



# Workplace Relations

## Implications of Recent Amendments to the Fair Work Act to Protect Vulnerable Workers

This article summarises the changes to the Fair Work Act (**FWA**) due to the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Amendment)*.

Most of the changes in the Amendment have been law since 15 September 2017. Changes related to the accessorial liability of franchisors and holding companies for breaches of the FWA by their franchisees and/or subsidiaries will become law on 27 October 2017.<sup>1</sup>

### Context

The purpose of the Amendment was said to be to address community concern about exploitation of vulnerable workers.<sup>2</sup> The Federal Government was jolted into action by the 2015 7 Eleven scandal that exposed systematic underpayment and exploitation of workers. The Amendment is the government's legislative response to the ensuing public outcry.<sup>3</sup>

The Amendment increases the maximum civil penalties for breaches of the FWA, establishes a definition for "serious contraventions" of the FWA, gives additional evidence-gathering powers to the Fair Work Ombudsman (**FWO**), expands accessorial liability provisions in the FWA and reverses the onus of proof for employers in designated civil penalty proceedings.

### Changes to the FWA

#### 1. **Increased maximum penalties for "serious contraventions" of workplace laws.**

The maximum penalties for "serious contraventions" of designated civil penalty provisions of the FWA have increased tenfold. The maximum civil penalty for each breach of the FWA has increased from \$12,600 to **\$126,000** for individuals and from \$63,000 to **\$630,000** for bodies corporate<sup>4</sup>.

"Serious contraventions" of the FWA are reserved for deliberate breaches of designated civil penalty provisions of the FWA related to the payment of employees (for example breaching the NES by not recognising the accrual of employees' annual leave or paying employees below the minimum rates of pay in a Modern Award) and are defined as contraventions that are committed "knowingly" and as part of a "systematic pattern of conduct".<sup>5</sup>

A "systematic pattern of conduct" is not defined. However, in assessing if the conduct amounts to a "systematic pattern of conduct", a Court may have regard to: the number of contraventions; the period of time over which the contraventions occurred; the number of persons affected by the contraventions; the responses to complaints by employees about matters related to the

<sup>1</sup> *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) ss 2 and 19.

<sup>2</sup> Explanatory Memorandum, *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* p i

<sup>3</sup> *Ibid.*

<sup>4</sup> *Fair Work Act 2009* (Cth), s 539(2)(Item 1), (Item 2), (Item 3), (Item 4), (Item 5), (Item 7), (Item 8), (Item 9), (Item 10), (Item 29) and s 546.

<sup>5</sup> *Ibid.*, s 557A(1).

contraventions; and if the employer has provided payslips to employees or kept employment records.<sup>6</sup>

**Note:** An employer can only be found liable for a “serious contravention” for conduct that occurred on or after the Amendment became law on 15 September 2017.<sup>7</sup>

## **2. Record keeping obligations and false or misleading information or documents**

The penalties for breaching record keeping obligations have been increased from \$6,300 to **\$12,600** for individuals and from \$31,500 to **\$63,000** for bodies corporate.<sup>8</sup>

Deliberate breaches of record keeping obligations can also be considered a “serious contravention” (as defined above) and result in penalties of up to **\$126,000** for individuals and **\$630,000** for body corporates.<sup>9</sup>

Both of the increased penalties are designed to target employers deliberately failing to keep records as part of a systematic plan to underpay workers and not employers who genuinely overlook record keeping requirements.<sup>10</sup> Breaches of record keeping obligations includes the provision of false and misleading employer records or payslips and the increased penalties are an acknowledgment that without reliable records employees are often unable to prove their case.<sup>11</sup>

## **3. Reverse onus of proof where records not provided**

If an employer fails to keep employee records or pay slips or is unable to produce them in a court proceeding related to a contravention of a designated civil penalty provision related to the payment of employees, unless the employer “provides a reasonable excuse”, a reverse onus of proof applies to the employer in the proceeding i.e. the employer “has the burden of disproving the allegation”.<sup>12</sup>

## **4. Prohibition on unreasonable requirements to make payments**

A headline grabbing part of the 7 Eleven scandal was that some franchise owners were paying employees the correct amount of pay then forcing the employees to withdraw half their salary in cash from ATMs to give directly back to their employer (**cash back schemes**).

