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REFORMS TO THE FAIR WORK ACT

There have been two recent updates to the Fair Work Act 2009 that create stricter offences and impose more stringent obligations on employers. The new laws focus on protecting vulnerable workers, and preventing corrupt benefits, thus protecting employees' rights and creating fairer workplaces. Employers need to take note of these changes, to avoid facing the deterrent effects in the legislation.

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

This Bill passed both Houses of Parliament as of 5 September 2017, and recently became law. This Bill has made several amendments to the *Fair Work Act 2009* ("FWA"). The aim of the amendments is to address community concerns and evidence about the exploitation of vulnerable workers by certain employers.

Higher penalties for 'serious contraventions'

An employer will be guilty of a 'serious contravention' of workplace laws if they engaged in a deliberate action that forms a systematic pattern of conduct. This applies to both individuals and corporate bodies, as well as people involved in a serious contravention.

The penalties for contravening prescribed workplace laws are raised to a maximum fine of $9,500 for individuals and five times that amount for corporate bodies. Generally, these include contraventions of national employment standards, employee wage obligations, record keeping obligations etc. This creates a penalty ten times more severe for contraventions of the FWA where there is aggravated conduct, and indeed a higher disincentive for engaging in such conduct.

Penalties are also raised for contraventions of certain record keeping obligations under the FWA. These include contraventions relating to employee records and pay slips. Individuals who engage in a serious contravention of these obligations could now face a fine up to $9,500, and corporate bodies up to $47,500. This should encourage employers to keep reliable records, and help to ensure that employees receive their entitlements.

Liability of responsible franchisor entities and holding companies

A 'responsible franchisor entity', that is, an entity that has a significant degree of influence or control over the relevant franchisee's affairs, will be subject to greater scrutiny under the reforms. This includes holding companies that have established subsidiaries in their corporate structure, over which they operate influence and control. The responsible franchisor entity (or an officer of the entity) will contravene certain provisions in the FWA if at the time of the contravention it knew or could reasonably be expected to have known that the contravention would occur, or was likely to occur. The provisions apply generally to fair payment of wages, employee contracts, unfair employment conditions, and record keeping obligations.

An example of this new regime in action would be where a responsible franchisor entity was aware of a series of complaints about underpayments of wages. Under this new provision, it would not be necessary to prove that the responsible franchisor entity knew exactly which employees were being underpaid nor on what basis.

If found to have contravened one of these provisions, a responsible franchisor entity will only be able to defend its actions (or lack thereof) if it can prove that at the time of the contravention, it took reasonable steps to prevent contravention of the same or similar character.

This reform allows legal action to be taken against the responsible franchisor entity directly, without having to go through the franchisee first. If found guilty of an offence, a responsible franchisor entity will be subject to a civil remedy penalty, similar to those described above. Furthermore, the court can make an order requiring any underpayment of wages to be paid back by the responsible franchisor entity.

Prohibiting 'cashback' payments

The reform also prohibits employers from cashback practices. That is, an employer must not directly or indirectly require an employee to pay any amount their money or any amount of their prospective wages to the employer or another person, where that payment would be unreasonable, or would directly or indirectly benefit the employer or a party related to the employer (e.g. director of the employer, relative of the owner of the employer). An employee can still rely on this provision even if they refuse to make the requested payment.

The idea behind this provision is that it will always be unreasonable and unfair for an employer to ask an employee for cashback so that the employee can keep their job, particularly if the request is made using undue influence, duress or coercion.

If found to have contravened this provision, an employer could be subject to a maximum civil penalty of 60 penalty units for an individual (approx. $9,500), or 300 penalty units for a corporate body (approx. $47,500). The employee will also be entitled to have the amount of their payment reimbursed to them by their employer.

An employer will not have engaged in unreasonable requests for payment if they engage in legitimate, mutual negotiations for overpayments.

Powers of the Fair Work Ombudsman

The reforms also grant the Fair Work Ombudsman ("FWO") more evidence-gathering powers. Firstly, the FWO will have the power to issue an 'FWO notice' if they reasonably believe that a person has information or documents relevant to an investigation, or if that person is capable of giving evidence relevant to an investigation. This power is in addition to the powers given to Inspectors to require the production of documents. Thus, if someone refuses to comply with a notice issued by an Inspector, the FWO will be able to issue an FWO notice.

Secondly, the FWO also has new enforceable questioning powers, in contrast to Inspectors who cannot enforce a penalty over those who refuse or fail to answer questions.

