
Proposed changes to franchisor liability under the Fair Work Act

1 September 2017

In brief

The Senate is currently considering significant changes to the *Fair Work Act 2009 (Cth)* (FW Act) to increase franchisor liability for franchisee labour law breach. These changes could be passed as early as September 2017. Under proposed laws, franchisors with material influence or control over franchisee businesses may be liable for franchisee breaches, and certain categories of contravention will attract fines of up to AUD630,000 per breach. Franchisors can avoid liability by taking ‘reasonable steps’, including through appropriate audit procedures.

These changes are in direct response to the issues arising out of a number of high profile franchisee underpayment cases in recent years. Given the current focus by the Fair Work Ombudsman (FWO) on the franchise industry and imminent law changes, having robust assurance programs in place will be key. In this Alert, we consider some steps your business can take now to prepare for the changes ahead.

In detail

The Senate is currently considering significant changes to the FW Act to increase franchisor liability for franchisee labour law breach under the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Bill).

What will change?

The Bill addresses issues arising out of a number of high profile franchisee underpayment cases since 2015. In brief, the changes proposed will:

- *Make a head or sub-franchisor liable for franchisee breach*, where the franchisor has:
 - sufficient influence or control over the franchisee business; and
 - knowledge, or could reasonably be expected to have knowledge of the breach.
- *Create a ‘reasonable steps’ defence*: A franchisor will not be liable where it can demonstrate that it has taken ‘reasonable steps’ to prevent the breach. Reasonable steps will include steps to put in place training, audit controls and complaint-handling mechanisms within a franchise network;
- *Introduce the concept of ‘serious contravention’*: attracting higher penalties (up to AUD630,000 per breach for a company, and AUD126,000 for an individual for certain

contraventions (note by comparison, the current maximum fine for a breach of the FW Act is AUD63,000);

- *Prohibit certain conduct* associated with exploitation, for example ‘cashback’ arrangements.
- *Increase information gathering powers* of the FWO.

When will the changes occur?

The Bill has not yet become law. The Bill is still before the Senate, and is subject to further debate and amendment. It is possible that the Bill will pass (potentially with some changes) in September 2017.

What should franchisor businesses be doing now?

Franchisor businesses should be considering their existing arrangements. In the least, you should undertake the following activities:

- Review existing franchise agreements to understand your level of influence, and in order to assess how the changes may apply to your franchise arrangements.
- Understand your current audit and termination rights and ensure your franchise agreements include a requirement to comply with the FW Act.
- Conduct franchisee risk profiling across your network.
- Review current training and on-boarding programs for franchisees.
- Review existing complaint-handling and reporting mechanisms.

In addition, given the current focus of the FWO on the franchise industry is likely to increase with the passing of this Bill and the associated media coverage, franchisors should establish a robust audit program to review franchisee compliance with both FW Act and immigration law/visa compliance obligations.

The takeaway

Whilst the Bill has not yet passed, the core elements pushing franchisors towards greater audit and review activities are not controversial, and likely to become law. Franchisor businesses should be actively considering their current approach to franchisee compliance. Our three tips are:

1. *Review your franchise arrangements, and understand whether your business will be affected by the proposed laws;*
2. *Review your current audit procedures;*
3. *Be proactive in seeking compliance amongst your franchise network, and making sure that your business has the resources and skill to respond to compliance activities.*

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

Bryony Binns
Partner, Legal
+61 (2) 8266 1107
bryony.binns@pwc.com

Rohan Geddes
Partner, Payroll Consulting
+61 (2) 8266 7261
rohan.geddes@pwc.com

David Patterson
Director, Assurance
+61 (3) 8603 5282
david.patterson@pwc.com

© 2017 PricewaterhouseCoopers. All rights reserved. In this document, “PwC” refers to PricewaterhouseCoopers a partnership formed in Australia, which is a member firm of PricewaterhouseCoopers International Limited, each member firm of which is a separate legal entity. This publication is a general summary. It is not legal or tax advice. Readers should not act on the basis of this publication before obtaining professional advice. PricewaterhouseCoopers is not licensed to provide financial product advice under the Corporations Act 2001 (Cth). Taxation is only one of the matters that you need to consider when making a decision on a financial product. You should consider taking advice from the holder of an Australian Financial Services License before making a decision on a financial product.

Liability limited by a scheme approved under Professional Standards Legislation.