The Senate

Education and Employment Legislation Committee

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 [Provisions]

May 2017

ISBN: 978-1-76010-575-4

This document was produced by the Senate Standing Committee on Education and Employment and printed by the Senate Printing Unit, Parliament House, Canberra.

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3.57 The committee recommends that the government consider amending proposed paragraph 558A(2)(b) of the bill to clarify that the term 'affairs' be specifically associated with workplace relations matters.

Recommendation 2

3.59 The committee recommends that as part of the Migrant Worker Taskforce, the government consider whether any further reforms are necessary to address issues of exploitation and liability in the context of labour hire.

Recommendation 3

4.41 The committee recommends that the government consider amending the bill to ensure that its reach and intent, as articulated in the Explanatory Memorandum and second reading speech, is clarified.

4.42 The committee encourages the FWO to take an appropriately targeted and measured approach to oversighting the measures within the bill once passed.

Recommendation 4

5.47 Subject to the recommendations contained elsewhere in this report, the committee recommends that the Senate pass the bill.

Chapter 1

1.1 The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the bill) was introduced into the House of Representatives on 1 March 2017 by the Hon Peter Dutton MP, Minister for Immigration and Border Protection.[1]

1.2 On 23 March 2017, the Senate referred an inquiry into the provisions of the bill to the Senate Education and Employment Legislation Committee (the committee) for inquiry and report by 9 May 2017.[2]

Conduct of the inquiry

1.3 Details of the inquiry were made available on the committee's website. The committee also contacted a number of organisations inviting submissions to the inquiry. Submissions were received from 37 individuals and organisations, as detailed at Appendix 1.

1.4 The committee held two public hearings:

- 12 April 2017 in Canberra; and
- 13 April 2017 in Sydney.

1.5 The witness lists for these hearings can be found at Appendix 2.

Structure of the report

1.6 Chapter 2 outlines the background to the genesis of the bill, and briefly outlines the measures contained in the bill.

1.7 Chapter 3 considers one of the key measures in the bill raised by submitters; that of making franchisors and holding companies responsible in certain circumstances for underpayment of employees by their franchisees or subsidiaries. In particular the chapter covers matters relating to the definition of 'franchise' used in the bill, as well as concerns raised about the expanded accessorial liability provisions.

1.8 Chapter 4 examines the views of submitters in regard to the strengthening of evidence-gathering powers of the Fair Work Ombudsman proposed in the bill.

1.9 Chapter 5 turns to several other parts of the bill raised by submitters, including:

- the higher scale of penalties for 'serious contraventions' of workplace laws;

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1 *Votes and Proceedings*, No. 37, 1 March 2017, p. 587.

2 *Journals of the Senate*, No. 34, 23 March 2017, p. 1147.

- the increased penalties for record-keeping failures; and
- the amendment expressly prohibiting employers from unreasonably requiring their employees to make payments.

Compatibility with human rights

1.10 The bill's statement of compatibility of with human rights states that the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[3]

Scrutiny of Bills Committee

1.11 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) considered the bill in its Scrutiny Digest 3 of 2017.

1.12 The Scrutiny of Bills Committee drew attention to two matters in the bill: the privilege against self-incrimination in Schedule 1, item 39 of the proposed new section 713; and the reversal of evidential burden of proof in Schedule 1, item 48, proposed paragraph 707A(2)(b).[4]

Financial Impact Statement

1.13 The Explanatory Memorandum did not contain a financial impact statement.[5]

Acknowledgements

1.14 The committee thanks those individuals and organisations who contributed to this inquiry by preparing written submissions and giving evidence at the public hearing.

1.15 References in this report to the Hansard for the public hearings are to the Proof Hansard. Please note that page numbers may vary between and proof and official transcripts.

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3 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, Statement of Compatibility with Human Rights, *Explanatory Memorandum*, p. 1.

4 For more detail on these matters see Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 3/17*, 22 March 2017, pp. 19–22.

5 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, Financial Impact Statement, *Explanatory Memorandum*, p. i.

