

‘Vulnerable Workers’ Changes to Fair Work Act - What Employers need to know?

On 15 September 2017 the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* took effect. It makes important changes to the *Fair Work Act 2009*. These changes potentially affect all businesses but in particular those in franchising or licensing or distribution.

This is intended to be a brief summary to alert you to the issues. It is not a substitute for legal advice. Every employer (and every franchisor or holding company of an employer) should consider the impact on its business and seek its own legal advice.

CRITICAL DATES

5 September 2017 – *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* is passed by Parliament after a long period of debate, media attention and lobbying

15 September 2017 – Bill comes into effect as law amending Fair Work Act – most of the new laws and changes apply from this date (but are not generally retrospective)

27 October 2017 – changes to Act affecting liability of franchisors and holding companies (s558B) become effective

WHO DO THE CHANGES AFFECT?

All employers (and those managers or advisors involved in workplace law compliance of a business) but additional liability for:

- Holding companies of subsidiaries that are employers.
- Franchisors (which includes certain licensors) of franchisees who are employers (note the definition of a ‘franchise’ here is wider than under the Franchising Code).

WHAT ARE THE CHANGES NOW AFFECTING ALL EMPLOYERS?

1. Serious contraventions introduced with increased penalties
2. Record keeping contraventions
3. Unreasonable deductions and payments from wages
4. New powers for fair work ombudsman

WHAT ADDITIONAL CHANGES AFFECT FRANCHISORS AND LICENSORS?

Potential additional liability for contraventions by franchisees and licensees for anyone considered a ‘responsible franchisor entity’

WHAT ADDITIONAL CHANGES AFFECT HOLDING COMPANIES?

Potential additional liability for contraventions by subsidiaries.

CHANGES THAT AFFECT ALL EMPLOYERS

1. SERIOUS CONTRAVENTIONS

There are now increased penalties for anyone (individual or company) who commits a '*serious contravention*' of certain workplace laws. A serious contravention occurs when:

- the person or business *knowingly* contravened one of the particular workplace laws, and
- the contravention was part of a *systematic pattern of conduct* affecting one or more people.

A company *knowingly* contravenes if it expressly, tacitly or impliedly authorised the contravention.

What is a *systematic pattern of conduct*?

Generally, a systemic pattern of conduct is a recurring pattern of methodical conduct, or a series of coordinated acts over time. The relevant factors include, but are not limited to, the number of contraventions, the period of occurrence, number of employees affected, nature of response to any complaints and whether proper records were kept and payslips provided.

What breaches of workplace laws will now have potential for liability for *serious contraventions*?

It applies to breaches of:

- the National Employment Standards
- a modern award
- an enterprise agreement
- a workplace determination
- a national minimum wage order
- an equal remuneration wage order
- method and frequency of paying wages
- the section that says an employer must not require employees to spend any of their money or pay back their wages if it is unreasonable ('cashback schemes')
- guarantees of annual earnings
- record-keeping requirements
- pay slip requirements.

Who else can be prosecuted for a serious contravention?

Anyone who is *involved* in the serious contravention of another (and that person *knew* it was a serious contravention) can be liable for the serious contravention as an *involved person* and subject to the same increased penalties. Under the existing provision with respect to accessorial liability for workplace

breaches (s550) a person is considered *involved in a contravention* including if, the person *has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention*.

For example an *involved person* in a company's contravention may include:

- Company Director;
- HR Manager or other manager;
- accountant or payroll service provider;
- another business involved in the supply chain.

Liability for these persons under s550 continues however their risk increases with the potential to now be also subject to prosecution for any serious contravention. The Fair Work Ombudsman has in recent time focussed heavily on including those it considers accessories in enforcement action. With the addition of serious contraventions, increased penalties and powers to obtain information this can only continue.

What is the penalty for a serious contravention?

Maximum penalties are 10 times the usual:

- Individual \$126,000 (600 penalty units) per contravention
- Company \$630,000 (3000 penalty units) per contravention

2. RECORD KEEPING CONTRAVENTIONS – PROVISIONS TOUGHENED (ss 535 - 536)

The existing maximum penalties for contravention of record keeping and pay slip obligations have doubled to \$12,600 for individuals, or \$126,000 for the serious contraventions. For corporations these penalties have increased to \$63,000 or \$630,000 for serious contraventions.

These new maximum penalties also extend to new provisions about making false and misleading employee records.

Further, where an employer fails to provide records, such as payslips, for inspection by the Fair Work Ombudsman then in a prosecution the onus of proof shifts to the employer to disprove the allegation of non-compliance with workplace laws. This is a marked difference to the current position and should encourage all employers to ensure that payslips and records of hours worked by employees are kept.

