FRANCHISING UPDATE

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Increased Franchisor Liability Likely Under New Laws

Many franchisors and other participants in the franchising sector are anticipating with concern the outcome of *The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (**Bill**) which was introduced into the Federal Parliament on 1 March 2017 and referred to the Senate Education and Legislation Committee on 23 March 2017. The Committee briefly accepted public submissions until 6 April 2017 and held public hearings on 12 and 13 April 2017.

Assuming that this Bill passes into law, new liability for franchisors will now be created in relation to the underpayment or non-payment of franchisee staff members. The Bill also proposes significant increases in fines.

The following update includes details about the Bill and what it means for franchisors should it be passed. We will provide a comprehensive bulletin regarding the matter once the Bill passes into law.

Recent Franchising Statistics

In January 2017 the Australian Competition and Consumer Commission (**ACCC**) released updated statistics regarding franchising in its report Small Business In Focus #13. According to the ACCC, fewer franchising complaints have been reported since the introduction of the amended Franchising Code in January 2015. Complaints fell to 32 per month by the end of 2016, after an average of 52 per month in the first half of 2015.

In the financial year ending 30 June 2016, the ACCC reported that the most complained about franchising issues were: misleading conduct / false representations (58 complaints), disclosure (44 complaints), unconscionable conduct (20 complaints) and termination of the franchise agreement (15 complaints).

In addition, during the financial year ending 30 June 2016, the ACCC reported that it audited five franchisors for compliance with the Franchising Code, in addition to other complaint checks. The ACCC reported that they took steps from those audits and checks to ensure that franchisors complied with the Franchising Code moving forward.

Calls for Increased Fines for Franchisors

Recently, the Productivity Commission stated that the AUD1.1 million maximum fine for breaching consumer laws is "too low" in the context of gains made by companies breaching those laws. With this in mind, we will keep you updated as to any changes that occur in this space.

Quick links

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- *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Bill)
- Higher Penalties, Construction, Health and Energy: the ACCC Sets its Enforcement Priorities for 2017
- On 13 February 2017 the Australian Government Passed the *Privacy Amendment (Notifiable Data Breaches) Bill 2017*
- They are Unhappy out There
- Chemist Warehouse Network fine Following Fair Work Audit

FAIR WORK AMENDMENT (PROTECTING VULNERABLE WORKERS) BILL 2017 (BILL)

In March 2017 the Federal Government introduced the Bill into the Parliament. It has passed the House of Representatives and is currently before a Senate Committee which is to report back during May 2017 regarding this Bill. It is anticipated that the Bill will pass the Senate in a substantially similar form to the current Bill.

The Bill represents a significant departure from the past and creates new significant liabilities for franchisors. Previously for a franchisor to be held liable by the Fair Work Ombudsmen, the franchisor had to be actively involved in the franchisee's breach under section 550 of the *Fair Work Act 2009* (**FWA**). The new offences fix franchisors with liability if:

- they are in a relationship of franchisor/franchisee
- the franchisor has a significant degree of influence or control over the franchisee entity's affairs
- the franchisor knew or could reasonably be expected to have known that the contravention by the franchisee was likely to occur. The defence with respect to this new liability is that the franchisor has taken reasonable steps to prevent a contravention by the franchisee.

If the Bill passes in its present form, we do not think that it would be a significant impediment for a Federal Court Judge to find that the franchisor had influence or control. The starting point for assessing influence or control would of course be the Franchise Agreement which would usually require compliance with all laws and regulations. Further, there would be generally powers held by franchisors to issue directions to franchisees and/or terminate agreements. We think that the intent of this legislation is to avoid the situation where a franchisor could order its affairs so as it take itself beyond the reach of this amendment. Hence the definition including the word influence which is a significantly smaller bar to surmount than to establish control.

In light of the context of the Bill, franchisors need to consider what type of compliance programs that may need to be implemented. Bear in mind issues with nonpayment of wages are likely to be systematic and will usually be deliberate. They will be deliberate because the franchisee or employer will actually intend to be making the payments to employees that are actually made. These records of course are available for review and inspection and it is probable that a Fair Work Ombudsmen Inspector will ask a franchisor what auditing or other review had taken place of a franchisee's time and wages records to ensure compliance.

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Finally, there are new requirements which require employers (read franchisee in this case) to keep time and wage records which are not false or misleading in material particulars. Further this same obligation extends to pay slips. A franchisor will need watch developments in regards to the Bill because it is likely to be in coming to force in the second half of 2017. K&L Gates can assist franchisors with advice regarding their compliance obligations under these new amendments.