Chapter 2

Background

Overview of the bill

2.1 The bill would amend the *Fair Work Act 2009* (Fair Work Act) to protect vulnerable workers by:

- introducing a higher scale of penalties for 'serious contraventions' of payment-related workplace laws;
- increasing penalties for record-keeping failures;
- 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 failed to take reasonable steps to prevent them;[1]
- expressly prohibiting employers from unreasonably requiring their employees to make payments (e.g. demanding a proportion of their wages be paid back in cash); and
- strengthening the evidence-gathering powers of the Fair Work Ombudsman (FWO) to ensure that the exploitation of vulnerable workers can be effectively investigated.[2]

2.2 The proposed amendments aim to more effectively deter unlawful practices that involve the deliberate and systematic exploitation of workers.[3]

The need for the bill

2.3 Over recent years the exploitation of vulnerable workers (including migrant workers) has been examined in a range of reports. These include:

- the FWO's June 2015 inquiry report into the labour procurement arrangements of the Baiada Group in New South Wales;[4]
- the Productivity Commission's November 2015 report into the workplace relations framework;[5]

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1 Note: The new responsibilities will only apply where franchisors and holding companies have a significant degree of influence or control over their business networks.

2 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. i.

3 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. i.

4 Fair Work Ombudsman, *A Report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, June 2015, https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports#baiada (accessed April 2017).

- the Senate Education and Employment References Committee's March 2016 report entitled 'A National Disgrace: The Exploitation of Temporary Work Visa Holders';[6] and
- the FWO's April 2016 inquiry report into 7-Eleven.[7]

2.4 In particular, the Senate Education and Employment References Committee's inquiry into the impact of temporary work visa programs highlighted shocking instances of exploitation. The report found that such unscrupulous behaviour not only had a detrimental impact on the workers themselves, but also negatively impacted on Australia's labour markets, placing downward pressure on the wages and conditions of workers and undercutting the majority of legitimate employers that abide by Australian workplace laws.[8]

2.5 Media investigations have also detailed instances of serious worker exploitation from numerous well-known companies, including 7-Eleven, Pizza Hut, Caltex, Domino's Pizza and United Petroleum.[9]

2.6 As a result of these inquiry reports, as well as significant media attention, the Australian community has become concerned about deliberate and systematic non-compliance with the Fair Work Act. As the Explanatory Memorandum (EM) noted:

> The bill addresses increasing community concern about the exploitation of vulnerable workers (including migrant workers) by unscrupulous employers, and responds to a growing body of evidence that the laws need to be strengthened.[10]

2.7 The EM further observed:

> The *Inquiry into 7-Eleven* report [by the FWO in April 2016], for example, revealed not only systematic underpayment of migrant workers, but also a practice of some franchisees paying their employees the lawful rate, but then coercing them to pay back a certain proportion of their wages to the

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5 Productivity Commission, *Workplace Relations Framework: Final Report, No. 76*, November 2015, http://www.pc.gov.au/inquiries/completed/workplace-relations/report (accessed April 2017).

6 Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report (accessed April 2017).

7 Fair Work Ombudsman, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven, April* 2016, https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports#7-11 (accessed April 2017).

8 See Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016.

9 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, p. 5.

10 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. i.

> employer in cash. In some cases, records were deliberately falsified to disguise the underpayments and leave the impression that workers were being paid their lawful entitlements. A series of cases involving the exploitation of franchise workers (both preceding and following the 7-Eleven scandal) demonstrate more can be done to protect vulnerable workers.[11]

2.8 The negative impacts of deliberate and systematic non-compliance with workplace laws by unscrupulous employers are stark: employees are denied the minimum wages and conditions to which they are entitled; compliant employers are placed at a competitive disadvantage; and Australia's international reputation as a desirable place to visit and work is undermined.[12]

2.9 The FWO submission outlined the limitations of the current statutory provisions:

> …the FWO has faced a range of challenges achieving lasting behavioural change in these circumstances [systematic exploitation of vulnerable workers] using the current tools available. The agency finds that the reality of what can be achieved in some limited but critically important areas, using the existing enforcement framework in the *Fair Work Act 2009*, falls short of community expectations.[13]

2.10 The Department of Employment stated that in developing the bill between October 2016 and February 2017 it undertook targeted consultations with a variety of stakeholders, including:

- employer and industry groups;
- unions;
- non-government organisations;
- state and territory governments;
- the Committee on Industrial Legislation under the National Workplace Relations Consultative Council; and
- the FWO.[14]

Committee view

2.11 While the committee acknowledges that the majority of employers are compliant with Australian workplace laws, several recent high-profile cases have identified that the existing provisions within the Fair Work Act are insufficient to effectively deal with situations where vulnerable workers have been deliberately and systematically exploited.

