

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT



Adam Salter
Partner, Jones Day

MESSAGE FROM THE EDITOR

In this edition of the *Update*, we discuss two significant developments that are likely to have far-reaching impacts for employers and employees across Australia. First, we discuss the proposed changes to the *Fair Work Act 2009* (Cth) that would impose increased liability on franchisors in relation to the conduct of franchisees as well as harsher penalties for serious contraventions. If enacted, these amendments will necessitate major changes to the way in which franchisors manage their franchise relationships. We then examine the long-awaited Fair Work Commission decision on weekend penalty rates and discuss how the various retail and hospitality awards will be affected by the changes.

IN THE PIPELINE—HIGHLIGHTING CHANGES OF INTEREST TO EMPLOYERS IN AUSTRALIA

■ SLUGGISH WAGES GROWTH IN THE PRIVATE SECTOR CONTINUES

The December quarter 2016 Wage Price Index released by the ABS on 22 February 2017 shows that wages growth in the private sector continues to be sluggish, increasing just 1.8 percent in the year to December 2016. This figure reflects another record low in wages growth, breaking the previous record low of 1.9 percent growth in the September and June 2016 quarters. Total wages growth from the September to December 2016 quarter increased by 0.5 percent. The Wage Price Index measures changes over time in the price of labour services, with the “headline” measure being the total hourly rates of pay excluding bonuses.

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■ AMENDMENT TO WORKPLACE LAWS INTRODUCED TO TARGET UNDERPAYMENT OF VULNERABLE WORKERS

The Federal Government is seeking to pass significant amendments to the *Fair Work Act 2009* (Cth) (“Act”) that would have the effect of making franchisors directly accountable for contraventions of the Act by their franchisees. The changes respond to recently uncovered evidence that suggests widespread misconduct in a number of retail and fast food chains using the franchise model.

Extended Liability for Franchisors. The cornerstone of the amendments is that they will extend the liability of franchisors for breaches of the Act by their franchisees. Under the current accessorial liability provisions in section 550 of the Act, franchisors with no knowledge of their franchisees breaching the Act will not be liable for their franchisees’ breaches. The new amendments will extend such liability to capture franchisors who have “a significant degree of influence or control” over their franchisee’s conduct if they know or could reasonably be expected to know that a franchisee was contravening the Act.

The amendments include a defence if a franchisor takes “reasonable steps” to prevent contraventions. In deciding whether reasonable steps are taken, the amendment requires the Fair Work Commission (“Commission”) or court to take into account the size and resources of the corporation and the franchise relationship itself.

The Explanatory Memorandum to the amendment specifies that “turning a blind eye to contraventions is not an option”. Whether this turns out to be true will depend on how far the courts and Commission will require corporations to go in order to find out about violations of the Act which they could reasonably be expected to have known.

Harsher Penalties for “Serious Contraventions”. The amendments would also increase the maximum penalties for contraventions of the Act fivefold, to \$108,000 for individuals and \$540,000 for corporations. Importantly, this applies per offence and per employee. That would be available where the contraventions involved are both “deliberate” and part of a “systemic pattern”. For corporations, deliberate conduct includes “expressly, tacitly or impliedly authoris[ing] the contravention”. This broad definition of “deliberate” conduct means that franchisors will need to be wary about not tacitly encouraging breaches of the Act, such as when responding to complaints that franchisees have breached the Act.

Express Prohibition on “Cash Back” Schemes. The amendments would also prohibit employers from requiring employees to hand back money, in so-called “cash back” schemes. Under the amendments, employers cannot “directly or indirectly” require an employee “to spend, or pay . . . an amount of the employee’s money” if it is “unreasonable”. The amendments would also make void any terms of employment contracts which require “unreasonable” payments. This will reduce the scope of allowable deductions under section 324 of the Act. The test of unreasonableness is vague, so it will take time to see how the Commission and the courts approach such provisions.

Increased Evidence-Gathering Powers of the Fair Work Ombudsman. To complement the new provisions, the amendments will also give the Fair Work Ombudsman (“Ombudsman”) new investigative powers, where the Ombudsman “reasonably believes” a person or corporation has information or documents relevant to its investigation. These powers are in line with bodies that investigate serious white collar crime in Australia. Additional penalties have been inserted for people and corporations that hinder the Ombudsman or its staff in their investigations.

Conclusion. The above amendments have received wide popular support as well as bipartisan support in Parliament. If they are passed, franchisors will be required to make substantial changes to their existing franchise arrangements, including conducting regular spot checks and providing contact numbers for franchisee employees to report potential underpayments. Franchisors should also consider updating franchise agreements to require franchisees to comply with the new workplace laws.

HOT OFF THE BENCH—DECISIONS OF INTEREST FROM THE AUSTRALIAN COURTS

■ FAIR WORK COMMISSION DELIVERS LONG-AWAITED DECISION ON PENALTY RATES

Factual Background. As part of its four-yearly review of modern awards, the Full Bench of the Commission has handed down its decision on penalty rates in a range of awards in the hospitality and retail sectors, namely: the Fast Food Industry Award 2010, General Retail Industry Award 2010, Hospitality Industry (General) Award 2010, Pharmacy Industry Award 2010,

Registered and Licensed Clubs Award 2010 and Restaurant Industry Award 2010.

The Commission considered proposals by a number of employer bodies to vary weekend penalty rates and, specifically, to reduce Sunday penalty rates to bring them in line with Saturday penalty rates. There were also proposals to reduce public holiday penalty rates across the various awards. Generally speaking, no reductions were sought to Saturday penalty rates.