3. PROHIBITIONS AGAINST REQUIREMENTS FOR UNREASONABLE DEDUCTIONS AND PAYMENTS

An employer must not make deductions from wages or amounts payable to employees, or require an employee to make a payment if the requirement is unreasonable in the circumstances and is for the benefit of the employer or a party related to the employer.

These provisions are directed at the notorious "cashback" schemes which were alleged to have been used by convenience store operators who paid award wages but then required workers to refund to the employer an amount.

It is important to understand that deductions from wages are only allowed where there is a written agreement with the employee, the deduction is principally for their benefit and in particular situations (eg court order, superannuation, salary sacrifice arrangements). Staff should not be forced to pay back amounts such as for till shortages or wages overpayments.

4. INCREASED INVESTIGATIVE POWERS FOR THE FAIR WORK OMBUDSMAN

The Fair Work Ombudsman has always had the investigative power to compel a person to produce documents or records, with at least 14 days' notice. However, the Ombudsman now has the power to compel a person to not only produce documents or records but to give information or attend an interview conducted under oath. This is a marked difference to the current investigative powers of the Ombudsman, where the power to compel answers under oath didn't exist.

THE CHANGES AFFECTING FRANCHISORS

Previously s550 of the Fair Work Act potentially exposed franchisors (and anyone else involved) to liability for franchisee workplace breaches if they were considered to be involved as accessories to the breach (similar to directors) under that section. This liability remains as does the new extended liability for a serious contravention under the new provisions for any "involved person".

In addition to these and other liabilities which apply to all persons, the Act now contains particular provisions which apply to any "*responsible franchisor entity*" and which extend its accessorial liability for the workplace breaches of its franchisees.

On the last page of this article is our [Flow Chart](#) which shows in simplified terms how you can determine if the additional liability for responsible franchisor entities applies to you.

Who is a responsible franchisor entity?

This is defined (in s558A) as anyone (company or individual) who:

- a) *is a franchisor (including a subfranchisor) in relation to the franchise, and*
- b) *has a significant degree of influence or control over the franchisee entity's affairs.*

It should be noted that that "franchise" has the meaning given under the Corporations Act not the Franchising Code of Conduct.

The term "franchise" under the Corporations Act means

an arrangement under which a person earns profits or income by exploiting a right, conferred by the owner of the right, to use a trade mark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services. An arrangement is not a franchise if the person engages the owner of the right, or an associate of the owner, to exploit the right on the person's behalf.

Unlike the Code there is no requirement for an amount or fee to be paid by the franchisee and no "system or marketing plan substantially determined, controlled or suggested by the franchisor".

Arrangements such as licensed dealerships and IP licence arrangements which may not be franchises under the Code may still be subject to the Fair Work Act as franchises. Businesses which may have previously structured themselves to avoid the compliance responsibilities under the Code will not escape liability as franchisors under the Fair Work Act.

When does a responsible franchisor entity become liable for the franchisee's contravention?

The franchisor has committed a contravention (under s558B(1)) if:

- a) its franchisee as an employer contravenes particular workplace laws (listed in s558B(7)) in its capacity as a franchisee, and
- b) the responsible franchisor entity (or one of its officers) knew or could reasonably be expected to have known that the franchisee's contravention would occur or that a contravention of the same or similar character was likely to occur.

In addition to enforcement action from the Ombudsman the franchisor is also liable to any employees who take civil action against it in respect of the breaches by their employer franchisee.

What types of workplace breaches are covered?

In addition to the same contraventions listed above which can attract liability for 'serious contraventions' a franchisor may also be liable for breaches of the 'sham contracting' provisions by its franchisees. Essentially this covers the following conduct:

- misrepresenting employment as an independent contracting arrangement (s 357(1));
- dismissing an employee to engage as an independent contractor (s358), and
- misrepresentations to engage an individual as an independent contractor (s359)

It should be noted that there a number of potential breaches for which a franchisor will not be liable. The include in relation unfair dismissal, unlawful termination of employees and matters concerning industrial action.

Are there any defences for the franchisor?

Yes - the franchisor is not liable if it can show it took *reasonable steps* to prevent a contravention by the franchisee entity

What are reasonable steps?