However, it is important to note that the FWO must follow certain safeguards to ensure that these powers are used appropriately, and that people are treated fairly. These include:

- The FWO cannot rely on mere suspicion, they must have reasonable grounds to believe someone can help with an investigation;
- An FWO notice can only be issued by the FWO personally, or an appropriate delegate;
- An FWO notice must conform to certain form requirements;
- A person who attends to answer questions has the right of legal representation and is entitled to be reimbursed for reasonable expenses; and
- A person subject to a notice is protected from self-incrimination.

There are also new offences for intentionally hindering and obstructing the FWO and inspectors (prescribed officials) in their investigations. Similarly to the civil penalty provisions listed above, the maximum penalty for a contravention is $9,500 for an individual and $47,500 for a body corporate. This does not apply where the person has a reasonable excuse.

Furthermore, a person cannot give false or misleading information or evidence which they know to be false or misleading to the FWO or an Inspector. This carries the same penalties.

What are the implications of these reforms?

This introduction of this harsher regime essentially puts in place a centralised system of compliance for employers/franchisors. It means that employers will no longer be able to place themselves at arms-length from employees and use franchisees or lack of knowledge as a shield for unfair work practices. It is likely that this regime will mean that employers/franchisors will be targeted more fundamentally by the FWO and employees. Thus, employers should be encouraged to ensure they put in place practices and policies that ensure fair work practices and laws are being complied with.

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Furthermore, the extension of the FWO's powers, and offences introduced for hindering, obstructing and misleading the FWO show the importance that has been placed on fair work practices.

Fair Work Amendment (Corrupting Benefits) Act 2017

The *Fair Work Amendment (Corrupting Benefits) Act 2017* ("FWAA") came into effect on 11 September this year. It has introduced several new criminal offences to the FWA.

Prohibiting giving, receiving, or soliciting corrupting benefits

It is now an offence to dishonestly give, receive or solicit corrupting benefits if the intention of the benefit is to influence an officer or employee of a registered organisation to improperly perform or exercise their duties or functions, or to provide an illegitimate advantage.

The benefit does not have to be provided to the officer or employee who is acting improperly for the offence to be made out- the benefit can go to another person. It is the intention that the benefit influence an employee or officer that is important.

An example of this offence would be if an employer or their representative offered to pay a registered organisation or one of its officers for a promise that the organisation/officer would attempt to convince their members to agree to more minimal terms and conditions of employment in an agreement that the organisation would otherwise have negotiated for. It would also be an offence for someone to request an employer to pay them or another person on the promise that they would cause officers of a registered organisation to discourage members of the organisation from engaging in industrial action.

The penalty for committing one of these offences holds a maximum of 10 years imprisonment and a fine of $900,000 for individuals, and a fine of $4.5 million for corporate bodies.

Cash in kind or payments to employee organisations

This new offence prohibits employers from making a cash or in-kind payment to a prohibited beneficiary (e.g. a union) if the employer employs members of that union. Similarly, it is an offence to receive or solicit a cash or in-kind payment for the same purposes. However, exemptions apply where cash is paid to an organisation in instances such as deductions for membership fees, tax deductible gifts and market value payments for the supply of goods or services. For example, token gifts, including travel and hospitality payments associated with consultation or bargaining, of up to $420 will not make a person liable under this offence.

The penalty for an individual who commits this offence is a maximum of two years imprisonment and a $90,000 fine, or a $450,000 fine for corporate bodies.

New disclosure obligations

Where an organisation is a union bargaining representative for proposed enterprise agreements and they will be directly or indirectly benefited by one or more term in the agreement, there are new disclosure requirements that the FWAA puts in place. They must take all reasonable steps to ensure that they provide the employer with a document outlining the beneficial terms and their nature, no later than the end of the fourth day of the seven day access period.

Similarly, employers are required to disclose to their employees information about any potential benefits they may receive under a proposed enterprise agreement.

An organisation or employer who fails to disclose benefits in the required form will not be able to claim that they have reasonable grounds to believe that the agreement has been genuinely agreed to by employees.

This document is to give employers and employees the opportunity of understanding any potential benefits that organisations will receive, and allow them to consider whether they wish to vote for the proposal in question.

What are the implications for employers?

These new offences should encourage employers to consider any current arrangements they have in place with unions, and determine whether they meet the standards required, or if any exclusions apply to their situation. The disclosure requirements especially will force employers to think much carefully about negotiations for proposed enterprise agreements, as they will be required to disclose all benefits.

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