

## Article Information

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## Compulsory FWO interviews: coming to an employer near you

**On 5 September 2017, the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth), was passed. The Act was introduced earlier this year in response to the 7/Eleven crisis. Emily Haar, Associate and Irene Nikoloudakis, Law Clerk review the recent reform.**

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The legislation was introduced in early 2017 in response to a number of reports and media investigations concerning the exploitation of vulnerable (often migrant) workers, including the Senate Standing Committee on Education and Employment's 2016 report, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, and the 2015 investigation by Fairfax Media and Four Corners about 7-Eleven franchisors.

### Increased penalties for serious contraventions

The amending legislation introduces a higher scale of penalties for 'serious contraventions' of civil remedy provisions. For a breach to be a 'serious contravention', the person must 'knowingly' contravene the provision (i.e. it must be deliberate) and it must form part of a 'systematic pattern of conduct'. A contravention by a body corporate will be considered to be deliberate if the entity 'expressly, tacitly or impliedly authorised the contravention'. In determining whether it formed part of a systematic pattern of conduct, a range of factors are taken into account. For example, if multiple contraventions of the *Fair Work Act 2009* (Cth) (FW Act) have occurred simultaneously (such as an underpayment of wages and record-keeping failures), the breaches occurred over a prolonged period of time and several workers were affected, then the contraventions are more likely to be considered part of a systematic pattern of conduct.

The amending legislation also increases the penalties for employers that fail to keep proper records and payslips, or keep misleading or false records. Those penalties are now in line with other civil remedy provisions in the FW Act.

### Liability of responsible holding companies and franchisors

The amending legislation also makes 'a responsible franchisor entity' or one of its officers liable for certain contraventions committed by their franchisees, if the franchisor knew or ought reasonably to have known about the contraventions. Similar provisions are provided for in the Act in respect of holding companies in relation to contraventions committed by their subsidiaries.

These provisions only apply to responsible franchisor entities that have a significant degree of influence or control over their franchisees' affairs. 'Control' relates to the broad affairs of the franchisee, rather than minor matters that do not impact on the operational decisions or the management of the business. The term 'affairs' is not defined but is to be read broadly and includes the corporate, financial or operational affairs of the franchisee. Relevantly, there is no liability if the franchisor took 'reasonable steps' to prevent a contravention of the same or a similar character.

The amending legislation provides a non-exhaustive list of factors for a court to take into account in determining whether a franchisor took reasonable steps, such as the size of the franchisor and their ability to control and influence the matter. This means that what constitutes reasonable steps for a large national franchisor will be very different to what constitutes reasonable steps for a much smaller business with only a few franchisees.

For further information about these changes as relevant to franchisees, see [this article](#).

### Unreasonable requirements and false or misleading documentation

The amending legislation prohibits employers from requiring an employee to spend or pay their employer part of their

wage, if this requirement is unreasonable and for the benefit of the employer or a party related to the employer. The employer will be liable even if the employee fails to make the payment.

### **Powers of the Fair Work Ombudsman**

The evidence gathering powers of the Fair Work Ombudsman (FWO) have also been strengthened under the amending legislation, though not without some additional safeguards negotiated in.

The FWO's powers will now be more in line with the powers available to other corporate regulators, such as the Australian Competition and Consumer Commission.

Most significantly, the FWO will now have the power to require persons to answer questions about suspected breaches of the FW Act. Previously, all interviews were voluntary.

After concerns were raised by the Opposition and Cross-Benchers, the Government conceded to amendments requiring the FWO to first obtain approval from a senior member of the Administrative Appeals Tribunal before issuing a notice to produce documents or answer questions.

The increased penalties for serious contraventions and record-keeping breaches commenced on 15 September 2017, while the new obligations that extend liability for breaches of workplace laws in subsidiary and franchise networks to head offices will commence on 27 October 2017.

*Should you have any questions concerning how this reform may affect your business, please contact a member of Piper Alderman's Employment Relations team.*