



\$630,000 PER BREACH, AND EXTENSION OF LIABILITIES TO FRANCHISORS INCORPORATED INTO NEW REFORMS TO THE *FAIR WORK ACT*

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SUMMARY

The *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) ('the Act') makes significant changes to the *Fair Work Act 2009* (Cth). These legislative changes apply to all employers, companies and employees covered by the Fair Work Act, including certain franchisors.

These reforms aim to address widespread community concern identified in a range of Government Reports and FWO investigations into 7-Eleven and Caltex Australia concerning the exploitation of vulnerable workers (such as, visa holders, students and employees under 25 years) through the underpayment or coercion of workers.

WHAT ARE THE KEY CHANGES?

The five key changes include:

1. Increased Penalties for record-keeping failures

Individuals – 'Serious contraventions' will be pursued where a person has 'knowingly contravened' a civil remedy provision and the person's conduct was part of a 'systematic pattern of conduct' relating to one or more persons.

In determining a **systematic pattern of conduct**, a court may take into account: the number of contraventions; the period over which the contraventions occurred and the

person's response (or failure to respond) to any complaints made about the relevant contraventions.

Corporations - A corporate entity will knowingly contravene a civil remedy provision if the corporate entity 'expressly, tacitly or impliedly authorised the contravention'.

In major changes, the civil penalties for serious contraventions have increased from 60 penalty units up to 600 penalty units. The maximum penalty for corporate entities is \$630,000 and \$126,000 for individuals for each breach.

2. Reverse onus of proof for unpaid wages claims

An employer must make and keep employee records for 7 years (such as wage records). The **employer** now bears the burden of disproving allegations in proceedings relating to contraventions of these civil remedy provisions, which also extends to failing to make a record available for inspection or to give a pay slip.

3. Liability of franchisors and holding companies

Franchisors and holding companies could be held responsible if their franchisees or subsidiaries don't follow workplace laws including requirements to provide minimum wages, apply the National Employment Standards, comply with industrial awards, or maintain required records such as pay slips.

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A franchisor will be found to be a 'Responsible Franchisor Entity' if the following components are met:

- i. There is a 'franchise' relationship as defined under the *Corporations Act*. This is any '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'.
- ii. For the purposes of the Act, a Responsible Franchisor Entity includes a franchisor in relation to the franchise that has a **significant degree of influence or control over the business affairs of the franchisee**. This influence or control may relate to the franchisee's financial, operational or corporate affairs.
- iii. The franchisor must have known or could reasonably be expected to have known that a franchisee or subsidiary was not following workplace laws; or if they knew, or should have known, and could have prevented it.

PREVENTING A CONTRAVENTION AND REASONABLE STEPS

A court may have regard to a non-exclusive list of factors included in the Act, when determining whether a Responsible Franchisor Entity took "reasonable steps" to prevent a contravention by the franchisee of the same or of similar character. These factors include:

- i. the size and resources of the franchise;
- ii. the extent to which the person had the ability to influence or control the contravening employer's conduct in relation to the contravention;
- iii. any action the person took directed towards ensuring that the franchisee had a reasonable knowledge and understanding of the legal requirements;
- iv. the franchisor's arrangements (if any) for assessing the franchisee's compliance;
- v. the franchisor's arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of the Act; and
- vi. 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 the Act and other workplace laws.

4. Investigative and enforcement powers of the FWO

The evidence-gathering powers of the Fair Work Ombudsman have been strengthened to also include the delegation of powers to other staff of the FWO.

There are further increased penalties for intentionally hindering or obstructing Fair Work inspectors in performing their functions or exercising their powers, and for making and keeping a record or providing a payslip that is false or misleading.

A person is not excused from giving information, producing a record or document, or answering questions on the ground that it might incriminate them or expose them to a penalty or other liability.

5. Prohibition on unreasonable requirements

In targeting cashback schemes, the new reforms also expressly prohibit employers from directly or indirectly requiring an employee (including prospective employees) to spend, or to pay to the employer or another person, an amount of the employee's money or the whole or any part of an amount payable to the employee in relation to the performance of work, if:

- i. the requirement is unreasonable in the circumstances; and
- ii. for a payment – the payment is directly or indirectly for the benefit of the employer or a party related to the employer.

WHAT EMPLOYERS SHOULD DO

Any company that holds a franchise or similar licensing arrangement must act now to protect itself from the new laws, by:

- i. informing themselves of the relevant changes;
- ii. reviewing their franchise agreement and policies;
- iii. educating and training relevant staff as to compliance and conduct compliance audits; and
- iv. seeking reliable workplace relations legal advice so as to properly ensure organisations over which they have the capacity to influence comply with workplace laws.

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