In determining whether the franchisor took reasonable steps, relevant factors (see s558B(4)) include:

- a) *the size and resources of the franchise* (so larger networks will need more robust compliance systems);
- b) *the extent to which the person had the ability to influence or control the contravening employer's conduct in relation to the contravention* ("influence" is potentially much easier to prove than control);
- c) *any action the person took directed towards ensuring that the contravening employer had a reasonable knowledge and understanding of the requirements* (it is important for the franchisor to ensure that franchisees are provided with information on workplace laws);

- d) *arrangements (if any) for assessing the contravening employer's compliance with the applicable provisions* (what reporting requirements, inspection and auditing powers were in place and did the franchisor use them?);
- e) *arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions* (so a need perhaps to educate franchisee staff on where to direct complaints and a process for addressing them)
- f) *the extent to which the person's arrangements (whether legal or otherwise) with the contravening employer encourage or require the contravening employer to comply with this Act or any other workplace law.* (so ensuring that the franchise agreement requires compliance)

The Explanatory Memorandum for the Bill provides the following guidance:

Many franchises and holding companies will already be undertaking steps to ensure such compliance, and will not need to change their arrangements as a result of these provisions. For those that do need to take additional steps, the following activities may constitute reasonable steps to avoid a contravention of the Act, depending on the size and influence or control of the relevant companies:

- *ensuring that the franchise agreement or other business arrangements require franchisees to comply with workplace laws;*
- *providing franchisees or subsidiaries with a copy of the FWO's free Fair Work Handbook;*
- *encouraging franchisees or subsidiaries to cooperate with any audits by the FWO;*
- *establishing a contact or phone number for employees to report any potential underpayment to the business;*
- *auditing of companies in the network.*

At this stage we do not know the extent to which franchisors will need to go to establish they have implemented the reasonable steps defence. The above actions described in the Explanatory Memorandum issued by the Minister of Employment do not seem draconian but whether the Fair Work Ombudsman and Courts expect a more active role from franchisors we will have to see.

A group of large franchisors have entered into formal Proactive Compliance Deeds with Fair Work which are enforceable commitments regarding compliance and audit. Presumably these companies will be considered to have taken *reasonable steps* but should all franchisors be expected to take a similar path? In our view, no, however we will have to await further guidance. The Proactive Compliance Deeds are available for public viewing on the Fair Work website <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/compliance-partnerships/list-of-proactive-compliance-deeds>

CHANGES TO LIABILITY OF HOLDING COMPANIES

The provisions for holding companies and their liability for the breaches by their subsidiaries mirror those above for franchisors.

A holding company has committed a contravention (under s558B(2)) if:

- a) its subsidiary as an employer contravenes the particular workplace laws (those listed above for serious contraventions plus the sham contracting provisions), and

- b) the holding company (or one of its officers) knew or could reasonably be expected to have known that the subsidiary's contravention would occur or that a contravention of the same or similar character was likely to occur.

The defence of having taken reasonable steps to prevent a contravention is also available to a holding company.

It should be noted that the franchisee or subsidiary does not have to have been prosecuted for the contravention for its franchisor or holding company to be liable.

Rights of recovery against franchisee or subsidiary

New s558C provides a statutory right of the franchisor (or holding company) to take action against the franchisee or subsidiary to recover the amount paid if it has rectified an underpayment by its franchisee or subsidiary.

It is difficult to see how this greatly assists a franchisor since such right of recovery will probably already exist under the franchise agreement and no provision is made for the recovery of any pecuniary penalties imposed by a court.

WHAT DO YOU DO NOW?

Every employer and every manager or professional advisor in employment affairs needs to consider the increased penalties and risks associated with the new serious contraventions regime and stronger requirements with respect to records and payslips. A review of procedures and training to ensure that these provisions are not being contravened by the business should be implemented.

Individuals with managerial responsibility need to consider their personal liability if their role involves oversight of payroll and/or employment conditions.

Risk assessment for 'responsible franchisor entities'

Franchisors and those who licence others to provide goods or services in their name need to consider what actions they need to take to protect their company and their officers from being vicariously liable as 'responsible franchisor entities' for the contraventions of their franchisees or distributors. This includes any potential sham contracting arrangements in which franchisees may have involvement.

A risk assessment of the current arrangements in place and the nature of your business should be undertaken. Risks may be higher for those networks which have any of the following features present:

- franchise employee workforce with high proportion of workers being visa holders (including 457 and international students) or on youth or training wages;
- significant number of franchisees who are recent immigrants of non English speaking background;
- previous history in the network of workplace breaches;
- high profile brand or large network;

- a high prevalence of franchisees with family members working (who may not have formal employment arrangements in place);
- involvement in particular industries including convenience/fuel retailing, fast food (including delivery) and cleaning, and
- use of labour hire company services or contracting.

Each franchisor should undertake a review with professional advice of what reasonable steps it must put in place to avoid or limit potential liability when this part of the legislation takes effect on 27 October 2017. We expect that while some may already have adequate processes in place many others who have to date taken a more 'hands off' approach to franchisee management will have to invest substantially in implementation of new systems. Finally, we recommend all companies should review their insurance including directors and officers cover to ensure adequate protection.

If you wish to discuss any aspect of the above and require advice on your own potential liability and risks please contact us



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ARE YOU RESPONSIBLE FOR A FRANCHISEE'S WORKPLACE BREACH?