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11 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. i.

12 Department of Employment, *Submission 1*, p. 3.

13 Fair Work Ombudsman, *Submission 4*, p. 3.

14 Department of Employment, *Submission 1*, p. 4.

2.12 The committee is of the opinion that the bill addresses a growing body of evidence that indicates that the Fair Work Act needs to be strengthened in order to better protect vulnerable workers, and appropriately punish those who deliberately and systematically break the law.

Chapter 3

Liability of franchisors and holding companies

3.1 This chapter focuses on matters relating to the liability of responsible franchise entities and holding companies as proposed in Part 2 of Schedule 1 of the bill.

Current framework

3.2 Workplace rights and obligations provided under the Fair Work Act and the Fair Work instruments are confined to the direct relationship between an employer and employee. In the franchising context, the franchisee is the direct employer of labour. As such, it is the franchisee who has obligations to its employees and who is responsible for compliance with workplace laws.[1]

3.3 However, under certain circumstances the Fair Work Act extends legal responsibility to persons beyond the direct employer, where persons are 'involved in' a contravention. This is referred to as accessorial liability.[2]

3.4 The relevant section of the Fair Work Act is as follows:

> **550 Involvement in contravention treated in same way as actual contravention**
>
> (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
>
> (2) A person is **involved in** a contravention of a civil remedy provision if, and only if, the person:
>
> a.) has aided, abetted, counselled or procured the contravention; or
>
> b.) has induced the contravention, whether by threats or promises or otherwise; or
>
> c.) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
>
> d.) has conspired with others to effect the contravention.[3]

3.5 Under the Fair Work Act's current accessorial liability provisions, franchisors and holding companies with no knowledge of contraventions within their networks cannot be found to have been 'involved in' the contraventions.[4]

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1 Fair Work Ombudsman, *Submission 4*, p. 10.

2 Department of Employment, *Submission 1*, p. 6.

3 *Fair Work Act 2009*, s. 550.

4 Department of Employment, *Submission 1*, p. 6.

Proposed amendments

3.6 The bill amends the Fair Work Act to insert new provisions to hold 'responsible franchisor entities' (i.e. franchisors) and holding companies responsible for payment-related contraventions of the Fair Work Act by businesses in their networks if they knew, or could reasonably be expected to have known, that the contraventions would occur, or that contraventions of the same or similar character were likely to occur. The new provisions supplement, not override, the existing accessorial liability provisions contained in section 550.[5]

3.7 The EM summarised the aim of the amendments as such:

> Some franchisors and holding companies have established franchise agreements and subsidiaries in their corporate structure that operate on a business model based on underpaying workers. Some have either been blind to the problem or not taken sufficient action to deal with it once it was brought to their attention.
>
> Recent highly publicised cases of exploitation of vulnerable workers, including by 7-Eleven franchisees, demonstrate more needs to be done by franchisors and holding companies to protect vulnerable workers employed in their business networks. [6]

3.8 The expanded accessorial liability provisions in the bill only apply to responsible franchisor entities which have 'a significant degree of influence or control' over the relevant franchisee's affairs.[7] In this context, 'control relates to the affairs of the franchisee or subsidiary broadly, not only as to minor matters that would not have any impact on the management and operational decisions of the business'.[8]

3.9 A franchisor or holding company will not be held liable if it has taken 'reasonable steps' to prevent contraventions from occurring.[9]

3.10 Importantly, the new provisions do not displace the obligations of employers to continue to comply with Australian workplace laws, nor do they introduce joint employment arrangements.[10]Joint employment arrangements occur when an entity

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5 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 6.

6 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 6.

7 Proposed subsection 558A(2), Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

8 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 6.

9 Proposed section 558B, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017. See also Department of Employment, *Submission 1*, p. 7.

