71.

¹¹⁹ [2009] FMCA 30 (29 January 2009).

Financial Services Pty Ltd,¹²⁰ the penalty money was awarded to the employees on the basis that they had not recovered elsewhere.¹²¹ In *AM Retail*,¹²² the fact that the employees might recover in the liquidation or from GEERS was sufficient for the Court to refuse to order that the penalty be paid to them. Courts are understandably reluctant to allow employees to recover twice in respect of the same loss, but this could easily be overcome by ordering the penalty be paid to the company's liquidator. In many cases it seems that the company's liquidation has been initiated precisely to avoid payments of employee entitlements so it is highly likely that there are insufficient assets in the company to pay outstanding wages.

It is important that the problem of unpaid employee entitlements is tackled by labour lawyers and company lawyers with a mutual understanding of their respective disciplines.¹²³ Labour law practitioners need to understand that the privilege of incorporation granted to businesses is not a blanket of protection for directors against an award of compensation. In labour law jurisprudence, it is well accepted that directors who are involved in their company's breaches of the law should face penalties for their actions, and there is no justification for liability not to extend to compensation. Similarly, the complexities of liquidation and the possibility of payments from GEERS should not scare applicants from seeking, or courts from making, compensation orders. The liquidator ensures that the pool of money from the sale of the company's assets and from any other recoveries they make — for example, from clawing back voidable transactions or from awards of damages against persons who have breached various laws — are distributed in accordance with predetermined priorities.¹²⁴ In the event that the employees have already received an advance from GEERS, the liquidator will return that money to the government pursuant to its right of subrogation to the employees' priority

¹²⁰ [2011] FMCA 459 (21 June 2011).

¹²¹ See above n 63 and accompanying text.

¹²² [2010] FMCA 981 (23 December 2010).

¹²³ We are not the first to consider the need for labour lawyers and corporate lawyers to have a greater understanding of each other's disciplines. See, eg, Jennifer Hill, 'At the Frontiers of Labour Law and Corporate Law: Enterprise Bargaining, Corporations and Employees' (1995) 23 *Federal Law Review* 204; Riley, above n 29; Anthony Forsyth, 'Corporate Collapses and Employees' Right to Know: An Issue for Corporate Law or Labour Law?' (2003) 31 *Australian Business Law Review* 81; Richard Mitchell, Anthony O'Donnell and Ian Ramsay, 'Shareholder Value and Employee Interests: Intersections between Corporate Governance, Corporate Law, and Labor Law' (2005) 23 *Wisconsin International Law Journal* 417.

¹²⁴ *Corporations Act* s 556(1).

under s 560 of the *Corporations Act*, in exactly the same way that they do when company assets have been liquidated.

While considering the role of the liquidator, it is timely to address briefly the scope for seeking damages or compensation from directors under the *Corporations Act*. Liquidators may seek compensation from directors in a wide range of circumstances, including where the directors have been involved in civil penalty breaches such as breaches of directors' duties and insolvent trading.¹²⁵ Section 437E allows for an order for compensation against a person dealing improperly¹²⁶ with the company's property once it is subject to a voluntary administration under pt 5.3A of the Act. This targets those who, for example, may attempt to remove company assets or who buy property from the company at an undervalue, while the administrator is trying to save the insolvent business from liquidation.¹²⁷ While there is also a wide range of penalties which can be sought by the regulator against directors, it is important to note that the Australian Securities and Investments Commission may also seek an order that the directors compensate the company that has suffered loss as a result of their civil penalty breaches.¹²⁸

Employees are not the only ones hurt in the cases noted above. Unsecured creditors including taxation authorities often remain unpaid when companies are liquidated, and the premature or unnecessary liquidation of companies should be discouraged. Directors may deliberately seek liquidation as a device to avoid payment of outstanding wages, if they believe that they will only be subject to a penalty less than the amount owing. The business may begin again under a new name and corporate entity as a 'phoenix company'.¹²⁹ As noted in the introduction, the federal government has passed a series of Acts

¹²⁵ *Ibid* s 1317H. Liquidators also have the ability to seek compensation for insolvent trading pursuant to s 588M(2). Alternatively, affected creditors may seek leave to apply: at ss 588R–588U.

¹²⁶ This breaches *ibid* s 437D.

¹²⁷ See Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) [492].

¹²⁸ *Corporations Act* s 1317H.

¹²⁹ It has been suggested by the FWO that this is what has occurred with Mr Robert Francis with respect to the defunct Beaver Press Pty Ltd. He has 'commenced another printing business on the same premises through another company — Goodcrowd Integrated Print Communications Pty Ltd — of which he is the sole director and majority owner': see Fair Work Ombudsman, 'Court Penalises Businessman over Company's Failure to Pay Staff' (Media Release, 21 December 2011) <<http://www.fairwork.gov.au/media-centre/media-releases/2011/12/pages/20111221-francis-penalty.aspx>>. See also *Fair Work Ombudsman v Francis* [2011] FMCA 1005 (19 December 2011).

in 2012 designed to tackle phoenix activity,¹³⁰ following a Treasury report on phoenix activity in 2009.¹³¹ It is important that regulators and courts become aware of the importance of discouraging this destructive and costly behaviour.

VII CONCLUSION

We have sought to make sense of the compensation remedy in the *Fair Work Act* insofar as it operates against persons involved in civil penalty contraventions of the Act. Theoretically, an order of compensation serves as a useful deterrent against proscribed behaviour, and given its ability to match the size of the loss suffered, may be more effective than penalties of a modest amount. It helps achieve the FWO's objective of ensuring that employees receive the full entitlements owing to them.¹³² The provision in present and past legislation that it may be beneficial to pay penalties to those hurt by breaches recognises the need of employees to be recompensed for their losses in these circumstances. A requirement that the full amount of the unpaid wages be paid to the employees also ensures that all companies are competing on a level playing field, and that some are not able to successfully undercut their competitors through a series of phoenixed companies leaving behind huge wage debts.¹³³

There appears to be no deliberate intention in earlier legislation to ensure that employees are not awarded compensation. The history of the development of the law shows an ad hoc approach to the insertion of compliance provisions. Nonetheless, courts seemed to struggle with an absence of express permission in the particular Act, despite s 15 of the *Federal Magistrates Act 1999* (Cth) apparently overcoming this issue. In particular, s 719(6) of the *WR Act*, which allowed courts to order employers to pay employees the amount of their underpayment, was read to prohibit similar orders against other parties although the section never did so specifically. Whether or not this interpretation was correct is now moot, as the *FW Act* clearly remedies the deficiency. It is to be hoped that applicants, whether regulators, unions or employees, are now able to take full advantage of the *FW Act's* new breadth and clarity.

¹³⁰ See above n 14 and accompanying text.

¹³¹ The Treasury (Cth), above n 13.

¹³² See, eg, Fair Work Ombudsman, 'Brisbane Retailer Fined over Underpayment' (Media Release, 14 April 2011) <<http://www.fairwork.gov.au/media-centre/media-releases/2011/04/pages/20110414-Macquarie-Wallace-penalty.aspx>>.

¹³³ *Ibid.*