The Amendment seeks to prevent analogous cash back schemes by introducing a civil penalty provision to the FWA that specifically prohibits employers from requiring their employees to spend or pay their wage to the employer (or a party related to the employer) if the requirement is unreasonable in the circumstances.<sup>13</sup>

A breach of the prohibition on unreasonable requirements to make payments can result in penalties of up to **\$12,600** for individuals and **\$63,000** for bodies corporate.<sup>14</sup>

Deliberate schemes like the 7 Eleven cash back schemes may also be considered a “serious contravention” (as defined above) and leave the employer exposed to the increased penalties of up to **\$126,000** for individuals and **\$630,000** for bodies corporate.<sup>15</sup>

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<sup>6</sup> Ibid, s 557A(2).

<sup>7</sup> *Fair Work Amendment*, above n 1, s 18.

<sup>8</sup> *Fair Work Act*, above n 4, s 539(2) (cell at table item 29, column 4).

<sup>9</sup> Ibid.

<sup>10</sup> Explanatory Memorandum, above n 4, paragraphs [15] - [16].

<sup>11</sup> Ibid, paragraph [16].

<sup>12</sup> *Fair Work Act*, above n 4 s 557C.

<sup>13</sup> Ibid, s 325.

<sup>14</sup> Ibid, s 539(2) Item 10A and s 546.

<sup>15</sup> Ibid.

## 5. **Increased powers of the FWO**

The Amendment gives the FWO increased evidence gathering powers that are similar to powers available to other regulators (i.e. ASIC, ATO and ACCC).<sup>16</sup>

The FWO can apply to the Administrative Appeals Tribunal (**AAT**) for an “FWO Notice”. The AAT must issue an “FWO Notice” if other methods of obtaining the information, documents or evidence have been unsuccessful or are not appropriate.<sup>17</sup> If the FWO has a reasonable belief that a person has documents relevant to an investigation or is capable of giving evidence that is relevant to an investigation the FWO can issue the “FWO Notice” to a person compelling the production of documents and/or requiring them to answer questions under oath.<sup>18</sup>

If an “FWO Notice” is given to a person by the FWO the person must comply with the requirements of an “FWO Notice”, unless they are “not capable” of complying with the requirements.<sup>19</sup> A person is not excused from complying with an “FWO Notice” on grounds of self-incrimination.<sup>20</sup>

The maximum penalty for not complying with an FWO Notice is **\$126,000** for individuals and **\$630,000** for bodies corporate.<sup>21</sup>

## 6. **Hindering or obstructing the FWO and FWO inspectors**

The Amendment introduces a new civil penalty provision to prevent employers from intentionally hindering or obstructing the FWO or an FWO inspector “without reasonable excuse”.<sup>22</sup> A breach of this civil penalty provision may result in a maximum fine of **\$12,600** for individuals and **\$63,000** for bodies corporate.

The prohibition only applies to an “appreciable” obstruction by an employer that “actually makes it more difficult” for the FWO (or an FWO inspector) to perform its duties and does not apply to an “accidental” obstruction.<sup>23</sup> A “reasonable excuse” for hindering or obstructing the FWO is not defined but is likely to include necessary obstructions in order to comply with workplace health and safety laws and also applies if the FWO inspector does not show their identity card upon request.<sup>24</sup>

## 7. **New accessorial liability for franchisors or holding companies for breaches of the FWA by franchisees or subsidiaries.**

The 7 Eleven scandal exposed that a large number of 7 Eleven’s franchisor agreements allegedly created a business model that was only profitable if workers were underpaid.<sup>25</sup> The Amendment has sought to deter similar agreements by broadening the accessorial liability provisions in the FWA that enable franchisors and holding companies to be held accountable for breaches of the FWA (**Accessorial Provisions**).