10 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 6.

that does not employ a particular employee is deemed to have the same liability as the employing entity.[11] As the Department of Employment submission clarified:

> The new addition to the Fair Work Act does not impose 'joint employment' responsibilities on franchisors and holding companies. Ultimately, as employers, franchisees remain responsible for their own wages bill. Any franchisor or holding company ordered to compensate franchisee workers under the new provisions will be entitled to recover this amount from the franchisee responsible for the underpayments.[12]

3.11 This point was reinforced by Professor Andrew Stewart, a specialist in employment law and workplace relations at the University of Adelaide:

> In my view it [the bill] does not impose joint liability at all, for two reasons. Firstly, it does not purport to make a franchisor or a parent company responsible right from the time someone is hired for the provision of employment entitlements. It is not, for example, saying, where a person is hired to work for a franchisee, that the franchisor and the franchisee—where the franchisee is actually the employer—are jointly liable to ensure that that worker is paid correctly. That is what joint liability is. The bill does not even come close to proposing that…
>
> There will never be double recovery there, so you cannot have a situation where an employee gets paid twice; that could never happen. There might be a situation where penalties are imposed both on the franchisee and on the franchisor, but that conceptually is no different from the current act, which allows for the imposition of penalties simultaneously on both an employer and a person knowingly involved in an employer's breach, such as a director, a manager or an external adviser. So to me the argument about joint liability being imposed is misconceived.[13]

3.12 The new provisions do not extend to impose franchisor obligations on corporations operating completely outside of Australia. For example, a company that does not have any operations in Australia and which has simply entered into a master franchisor or holding company relationship with an Australian company (even if the Australian company is a subsidiary of the foreign company) will not be affected by the amendments.[14]

3.13 The FWO outlined its support for the amendments:

> The proposal to include specific provisions to impose liability on the key class of franchisors and holding companies, who have knowledge of issues in their network or subsidiary companies and fail to take reasonable steps to address them, will facilitate compliance in franchise networks by those who

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11 Department of Employment, *Submission 1*, p. 7.

12 Department of Employment, *Submission 1*, p. 7.

13 Professor Andrew Stewart, private capacity, *Proof Committee Hansard*, 12 April 2017, p. 17.

14 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 6. See also Department of Employment, *Submission 1*, p. 7.

> have a real capacity to influence or control. It reinforces the 'moral and ethical responsibility' that the FWO has been emphasising established brands should be taking. The provisions would provide the FWO with an additional lever to pursue non-compliance and recover underpayments.[15]

3.14 The FWO also emphasised that it would take steps to educate franchisors, franchisees and their employees about any new obligations introduced by the bill:

> The Explanatory Memorandum notes that the proposed requirement in the bill provides flexibility to franchisors and holding companies in deciding what steps to take to support compliance. This is consistent with the tailored advice that the FWO already provides for franchisors, which can be scaled up or down depending on the type and sophistication of the franchise network. The FWO recognises that a one-size-fits-all approach to compliance is not appropriate and is contrary to the intention of the bill.[16]

Adequacy of current framework—the Yogurberry case

3.15 Some submitters claimed that the existing accessorial liability provisions contained in the Fair Work Act were more than adequate to address any compliance problems arising within franchises. These submitters pointed to the FWO's successful civil remedy litigation against the franchisor of the Yogurberry chain[17] as evidence for this argument.[18]

3.16 However, the committee received evidence from several inquiry participants rebutting this argument and emphasising that the decision in the Yogurberry case had to be viewed in context.[19]

3.17 The Yogurberry case involved the exploitation of four Korean backpackers (working on subclass 417 Working Holiday visas) employed by a Yogurberry franchise in Sydney. A FWO investigation uncovered underpayments, unlawful deductions from wages, and various pay slip and record-keeping failures.[20]

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15 Fair Work Ombudsman, *Submission 4*, p. 14.

16 Fair Work Ombudsman, *Submission 4*, p. 15.

17 See *Fair Work Ombudsman v Yogurberry World Square Pty Ltd [2016] FC 1290*.

18 See Franchise Council of Australia, *Submission 9*, pp. 19–21; Australian Industry Group, *Submission 5*, p. 4; Mr Bruce Billson, Executive Chair, Franchise Council of Australia, *Proof Committee Hansard*, 12 April 2017, p. 36; Ms Dominique Lamb, Chief Executive Officer, National Retail Association, *Proof Committee Hansard*, 12 April 2017, p. 48.

