



BREAKDOWN OF

Franchisor Liability

UNDER THE FAIR WORK ACT



Clyde Industrial

THE IMPORTANCE OF HR MANAGEMENT FOR FRANCHISORS

In September 2017, the Fair Work Act 2009 (Cth) (FW Act) was amended to include new provisions dealing with responsible franchisor entities.

These provisions mean that franchisor entities can be held legally responsible if a franchisee contravenes certain provisions of the FW Act, including:

- Entitlements under the National Employment Standards, Modern Awards or Enterprise Agreements
- National Minimum Wage Orders, equal remuneration orders and guarantees of annual earnings
- Rules for methods and frequency of payment
- Pay slips and record keeping; and
- Sham contracting.



Liability for the actions of franchisees will apply to franchisors if they meet the relevant statutory test, and if they:

- knew, or could reasonably be expected to have known, that a relevant contravention would happen, or
- at the time the contravention happened, knew, or could reasonably be expected to have known, that a contravention of the same or similar kind was likely to happen, and
- haven't taken reasonable steps to prevent the contravention or a contravention of the same or similar character.

The relevant statutory test applied to franchisors is as follows:

1. There must be a franchise

This requires an arrangement where the owner of a brand or trademark (franchisor) allows a person to earn money by using the brand or trademark, or the reputation of the brand, in running a business (franchisee)

2. The franchisee's business must be substantially or materially associated with intellectual property (for example, the trademark) relating to the franchise

This means that the use of the franchise branding, such as a trademark, logo or marketing, must be a major feature of the business operated by the franchisee

3. The franchisor has a significant degree of influence or control over the franchisee's affairs

This examines the degree of influence or control a franchisor has over a franchisee's financial, operational and/or corporate affairs. There will be some degree of influence or control in all franchise arrangements. For the extended liability provisions to cover a franchisor, a significant level of involvement in the franchisee's business affairs is needed

Determining whether influence or control is significant will depend on the franchise model and the parties. It looks at:

- the rights of the franchisor to direct, manage, regulate, determine, or command the franchisee entity about financial, operational and/or corporate matters. For example, things like trading hours, sales targets, or quotas, staffing levels, expenditure on business expenses and costs
- how the relationship works in practice, such as how much the franchisor influences or contributes to management or operational decisions of the franchisee business or affects the franchisee's ability to generate revenue or profits.



WHAT DOES THIS MEAN FOR FRANCHISORS?

Simply put, these provisions mean that responsible Franchisors must take reasonable steps to ensure that their franchisees act in compliance with their lawful obligations under the Fair Work Act and relevant Modern Award or Enterprise Agreement.

These provisions do not mean that Franchisors need to develop an extensive human resources department and assume control of all aspects of human resource management for their franchisees (unless otherwise occurring). These functions can remain under the direct control of the Franchisees. It does however mean that Franchisors should take a more active role in regulating the application of minimum employment conditions and entitlements across their franchisees. This may include:

- Providing up-to-date and accurate minimum wage advice to their franchisees
- Offering training to franchisees in ways in which the classification of employees ought to occur under the relevant modern award or enterprise agreement (i.e. how to determine the correct pay level).
- Guidance and oversight on the application of National Employment Standards such as annual leave, sick leave, redundancy pay, notice of termination etc.
- Systems to ensure that pay slip and record keeping practices are compliant with the Fair Work Act 2009 and Fair Work Regulations 2009
- Training and advice on Sham Contracting.

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