

## Article Information

Author: Ben Motro, Michael Bacina

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## Changes to the Fair Work Act targeting the Franchise Sector

**The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 proposes a significant new direction by making Franchisors liable for the breaches of their corporate subsidiaries and Franchisees.**

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**Jenny Needham, Senior Associate** and **Ben Motro, Senior Associate** discuss the issues Franchisors need to consider.

### Critical Issues for the Franchisor

- The Franchisor will be held responsible for contraventions of the Fair Work Act by their Franchisees if it is viewed that the Franchisor knew, or could reasonably be expected to have known that a breach by the franchisee occurred, or was likely to have occurred.
- Penalties for deliberate contraventions (that is if a contravention is intentional) which are “part of a systematic pattern of conduct relating to one or more persons” have been increased ten fold.
- Franchisors and parent companies in groups with a significant degree of influence or control over a Franchisee’s affairs, can be held responsible for contraventions by Franchisees or subsidiaries more broadly:
  - If they knew or should reasonably have known about the contraventions, or that similar contraventions would be likely to occur.
  - They did not take reasonable steps to prevent the contraventions.
- While the Franchisor/parent company can seek an indemnity for any liability imposed on them from the Franchisee, they cannot seek an indemnity for penalties (i.e. they pay the penalties but can put unpaid wage payments back on the responsible franchisee or subsidiary).
- There are new prohibitions on ‘cashback’ or similar arrangements in relation to payments of wages (such as occurred in the 7/11 situation) and in respect of deliberate falsification of records or hindering Fair Work inspectors.

These changes are very significant given the nature of franchising. While Franchisors are currently liable as accessories under section 550, under the new Bill, the Fair Work Ombudsman (FWO) will have enhanced evidence gathering powers to facilitate investigations and it will be even easier for the FWO to pursue Franchisors for the sins of their franchisees.

### Proposed Penalties for Breaches

- Increase the civil penalty to \$108,000 for individuals and \$540,000 for corporations in the case where there has been a “*serious contravention of civil remedy provisions*”. That is, where the breach was deliberate and part of a systematic pattern of conduct relating to one or more other persons.
- Payment of the wages and salaries of those aggrieved employees of the Franchisees.

### Case Studies

In *FWO v Yogurberry World Square Pty Ltd* [2016] FCA 1290, fines were made against the Franchisee, the Franchisee director, the Master Franchisor as well as the out-sourced payroll provider of the popular Yogurberry frozen yoghurt chain for the underpayment of staff at that store. Each of those companies in the Yogurberry Group were found to be accessories to the exploitation of workers.

The 7 Eleven controversy has made headlines out of wage underpayment and the Government has made clear that it will not tolerate a “*head in the sand*” approach by Franchisors. 7 Eleven Franchisees were found to be requiring staff to “pay

back” wages paid and threatening to revoke visa sponsorship if staff didn’t comply in falsifying records of employment.

In *FWO v South Jin Proprietary Limited* [2015] FCA 1456, White J summarised that, in order to be knowingly concerned in, or a party to a contravention, a person must have engaged in some conduct which implicates or involves them in the contravention, so there is some practical connection between the person and the contravention.

His Honour also said that the Court needs to be satisfied that actual knowledge of the essential elements constituting the contravention is required, but that the Court can infer that a person had actual knowledge from the facts and circumstances of the case. Put another way, a director or accountant cannot be wilfully blind as to a contravention if the facts and circumstances they are aware of, should have lead them to know of a contravention.

Franchisors have a unique position in being able to know the number of staff needed to achieve certain financial metrics in a business, as well as ratios of products and hours worked to sales. With technology increasingly making this information available upstream, franchisors are more and more exposed to an inference that they have actual knowledge of the omissions of Franchisees.

### **What can you do?**

- Review your Franchise Agreements to include a requirement for Franchisees to comply with workplace laws.
- Provide access to Franchisees for reliable workplace relations advice.
- Create legal and policy frameworks which enable and assist compliance with the new laws such as developing internal tools and processes to support compliance.
- Show that you have taken steps to inform the Franchisee of their obligations as employer and their obligations pursuant to the Fair Work Act.
- Select, recruit and train Franchisees who are committed to compliance.
- Monitor compliance through the use of technology where possible to manage costs.

If this Bill is passed (there is no impediment to it doing so currently), it will see employer’s existing obligations to their employees increased and Franchisors will be compelled to actively consider the employment arrangements of its Franchise network.