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Changes to the Fair Work Act

Following a spate of investigations by Australia's peak industrial law watchdog, the Fair Work Ombudsman (FWO), in which 7-Eleven, Caltex, Dominos, Pizza Hut and a number of other well-known, multi-national companies, were found to have been underpaying their Australian-based workers, the Commonwealth Parliament has rolled out a number of amendments to the Fair Work Act 2009 (FWA). Having come into effect on September 15, 2017, these amendments are unique in that, for the first time, head franchisors, even those that are not located within Australia, can now be held strictly liable for underpayments (as well as other breaches of Australian industrial law) made by local, Australian-based franchisees. While the amendments are, on one level, a reaction to the seeming epidemic of underpayment of workers by such companies, it can also be seen as part of the current government's broader push to hold overseas companies more accountable for their Australian-based operations.[1]

This article will look at some of the key features of these amendments and offer some practical risk mitigation strategies for overseas-based companies who have established, or are looking to establish, franchises in Australia.

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Key Features

As mentioned above, the key feature of the amendments is that the law now targets franchisors that turn a blind eye to the breaches of their franchisees, with franchisors now strictly liable for their franchisees' actions when exercising a "significant degree of control" over them. The Parliament has deliberately left the definition of "significant degree of control" relatively open. The deliberate vagueness in the definition is not unique to these amendments and is a common feature throughout the FWA. The apparent policy rationale for this approach is to encourage employers (and now franchisors) to "over comply" with their obligations to best protect themselves from breaches of the FWA. Sophisticated employers often used skilled employment and industrial lawyers to balance their legal obligations under the FWA with the commercial reality of that employer's business. With these changes, franchisors, especially those with headquarters outside Australia, are now encouraged to engage such specialists as part of their retinue of Australian-based service providers.

Another key feature of the amendments is that franchisors (as well as franchisees) are now exposed to significantly higher penalties for contravening payment-related workplace laws, with fines increasing ten-fold. In addition, employers are now prohibited from asking their employees for "cash-back" – an amendment spurred by findings that young workers were led to ATMs by employers and forced to return some of their wage.

The Practical Reality

A franchisor has yet to be charged under these new laws, despite the FWO charging ten companies under the FWA since the amendments went into effect. In the recent decision of *Fair Work Ombudsman v NSH North Pty Ltd t/as New Shanghai Charlestown* [2017] FCA 1301, Justice Bromwich endorsed the policy rationale and objective of the amendment. He called Parliament's efforts to increase penalties for such cases as "entirely warranted." With multi-national bodies such as 7-Eleven charged with paying employees as little as $5 an hour, the necessity of such stringent laws becomes apparent.

However, not everyone is satisfied. The scope of the new laws has been criticized, particularly when considering the breadth of the definition of the "franchisor," the type of control required by the franchisors, and the level of knowledge they must have in terms of wrongdoing by franchisees. As more cases come before the court, the parameters of liability for franchisors under the amendments are very likely

to become more clearly defined through judicial consideration. Nevertheless, and for the reasons discussed above, the amendments (as well as the FWA overall) are designed to retain some degree of vagueness in their terms and operation.

Advice for Investors and Business Owners

To minimize the risk of violating the FWA, franchisors should assist their franchisees in understanding and complying with their legal responsibilities; record-keeping and pay slip obligations are of particular importance now. Not only can franchisors be liable when they have actual knowledge of their franchisees' wrongdoing – if the court is of the view that they could reasonably have known that their franchisee has breached workplace laws, they can be equally liable.

Be prepared to have to disprove allegations relating to wage claims in court. The onus of proof has been reversed for employers who do not meet their record-keeping or pay slip obligations without a reasonable excuse.

For international investors in Australia-based franchisors, the biggest challenge will lay in ensuring that franchisees are following the law, notwithstanding the fact that the parent franchisor may be many thousands of miles away. One way to minimize risk of franchisees breaching the law and, in doing so, exposing the parent franchisor to liability, is to have strict protocols and systems in place by which regular compliance audits are conducted. It is also recommended that individual staff members should be held accountable for ensuring compliance with all laws. This can be achieved by having carefully drafted contracts of employment. Working closely with an industrial and employment law specialist to assist with the development of these systems or protocols will be invaluable in minimizing this risk. P

1 Another example of the current government's push to hold overseas-based companies liable is in respect of tax avoidance, with increased penalties for the same currently set to be forwarded to the Commonwealth Parliament for consideration.