This article was written by Gerard Phillips, Partner, in the Sydney office.

HIGHER PENALTIES, CONSTRUCTION, HEALTH AND ENERGY: THE ACCC SETS ITS ENFORCEMENT PRIORITIES FOR 2017

- On 24 February, the ACCC unveiled its Enforcement and Compliance priorities for 2017.
- The ACCC's enforcement activities in 2017 will continue to target larger companies causing harm to consumers and small businesses.
- As expected, the ACCC will continue to push for higher penalties for breaches of both competition and consumer laws, in particular against larger businesses.
- In the competition space, the ACCC will return its focus to anti-competitive conduct resulting in a substantial lessening of competition, particularly price-parity agreements. It also warns that there will be more criminal prosecutions of cartel participants after the commencement of the first criminal cartel case in 2016.
- At a consumer law level, the ACCC will focus on consumer guarantees, unfair contract terms, country of origin labelling, payment surcharges and broadband performance and speed claims.
- Industries that will be particularly focused upon include the commercial construction industry, energy, health (including private health insurance), agriculture, new car retailing and telecommunications.

Enforcement Priorities for 2017

In his first public address for 2017, ACCC Chairman Rod Sims addressed the Committee for Economic Development of Australia (**CEDA**) and announced the Australian Competition and Consumer Commission (**ACCC**)'s Enforcement and Compliance Policy for 2017.

The ACCC has identified the following areas as enforcement priorities in 2017:

- *general priorities* – stronger penalties, targeting large companies, working with specialist regulators and market studies
- *competition priorities* – criminal cartels and anti-competitive conduct with a particular focus on price parity deals, including in relation to online platforms
- *consumer priorities* – unfair contract terms, payment surcharges, broadband performance and speed claims, consumer guarantees and product safety with a particular focus on commission based sales, the airline industry, the private health insurance sector and online platform providers.

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Mr Sims identified the following industries as targets for the ACCC's enforcement efforts: the energy sector, health sector including the private health insurance industry, commercial construction industry, agriculture, new car retailing and telecommunications.

Consistent with recent practice, Mr Sims stated that the ACCC will "gravitate towards larger businesses" when investigating conduct and commencing legal proceedings.

ACCC will Continue to Push for Higher Penalties

As anticipated, penalties will continue to be a key focus for the ACCC heading into 2017. Mr Sims emphasised the importance of securing penalties with a sufficient deterrent effect, stating:

> "One issue that continually emerges is whether the penalties against large businesses are enough of a deterrent and more than just the cost of doing business."

Clearly encouraged by its recent success in the courts relating to penalties, the ACCC will continue to seek higher penalties this year, particularly against large companies. Mr Sims acknowledged that this approach may lead to fewer agreed settlements, at least initially.

The approach is consistent with the ACCC's public push for higher legislative penalties for breaches of the Australian Consumer Law (**ACL**). In particular, the ACCC's position is that fines under the ACL should be equal to those available in relation to breaches of the competition provisions of the Competition and Consumer Act 2010.

Competition Priorities

Criminal Cartels

Cartel conduct will once again be a priority of the ACCC in 2017 and we can except to see more criminal prosecutions, including against individuals. Mr Sims stated that the ACCC continues to see too much cartel activity and that he fears "only jail sentences for individuals in prominent companies will send the appropriate deterrence messages."

Following the ACCC bringing the first ever criminal cartel cases under the cartel laws in 2016, it is of little surprise that criminal cartels continues as one the ACCC's top priorities.

Anti-Competitive Conduct

Interestingly, Mr Sims conceded that the ACCC's focus on criminal cartels in recent years has led to the ACCC being less involved in investigating other anti-competitive conduct resulting in a substantial lessening of competition (SLC). This will now change with Mr Sims stating that:

> "We will now be devoting more resources to SLC cases, and we have undertaken considerable work in assessing past judicial decisions in SLC cases and training our staff."

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A particular area of focus in this regard will be price parity deals, with Mr Sims referring to the recent High Court decision against Flight Centre which held that agents can be in competition with their principals. Mr Sims noted that price parity deals are often associated with online markets. We therefore advise businesses using online sales platforms to review their commercial arrangements where price parity clauses are involved.

Mr Sims also used his speech to put the energy, health, commercial construction and agriculture sectors on notice commenting that anti-competitive conduct investigations in these industries are well advanced.