19 See Fair Work Ombudsman, *Submission 4*; Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26;* Mr Trevor Clarke, Director, Legal and Industrial, Australian Council of Trade Unions, *Proof Committee Hansard*, 12 April 2017, p. 19; Professor Andrew Stewart, private capacity, *Proof Committee Hansard*, 12 April 2017, pp. 18–19; Ms Natalie James, Fair Work Ombudsman, Proof Committee Hansard, 12 April 2017, pp. 73–74.

20 Fair Work Ombudsman, *Submission 4*, p. 11.

3.18 Dr Tess Hardy and Dr Joo-Cheong Tham, academics at the Melbourne Law School specialising in employment and labour law, pointed out that the circumstances of the Yogurberry case were unique and did not necessarily reflect the typical business format of franchise arrangements. In the Yogurberry litigation, the putative employer (the franchisee which operated the relevant store) and the head franchisor were part of a group of complex companies controlled by various members of the same family. Dr Hardy and Dr Tham emphasised that this 'corporate nexus, overlaid with close family connections' was not generally present in the majority of franchise networks, and as such the decision of the Federal Court of Australia was confined to its facts.[21]

3.19 Finally on the Yogurberry case, the committee notes comments from the ACTU's representative about limited nature of the precedent it may set:

> I simply observe that those who click on the link and read the case will see it was actually a judgement by consent, where liability was admitted, including the liability of the accessories. Not to take any credit away from the Fair Work Ombudsman for resolving the matter, but to suggest that it is some outstanding legal precedent that every court will follow is a bit rich.[22]

Submitter views

3.20 The committee received submissions from a number of inquiry participants voicing opinions on the expanded accessorial liability provisions.

3.21 The Franchise Council of Australia (FCA) was among the most vocal opponents of the expanded accessorial liability provisions proposed in the bill. The FCA argued that the bill unfairly targets franchising as a business model, and that if enacted without significant amendments, would result in a reduction in franchising activity, growth and investment in Australia.[23]

3.22 The FCA submission summarised its opposition to the bill as follows:

> It is unsafe to presume that there is a single model of franchising and that high profile cases are typical of the commercial arrangements between two separate businesses that characterises the franchisor-franchisee relationship.
>
> A minority of franchise systems have control, exercise direction, impose workplaces relations policies and practices or have a line-of-sight over Fair Work Act compliance matters. To mandate this change would be to force business models to be varied for regulatory convenience against the commercial judgement of the contracting parties.[24]

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21 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, pp. 7–8.

22 Mr Trevor Clarke, Director, Legal and Industrial, Australian Council of Trade Unions, *Proof Committee Hansard*, 12 April 2017, p. 19.

23 Franchise Council of Australia, *Submission 9*, p. 6.

24 Franchise Council of Australia, *Submission 9*, p. 6.

3.23 Groups representing employers and franchisors either indicated support for the content of the FCA submission, or raised similar or related concerns. These groups included:

- the Australian Industry Group (Ai Group);
- Australia Post;
- the Asia-Pacific Centre for Franchising Excellence;
- the Federal Chamber of Automotive Industries (FCAI);
- the Australian Lottery and Newsagents Association (ALNA);
- the Housing Industry Association (HIA);
- the Australasian Convenience and Petroleum Marketers Association (ACAPMA);
- the Franchise Advisory Centre;
- BlueRock Partners;
- the Australian Fleet Lessors Association (AFLA);
- the International Franchise Association (IFA);
- the Australian Chamber of Commerce and Industry (ACCI);
- Queensland Law Society (QLS); and
- the National Retail Association (NRA).

3.24 The Ai Group stated that the bill as drafted would discourage investment in franchise businesses, and recommended that the proposed Division 4A (responsibility of responsible franchisor entities and holding companies for certain contraventions) be deleted from the bill entirely. The Ai Group also stated that the expanded accessorial liability provisions would lead to franchises restructuring their business and terminating their relationships with franchisees.[25]

3.25 Similarly, the ACPAMA argued that the bill would fundamentally change the framework within which franchisee agreements were made in Australia:

> Making franchisors liable for breaches of employment law challenges the longstanding commercial paradigm under which franchisee agreements are offered in the Australian economy, potentially setting a precedent for franchisors to be held accountable for breaches of other laws by safety and environmental compliance. If passed, the net effect of these laws will be to force a redesign of the commercial arrangements that exist between franchisors and franchisees.[26]