The review process was a mammoth undertaking, with the Commission receiving more than 5,900 submissions from the various parties, including employees, employers and other interested organisations. After 39 days of hearings involving evidence from 143 witnesses, the final written submission was received in early February this year, with the Commission handing down its decision on 23 February 2017.

Legal Background. As part of its modern award review, the Commission is required, under section 134 of the *Fair Work Act 2009* (Cth) (“Act”) to consider whether each award is achieving the modern awards objective. The modern awards objective requires that the Commission “ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions”, taking into account matters including (relevantly) “... the need to provide additional remuneration for ... employees working on weekends or public holidays...”.

Reasons for Decision. The Commission noted that while the traditional rationale for setting penalty rates has been to deter employers from scheduling work outside regular working hours, the “deterrence” element should no longer be a relevant consideration in the setting of weekend and public holiday penalty rates. Rather, the sole determinant should be how best to compensate employees for the inconvenience of working on weekends and public holidays. This requires consideration of: (i) the extent of the inconvenience (in particular the impact on health and work-life balance); (ii) the terms of the particular modern award, including whether it already compensates employees for working on such days; and (iii) the extent to which working on such days is a feature of the particular industry.

After examining the evidence before it, the Commission concluded that while there is still a higher level of inconvenience associated with weekend work (compared to weekday work) and Sunday work (relative to Saturday work), the extent of inconvenience has reduced in recent times such that the sizeable gap between Saturday and Sunday penalty rates is no longer justified. The Commission noted that the same principles should apply to public holidays, though in doing so it acknowledged that public holidays still serve an important community purpose.

The Commission concluded that there would be a clear benefit in achieving consistency in penalty rates across Saturdays, Sundays and public holidays (and across various awards, where appropriate), in light of lay evidence that current penalty rates were leading employers to impose operational limitations on Sundays and public holidays (including reducing trading hours, lowering staff levels and restricting the range of services provided).

Decision. The Commission determined that Sunday penalty rates in four of the six modern awards (the Fast Food, Hospitality, General Retail and Pharmacy Awards) do not provide a “fair and relevant minimum safety net” as per the modern awards objective and therefore should be reduced. The Commission’s approach to casual penalty rates was to keep the rate 25 percentage points higher than the rate for non-casual workers. The Commission chose not to make any changes to penalty rates in the Registered and Licensed Clubs Award 2010 or Restaurant Industry Award 2010.

The reductions in Sunday penalty rates for each award (for full-time and part-time employees), to be implemented by way of a series of annual adjustments commencing on 1 July 2017, are as follows:

- (a) Hospitality Award—175% to 150% (no change for casual employees);
- (b) General Retail Award—200% to 150% (175% for casual employees);
- (c) Fast Food Award (Level 1 Employees only)—150% to 125% (175% to 150% for casual employees); and
- (d) Pharmacy Award—200% to 150% (175% for casual employees).

The Commission also reduced the public holiday penalty rates for full time employees in respect of the following awards (with the changes also due to commence on 1 July 2017):

- (a) Hospitality Award—250% to 225% (275% to 250% for casual employees);
- (b) Restaurant Award—250% to 225% (remaining at 250% for casual employees);
- (c) General Retail Award—250% to 225% (250% for casual employees);
- (d) Fast Food Award—250% to 225% (250% for casual employees); and
- (e) Pharmacy Award—250% to 225% (250% for casual employees).

Finally, the Commission also varied provisions in the Restaurant and Fast Food Awards that offer higher penalty rates for those undertaking early/late night work. Specifically, it amended the provision that provides a 15 percent loading for work performed between midnight and 7.00 a.m., reducing the time span to 6.00 a.m. It did so on the basis that the existing provision was overcompensating employees for work performed between 6.00 a.m. and 7.00 a.m., which it viewed as inconsistent with the modern awards objective (because it was neither “fair” to employers nor “relevant” to the prevailing circumstances in the industry). These changes are to come into effect, after a period of consultation, on 27 March 2017.

The Commission stressed that the decision to change penalty rates was determined in light of characteristics unique to the Retail and Hospitality sectors, so it should not be seen as justifying similar amendments in other awards. For instance, the Retail and Hospitality sectors are particularly important sources of entry-level jobs for young workers (who are more likely to work on weekends). In addition, consumer expectations regarding access to services in those sectors have increased over time.

The Commission also expressed provisional views on transitional arrangements for the Sunday penalty rate reductions and invited public submissions (particularly on the question of whether take-home pay orders might be an available option). However, the Commission expressed opposition to the idea of a 12-month transitional period before the changes came into effect. It also did not think that preserving current penalty

rates for all existing employees was a viable option (as it would lead to different employees being employed on different terms and conditions).

Impact on Employers. This decision has been warmly welcomed by employers and employer organisations, which see the alignment of penalty rates as an important first step in increasing productivity and overall competitiveness. While the Commission anticipates that the changes are likely to have a positive impact on employment, it remains to be seen whether they will ultimately lead to more jobs or longer trading hours. As expected, there has been strong opposition to the Commission’s decision from unions and other employee bodies. Consequently, it appears highly likely that one or more political parties will seek to introduce legislation to prevent the amendments from coming into force or at least delay their commencement. The Government has also indicated it is open to possible measures to offset any reductions in pay so that workers are not left worse off as a result of the changes.

We thank associate Claire Goulding and law clerk Bowen Fox for their assistance in the preparation of this Update.

LAWYER CONTACT

Adam Salter

Partner

Sydney

+61.2.8272.0514

asalter@jonesday.com

QUESTIONS

If you have any questions arising out of the contents of this *Update*, please do not hesitate to contact [Adam Salter](#), Partner. Adam can be contacted by email at asalter@jonesday.com or by phone on +612 8272 0514.

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