Following the establishment of the Agriculture Unit in October 2015 and with ongoing inquiries into the dairy, beef and cattle, and horticulture industries, it is clear that the ACCC is particularly concerned with the state of competition in the agriculture sector. The ACCC has similarly set up a team to focus on anti-competitive conduct in the construction industry as part of its heightened focus on that sector.

Consumer Priorities

Unfair Contract Terms

Following the introduction of the new unfair contract terms regime in November 2016 protecting small businesses, it is again of little surprise that unfair contract terms will be a top priority for the ACCC in 2017.

Mr Sims reiterated that terms which are commonly considered unfair include those that grant a large contracting party broad and unreasonable powers to protect their interests, unilaterally vary terms or cancel agreements.

He warned that the ACCC is moving from an education phase to an enforcement phase in relation to these new laws. The focus on unfair contract terms is in line with the ACCC's general priority of targeting large companies in order to try and set benchmarks for industry behaviour.

Consumer Guarantees

Another enduring priority for the ACCC is business compliance with consumer guarantees. The ACCC is vocally of the view that breaches of the consumer guarantees and/or misleading conduct regarding the availability of these guarantees, is manifestly detrimental to consumer welfare.

This year, the ACCC will be particularly focused on consumer guarantees as they apply to more complex products and, particularly, their application to services. Mr Sims also called out a number of industries about which the ACCC has concerns, including the airline industry, new motor vehicle industry and telecommunications companies.

Mr Sims indicated that in the coming year, the ACCC will examine how airline terms and conditions in regards to limitations on refunds for inflexible fares, delays and airline initiated cancellations interact with the consumer guarantees remedies.

In relation to telecommunications, Mr Sims indicated that inadequate broadband speeds and service drop outs and delays, are issues that require further examination in 2017.

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Mr Sims also indicated that the new car retailing industry will continue as an enforcement priority in 2017 as the ACCC works towards the timetable of releasing a draft report in mid-2017 for the in-depth market study that was initiated in June 2016.

Private Health Insurance

Consumer issues in the private health insurance industry will continue to be a top priority for the ACCC in 2017.

The ACCC remains concerned that insurers are not adequately notifying consumers of cuts to their insurance coverage and benefits. Mr Sims noted that "unexpected out of pocket expenses and limits on…access to medical treatment can cause great harm and detriment."

Country of Origin Labelling

With the *Competition and Consumer Amendment (Country of Origin) Bill 2016* recently being given the tick of approval by Parliament, the ACCC has indicated that country of origin labelling will also be a top priority.

The new legislation raises the standards of what is considered to be 'substantial transformation' in a particular country and removes the '50% production test' which was considered to be difficult to measure and administer.

Since businesses have until July 2018 to implement the new labelling arrangements, Mr Sims indicated that over the next 16 months, the ACCC will be involved in education activities to support businesses during the transition period for the new country of origin labelling laws.

Payment Surcharges

A ban on businesses charging excessive payment surcharges came into effect in 2016 for large merchants and will extend to all other merchants on 1 September 2017.

Whilst Mr Sims acknowledged that the ACCC's involvement is still in its early stages and will largely focus on education and awareness activities, he also foreshadowed that "we will also act on possible breaches particularly for larger businesses that have had time and the resources to make the necessary adjustments."

Broadband Performance and Speed Claims

In February 2017, the ACCC released a report on broadband speed claims following a lengthy consultation period calling for views on how consumer information about broadband speed and performance could be improved. The report noted that 80% of consumers are confused about broadband speed claims and want broadband speed information to be presented in a simple, standardised format to enable easy comparisons.

Mr Sims announced that the ACCC will increase its involvement in the communication sector to ensure that consumers better understand broadband plans. He also foreshadowed that the ACCC will release a best practice broadband speeds advertising guidance to the industry in the first half of 2017 and that the ACCC will work with the government on the introduction of a Broadband Performance Monitoring and Reporting program.

Whist Mr Sims addressed consumer law priorities at great lengths, his noteworthy silence on unconscionable conduct suggests that the ACCC is eager to move on from recent unsuccessful proceedings.

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If you want any details or you wish to discuss how the ACCC's focus may affect your business please contact Ayman Guirguis or any other member of our Competition and Consumer Law team.

This article was written by Ayman Guirguis, Partner, in the Sydney office and Theadora Fabricius, Lawyer, in the Sydney office.

ON 13 FEBRUARY 2017 THE AUSTRALIAN GOVERNMENT PASSED THE *PRIVACY AMENDMENT (NOTIFIABLE DATA BREACHES) BILL 2017*

Who Does This Affect?

