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VANA Employment Relations Alert
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WHAT THE NEW PROTECTING VULNERABLE WORKERS LAWS MEANS FOR VANA MEMBERS

All employers, not just franchisors, face significant new responsibility, a more robust watchdog and stiff new penalties after the Parliament voted to pass the long anticipated *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017,* despite the efforts of the Franchise Council of Australia (FCA) to significantly minimise the scope and coverage of the proposed legislation.

The Bill will widen the accessorial liability of franchisors, holding franchisors responsible for their franchisees contraventions or violations of the *Fair Work Act 2009* (Cth). Under the new legislation, if a franchisor knew or ought to have known about any breaches undertaken by franchises' they could be held liable, facing hefty fines.

While the franchise sector is receiving predominant attention with the announcement of the new legislation, it is important to note that the new legislation is not solely restricted to the franchise sector. Under the Bill, any employer who is found to have committed "serious contraventions" of payment-related workplace laws now faces much harsher penalties with the Fair work Ombudsman also being granted sweeping new investigative powers.

What the Protecting Vulnerable Workers Bill means for VANA members?

The legislation aims *to* protect vulnerable workers by:

- introducing a new scale of penalties for "serious contraventions" of the Fair Work Act with a tenfold increase in the maximum penalty, (up to **$630,000** for a corporation and **$126,000** for an individual);
- trebling the maximum penalties for contraventions relating to employee records and payslips;
- giving the Fair Work Ombudsman substantially greater investigation and enforcement powers – this means there is a greater chance of getting caught;
- introducing new penalties for providing Fair Work inspectors with false or misleading information or records;
- making franchisors and holding companies responsible for underpayments by their franchisees or subsidiaries where they knew or ought to have reasonably known of the contraventions and subsequently failed to take reasonable steps to prevent them;
- making officers of a franchisor or holding company potentially liable as an accessory to a contravention of the new provisions by a franchisor or a holding company;
- expressly prohibiting employers from unreasonably requiring their employees to make payments back to the business (e.g. cash back schemes); and

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- imposing the burden on the employer to disprove an allegation made by an employee in relation to contraventions of certain civil remedy provisions where the employer was required to make and keep a record, make a record available for inspection or give a payslip but fails to do so.

How you can protect your business:

Turning a blind eye to workplace non-compliance is no longer a viable option. There is a clear expectation that all employers take reasonable steps to identify and eliminate workplace non-compliance. Those that choose not to act do so as their own peril.
For Franchisors this includes taking proactive steps including but not limited to:

- Conducting audits of their franchise network
- Educating franchisees as to compliance expectations
- Ensuring that franchisees have appropriate systems for controlling their employment structures and employment records
- Implementing an employee complaints handling process; and
- Obtaining expert advice in the event that they are approached by the regulator so that they clearly understand their rights and their obligations – (this is where the Telephone Advisory Service can help!)

For more information regarding the Protecting Vulnerable Workers Bill please contact the VANA Employment Relations Team.

"Contractor" vs Employee know the difference or face civil penalties

Sham contracting is in the spotlight once again with the Federal Court finding a truck repair company was liable for underpayments, unpaid overtime, superannuation, notice and leave entitlements to a couple performing clerical work from their home for the Company for over 10 years.

In this case, the company had classified the pair as "contractors" however the substance of the relationship led the Court to find they were in reality engaged as employees covered by the *Clerks Private Sector Award 2010*.

What is Sham Contracting?
Sham contracting occurs where an employment relationship is labelled as an independent contractor arrangement. Disguising an employment relationship in this way is prohibited under section 357 of the *Fair Work Act 2009* (Cth) and will result in substantial civil penalties for both the company and individuals involved in the contravention, such as HR Managers or Directors.

How to determine whether an employment relationship exists - The multi indicia test.

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In determining whether an independent contractor or employment relationship exists the Court will look beyond any written contract between the parties and instead look at the substance of the relationship applying what is known as a multi indicia test.

In applying the multi indicia test, factors that point to an **independent contractor** arrangement may include:

- the right of the worker to subcontract their work;
- the worker providing their own equipment;
- the ability to work for others at the same time;
- the worker occurring losses or profit on the job;
- having an ABN and rendering tax invoices for payment; and
- the worker being in business "of their own."

In contrast, features that point to the existence of an **employment relationship** often include:

- the right to the *exclusive* services of the worker;
- working standard hours;
- the ability of the company to control when, how and where work is performed;
- working solely or predominately for the company;
- wearing a company uniform; and
- where equipment and tools are provided by the company.

However no single factor will be determinative. In the case of the couple working from home despite the pair having an ABN, issuing tax invoices and not wearing a uniform this was not enough to establish the couple were independent contractors. Not wearing a uniform was not a determinative factor here given the couple performed work from home and interacted with the Company's customers and clients solely via telephone.

The company provided the couple with equipment such as a telephone connection and scanners, exercised a significant degree of control and the pair performed services exclusively for the company. Applying the multi indicia test, the Court found the couple were not in any way "running their own business." The reality was they were performing work as representatives of the company.

Take* Away *Points

This case acts as a warning for employers to be careful when engaging workers to not misrepresent an employment relationship as an independent contractor arrangement. Whilst characterising relationships with workers as "contractors" may seem appealing due to the perceived flexibility and ability to avoid NES entitlements such as leave and Modern Award requirements such as minimum engagement periods, the risks are high. Not only will you face back pay for unpaid leave entitlements, overtime and wages, the Company and any individuals involved will face substantial civil penalties.

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For more information on sham contracting and help determining whether the substance of your relationship with "contractors" is an employment relationship, please phone the VANA Employment Relations team.

Regular and systematic casual employment counted when calculating redundancy pay

We have been getting an increasing number of calls through the Telephone Advisory Service in relation to redundancy payments for permanent employees who were once casual.

In a case last year before the Fair Work Commission, Senior Deputy President Drake and Deputy President Lawrence found that for the purposes of calculating redundancy payouts, a permanent employee's initial period of regular and systematic casual employment **will** count towards their period of continuous service.

Employers who, for the reason of redundancy, terminate an employee who was once casual but transferred to permanent employment will now be forced to include the period of casual employment in their calculations of redundancy pay. This decision has changed the accepted interpretation of the meaning of "service" within the *Fair Work Act 2009* (Cth) (the **"Act"**) for the purposes of redundancy pay to include initial periods of casual employment

This decision turns on its head the widely accepted interpretation of "service" within the *Fair Work Act* (2009) to only encompass a period of permanent employment for the purposes of redundancy pay.

For more information regarding this decision please contact the VANA Employment Relations Team.