Franchisors and holding companies can be held liable for breaches of workplace laws by their franchisees/subsidiaries if they knew or could reasonably be expected to have known that contraventions would occur, or that contraventions of the same or a similar character were likely to occur.<sup>26</sup>

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<sup>16</sup> Explanatory Memorandum, above n 2, paragraph [101].

<sup>17</sup> *Fair Work Act*, above n 4, s 712AB(c).

<sup>18</sup> Explanatory Memorandum, above n 2, paragraph [102] and *Fair Work Act*, above n 4, s 712AA.

<sup>19</sup> *Fair Work Act*, above n 4, s 712B.

<sup>20</sup> *Ibid*, s 713.

<sup>21</sup> *Ibid*, 539(2)(Item 32A).

<sup>22</sup> *Ibid*, 707A.

<sup>23</sup> Explanatory Memorandum, above n 2, paragraphs [171]-[172].

<sup>24</sup> *Ibid*, paragraph [175] - [176].

<sup>25</sup> Explanatory Memorandum, above n 2, paragraphs [36]-[37].

<sup>26</sup> *Fair Work Act*, above n 4, ss 558B(1) and (2).

A franchisor or holding company can defend a proceeding if it demonstrates it has taken “reasonable steps” to prevent its franchisee or subsidiary contravening the FWA.<sup>27</sup> “Reasonable steps” depends upon the circumstances of each specific franchisor or holding company including; its size and resources, control and influence, action taken to ensure its franchisee and/or subsidiary had knowledge and understanding of workplace laws and arrangements for assessing and addressing workplace compliance of franchisees and/or subsidiaries in place.<sup>28</sup>

In the worst case scenario a franchisor or holding company could face a civil proceeding where there is a reverse onus of proof alleging “serious contraventions” by a franchisee or subsidiary that could cause the franchisor or holding company to be directly liable for fines of up to **\$630,000** per breach by its franchisee or subsidiary.<sup>29</sup>

**Note:** A holding company or franchisor can only be held liable in relation to contraventions that occur after 27 October 2017 but in determining if a holding company or franchisor had ‘knowledge’ the Court “may have regard to conduct that occurred, or circumstances existing, before” 27 October 2017.<sup>30</sup>

### **Recommendations for Employers**

1. Immediately introduce a record keeping protocol to suitably capture workplace records and identify any non-compliances if one does not already exist.
2. Seek advice about how to approach and address the risk of non-compliance.
3. If record keeping and administrative protocols and procedures already exist review them to ensure that they are capturing all information that employers are required to capture. Ensure you are satisfied they are identifying any possible non-compliances within the organisation and you have a process in place to rectify any non-compliance.
4. If a body corporate has franchisees or subsidiaries that employ staff ensure it has systems in place that enable it to satisfy itself that its franchisees or subsidiaries are complying with workplace laws (including record keeping obligations). Systems may include declarations, audit programs and risk assessments.

If you would like advice or assistance with any issues related to the recent amendments to the Fair Work Act please contact a member of our Workplace Relations team.

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<sup>27</sup> Ibid, 558B(3).

<sup>28</sup> Ibid, 558B(4).

<sup>29</sup> Explanatory Memorandum, above n 2, paragraph [47].

<sup>30</sup> *Fair Work Amendment* above n 1, s 19.



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## Civil Penalty Provisions of the *Fair Work Act*

Civil penalty provisions of the Fair Work Act.

Civil penalty Provisions in the Fair Work Act capable of being "seriously contravened" (includes ss.44(1), 45, 50, 280, 293, 305, 323(1), 323(3), 325(1), 325(1A), 328(1), 328(2), 328(3), 357(1), 358, 359, 535(1), 535(2), 535(4), 536(1), 536(2), 536(3)).