The new requirements affect all APP entities i.e. any entity that is currently bound to comply with the Australian Privacy Principles under the *Privacy Act 1988* (Cth), including Commonwealth Government Agencies and private organisations with an annual turnover of more than AUD3 million, as well as a limited number of other entities including credit reporting bodies, credit providers and file number recipients (together, **Entities**).

What are the New Requirements?

Entities must notify affected individuals, as well as the Privacy Commissioner, when Entities become aware that there are reasonable grounds to believe that an 'eligible data breach' has occurred in relation to that Entity.

An eligible data breach is either:

- unauthorised access to or disclosure of the relevant information, where the access or disclosure would reasonably be likely to result in serious harm to any of the individuals to whom the information relates, or
- loss of information in circumstances where unauthorised access to or disclosure of the information is likely to occur, and assuming that it were to occur, that access or disclosure would reasonably be likely to result in serious harm to any of the individuals to whom the information relates.

In determining whether access to or disclosure of information would reasonably be likely to result in serious harm, various matters are taken into account, including:

- the kind or kinds, and sensitivity, of the information
- whether the information is protected by one or more security measures, and the likelihood that those measures could be overcome
- the person or the kinds of persons who have obtained or could obtain the information
- the likelihood that any persons who could obtain information that has been secured by making it unintelligible or meaningless to unauthorised persons may also have the means to circumvent that security
- the nature of the harm.

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If an Entity is aware that there are reasonable grounds to believe that an eligible data breach has occurred, the Entity must prepare a statement setting out specified details and notify both the Privacy Commissioner and the affected individual(s). If it is not practicable to notify affected (or at risk) individuals, the Entity is required to publish the statement on its website.

If an Entity suspects an eligible data breach may have occurred, but is not aware of reasonable grounds to believe the relevant circumstances amount to an eligible data breach, the Entity must investigate and within 30 days determine whether there are reasonable grounds to believe that an eligible data breach has occurred, and therefore, whether notification is necessary.

What About Information Held by Overseas Recipients?

The new requirements apply to information held on behalf of an Entity by an overseas recipient, as though the information was directly held by the Entity. Therefore, an eligible data breach that occurs in relation to the overseas recipient will be deemed to have occurred in relation to the Entity.

This obviously makes it important for Entities to understand what information is held on their behalf by overseas service providers, and to ensure that there are appropriate contractual arrangements in place to enable them to comply with these new requirements.

However, it is not yet clear whether an overseas recipient's awareness of a breach will be imputed to the Entity, and therefore whether the requirement to notify of eligible data breaches applies in circumstances where the overseas recipient is aware of the breach, but the Entity is not. Depending on the types of information an overseas recipient holds on its behalf, an Entity may be justified in taking a conservative approach to this issue when contracting with overseas recipients, at least until the Privacy Commissioner's approach to the enforcement of this issue becomes clearer.

Are There any Exceptions?

If an Entity takes action in relation to unauthorised access or disclosure before that access or disclosure results in serious harm to the individuals to whom that information relates, and a reasonable person would conclude that as a result of the action the access or disclosure would not be likely to result in serious harm to any of those individuals, then an eligible data breach will be deemed not to have occurred.

Are There any Penalties?

A failure to comply with the new laws could result in monetary fines of up to AUD360,000 for individuals and AUD1.8 million for businesses.

At the time of passing the legislation no specific date has been set for when the new requirements will come into effect but we expect them to come into effect within the next 12 months.

To follow the latest developments in cybersecurity and privacy, click here to subscribe to our cybersecurity blog, CyberWatch: Australia.

This article was written by Cameron Abbott, Partner, in the Melbourne office and Rob Pulham, Senior Associate, in the Melbourne office.

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THEY ARE UNHAPPY OUT THERE

Many workplaces are not happy and bullying at the workplace appears on the rise, so the November 2016 Psychosocial Safety Climate and Better Productivity in Australian Workplaces Report and the Bullying and Harassment in Australian Workplaces Report tell us.

We may instinctively know this. It seems despite efforts by workplaces to address this malaise, and legislation to address bullying, the trajectory is going in the wrong direction.

Using the international definition of bullying which is reflected in the definition of bullying under the Fair Work Act, 10% of people reported that they had been bullied at work, up from 7% five years ago. This does not account for the people who stated that they had been harassed: where bullying is repeated, harassment can be inferred from a single incident.

Only 52% of participants perceive their workplace to be mentally healthy compared to 75% who consider their workplace offered physical safety.

