

12 September 2017

NAT 020/17

Amendments to the *Fair Work Act 2009* to protect vulnerable workers – New employer obligations and much higher penalties

SUMMARY

The *Fair Work (Protecting Vulnerable Workers) Act 2017* has been passed by Parliament and will come into operation shortly. The legislation amends the *Fair Work Act 2009* to:

- Introduce a new “serious contravention” penalty of up to \$630,000 per breach for a company (10 times the current maximum penalty);
- Increase penalties for pay slip and record keeping offences – up to \$63,000 per contravention (double the current maximum penalty) and up to \$630,000 for a serious contravention (20 times the current maximum penalty);
- Reverse the onus of proof for underpayment claims against employers who have failed to keep relevant employee records and pay slips. Such employers will be required to prove that they have paid employees correctly;
- Give franchisors and holding companies more responsibility for breaches of workplace relations laws and instruments by franchisees and subsidiaries; and
- Grant the Fair Work Ombudsman (**FWO**) compulsory interview powers (similar to the powers of the Australian Building and Construction Commission).

The *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (**the Vulnerable Workers’ Act**) has been passed by Parliament and will come into operation shortly.

The legislation amends the *Fair Work Act 2009* (**FW Act**) in the areas identified above.

The new requirements are summarised below.

New “serious contravention” penalties

New, much higher penalties will apply for a “serious contravention” of the provisions of the FW Act dealing with the entitlements of employees under awards, enterprise agreements, the National Employment Standards (**NES**) and other specified provisions of the Act.

The maximum penalty for a “serious contravention” is \$630,000 per breach for a company, i.e. 10 times higher than the current maximum penalty.

A contravention by a person (including a business) is a **serious contravention** if:

- the person knowingly contravened the provision; and
- the person’s conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons.

Without limiting other matters that a Court may take into account, the legislation states that in determining whether a person’s conduct constitutes “part of a systematic pattern of conduct”, a Court may have regard to:

- the number of contraventions of the Act committed by the person;
- the period over which the relevant contraventions occurred;
- the number of persons affected by the relevant contraventions;
- the person's response, or failure to respond, to any complaints made about the relevant contraventions;
- whether the person failed to keep employee records; and
- whether the person complied with the pay slip requirements of the FW Act.

The "serious contravention" penalties are extended to persons (such as directors and managers) who are involved in a "serious contravention" by a business and knew the contravention was a serious contravention.

Record keeping and pay slip obligations

Penalties for breaches of pay slip and employee record keeping requirements of the FW Act have increased to \$63,000 per contravention (double the current maximum) and up to \$630,000 for a "serious contravention" (20 times the current maximum penalty).

Further, employers who fail to keep employee records and issue pay slips will now bear the onus of disproving any allegation that they contravened relevant provisions of the FW Act (e.g. by paying an employee less than what the employee is entitled to under a modern award).

Franchisors and holding companies

The FW Act has been amended to impose responsibilities upon franchisors and holding companies for breaches of workplace relations laws and instruments by franchisees and subsidiaries in many circumstances.

A person (including a business) is a **responsible franchisor entity** (and hence has responsibility for certain breaches of the Act by their franchisees) if:

- the person is a franchisor; and
- the person has a significant degree of influence or control over the franchisee's affairs.

Responsible franchisor entities and holding companies may be held responsible for contraventions by franchisees and subsidiaries of the provisions in the FW Act dealing with the entitlements of employees under awards, enterprise agreements, the NES and other specified provisions of the Act, if the franchisor or holding company knew or could reasonably be expected to have known that the contravention would occur.

The legislation includes a defence for a franchisor or holding company that is able to demonstrate that it took reasonable steps to prevent the contravention by the franchisee or subsidiary.

Unreasonable requirements for employees

The Vulnerable Workers Act prohibits an employer requiring an employee to spend, or pay to the employer or another person, any of the employee's money or any amount payable to the employee for work performed, if the requirement:

- is unreasonable; and
- the payment is for the benefit of the employer or a party related to the employer.

Increased Powers for the FWO

The Vulnerable Workers Act gives the FWO greater investigative and enforcement powers.

The FWO may compel a person to provide information, documents, or attend an interview to answer questions relating to an investigation by an FWO inspector into a suspected contravention of specified provisions of the FW Act. The specified provisions include those dealing with the entitlements of employees under awards, enterprise agreements, and the NES.

Various protections are included in the Act to ensure fairness to those who are subjected to the use of the powers.

Ai Group Webinar

Ai Group is conducting a webinar that will discuss the new requirements under the Vulnerable Workers' Act. The webinar will be conducted between **11am and 12pm (AEST) on Wednesday 20 September 2017**

[Register here.](#)

Do you require further advice or assistance?

For general information or assistance, please contact the **Ai Group Workplace Advice Line** on 1300 55 66 77.

For more detailed assistance [Ai Group](#) and [Ai Group Workplace Lawyers](#) is able to assist with all of your workplace relations requirements, including:

- Auditing current workplace relations practices of businesses, franchisors and franchisees, and auditing compliance with legislative requirements;
- Conducting training for businesses, franchisors and franchisees;
- Drafting and reviewing employment policies;
- Drafting and reviewing contracts of employment; and
- Liaising with the FWO.

Advice given by Ai Group Workplace Lawyers is subject to legal professional privilege.



Stephen Smith
Head of National Workplace Relations Policy