Bullying is more prevalent in Australia than in Europe and the cost of untreated psychological health problems on Australian workplaces is suggested to be about AUD11 billion per year through absenteeism, presenteeism (where employees go to work but are not productive due to health related problems) and workers' compensation.

Yet the anti-bullying jurisdiction of the Fair Work Commission that has been in place since 1 January 2014 has made only a handful of orders to stamp out bullying with many claims lacking in substance or being misconceived.

We know that management action carried out in a reasonable way is not workplace bullying, yet the problem is that many people feel that they are inappropriately treated. They feel upset or undervalued or 'bullied' even though their dissatisfaction is not a product of bullying.

One of the key consequences is productivity. Unhappy, undervalued employees are obviously not productive.

The Psychosocial Safety Climate and Better Productivity in Australian Workplaces Report says that organisations attempt to lift productivity through negative means, by increasing pressure on their workforce, by reducing job control and limiting available job rewards. In its view, these methods are counterproductive and their outcomes are outweighed by the physical and psychological health problems associated with such demands.

So is it us or is it Them?

What can employers do to address this increase in prevalence of apparent workplace bullying and workplace malaise?

Employers must be vigilant in stamping out bullying. Sometimes or often they are not.

Here's a checklist or reminders of what can be done.

- Employers must have a policy around bullying and harassment. They must say that this conduct is unlawful.

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- There must be training of staff but especially supervisors and leaders about the perils and consequences of bullying type conduct. The evidence shows that claims of bullying are most commonly made against supervisors. Is it crystal clear what is and isn't appropriate conduct under the bullying policy or code of conduct? Are examples given? Are training videos used?
- Is bad behaviour jumped on or just skirted around?
- Are allegations of bullying followed up quickly, taken seriously, subject of a proper investigation or a mediated outcome?
- If the conduct does not constitute bullying or harassment, that is hardly the end of the matter. It's really just the beginning. How does the organisation address the perception of it – what can be done to improve interpersonal relations?
- Should a cultural survey be conducted to determine whether there are organisational factors or pressures which have the effect of creating a culture of bullying and harassment or dysfunctional relations?
- Are there strategies in place to assess productivity and well considered action plans to lift it?

For all the regulation of the Australian workplace, for all the attempts to provide attractive working conditions and to manage reasonable hours of work, some would say that nothing beats a happy or even a 'not unhappy' workplace. Addressing workplace interactions, ameliorating overzealous or potentially bullying behaviours, and lifting the impediments to "a great place to work" will produce great productivity rewards and minimise legal exposure.

In politics it is said "it's the economy, stupid." In the Australian workplace, "it's human relations, stupid."

This article was written by Nick Ruskin, Partner, in the Melbourne office.

CHEMIST WAREHOUSE NETWORK FINE FOLLOWING FAIR WORK AUDIT

Late last year the Fair Work Ombudsman conducted an extensive audit of the Chemist Warehouse network.

CW Retail Services Pty Ltd (**CW Retail**) had instructed the business owners in its network with respect to compulsory training of workers in the network. CW Retail gave instructions that the business owners should pay workers for compulsory training or that compulsory training should be conducted during working hours.

Despite this instruction, Fair Work found that many business owners did not pay their workers for time spent on the compulsory training. In December 2016, Chemist Warehouse was ordered to pay approximately 5976 workers, being 2/3rd of the Chemist Warehouse workforce, for compulsory online training the workers performed in their personal time. The payment amounts to AUD3.5 million, a significant sum.

What could CW Retail have done? CW Retail acknowledged that across the network there existed the potential for non-payment of workers for training time. The ombudsman Natalie James stated that young workers in particular are vulnerable to not realising that they must be paid for all the hours they dedicate to their work.

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CW Retail could have taken further steps to reinforce the need for payment during compulsory training. It is important the franchisors realise the extent to which they need to take positive steps to avoid liability in this situation. Many would believe that the action taken by CW Retail should have been sufficient to avoid liability for the conduct of third party business owners.

Following the extensive Fair Work Ombudsman audit of the Chemist Warehouse network, CW Retail signed a compliance deed on behalf of the 350 retail pharmacy businesses that make up its network. The network employs over 9,000 workers throughout Australia.

Under the deed, Chemist Warehouse agreed to "establish systems and processes to ensure compliance, particularly relating to compulsory training and how it is conducted and recorded by all franchises", the ombudsman reported.
Franchisors that are unsure as to the extent of their liability in dealing with their network should contact our office to discuss what positive steps they can take to minimise this liability.

This article was written by Anna Trist, Special Counsel, in the Melbourne office.

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