25 Australian Industry Group, *Submission 5*, pp. 1–2.

26 Australasian Convenience and Petroleum Marketers Association, *Submission 16*, p. 4.

3.26 Submitters also raised concerns with the costs of any new compliance obligations. For example, Australia Post argued that the cost of compliance with the bill would impact the financial performance of the company and its licensees, which would be reflected in general cost increases.[27] The Ai Group stated that the bill may lead franchisors into believing that they needed to establish extensive auditing, training and other systems to ensure compliance by franchisees, with these substantial costs then being passed on to franchisees.[28] Additionally, the NRA argued that many retailers and fast food entities captured by the bill would simply not have the financial or personnel resources available to ensure compliance.[29]

3.27 Submitters also emphasised that the broad reach of the expanded accessorial liability provisions may have negative, unintended consequences. For example, ACCI stated:

> The significant scope for liability pursuant to the bill's terms does create some risk that businesses will restructure their affairs in such a way that they are not captured by the provisions. For franchisors this may see a withdrawal of support of the nature that could give rise to a finding of influence and control. Other organisations may elect to conduct their operations completely outside Australia. The extent and likelihood of such risk is difficult to gauge however it would likely be mitigated if the extent of liability for franchisors and holding companies was contained to better reflect the types of practices that gave rise to the bill.[30]

3.28 7-Eleven stated that although it supported a degree of increased franchisor responsibility, it noted it still had some concerns about the provision. For example, its submission noted that an assessment of what a franchisor ought to be reasonably expected to have been known (about a contravention committed by a franchisee) would inevitably occur with the benefit of hindsight.[31]

3.29 Other submitters indicated support for the expanded accessorial liability provisions (or at the very least, the broad aims of the provisions), and some also recommended amendments designed to improve the effectiveness or increase the scope of the provisions. These submitters included:

- Dr Hardy and Dr Tham;
- Maurice Blackburn Lawyers (Maurice Blackburn);
- Independent Contractors Australia (ICA);
- the Australian Council of Trade Unions (ACTU);

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27 Australia Post, *Submission 34*, p. 4.

28 Australian Industry Group, *Submission 5*, p. 2.

29 National Retail Association, *Submission 7*, p. 6.

30 Australian Chamber of Commerce and Industry, *Submission 5*, p. 14.

31 7-Eleven, *Submission 28*, p. 3.

- JobWatch;
- Uniting Church in Australia (Synod of Victoria and Tasmania); and
- WEstjustice.

3.30 In particular, submitters raised concerns with proposed section 558A (relating to the meaning of 'franchisee entity' and 'responsible franchisor entity') and proposed section 558B (relating to the responsibilities of 'responsible franchisor entities' and 'holding companies' for certain contraventions).[32]The chapter will now examine matters surrounding each of these proposed sections in turn.

The meaning of 'franchisee entity' and 'responsible franchisor entity'[33]

3.31 The FCA raised concerns with the definitions used in the bill of key terms relating to franchises. The FCA argued that using an 'obscure' and 'inappropriate' definition of franchising taken from the *Corporations Act 2001* would lead to ambiguity and regulatory overreach, and instead advocated for the definitions to be based on those in the Franchising Code of Conduct (Franchising Code).[34]

3.32 The FCA outlined the impacts of the definitions as currently proposed in the bill:

> The consequence is that there will be many business caught by the legislation that do not currently see themselves as a franchise. It would seem that there will also be franchise agreements caught by the current Franchising Code of Conduct definition that will not be covered. This creates substantial additional compliance costs, as a business needs to consider afresh whether it is or is not a franchise for the purposes of the Fair Work Act.[35]

3.33 Submissions from BlueRock Partners, AFLA, Australia Post, HIA, QLS, and FCAI raised similar concerns about the inappropriate definitions in the bill and made recommendations to align the definitions with those in the Franchising Code.[36]

3.34 WEstjustice submitted that the definition of 'responsible franchisor entity' should be widened as the current definition was too limited in scope. It suggested that a new definition could be drafted modelled on the Franchising Code.[37]

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32 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, pp. 7–8.

33 Proposed section 558A, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

34 Franchise Council of Australia, *Submission 9*, pp. 22–23.

35 Franchise Council of Australia, *Submission 9*, p. 22.

36 See BlueRock Partners, *Submission 21*, pp. 2–3; Australian Fleet Lessor Association, *Submission 23*, p. 3; Australia Post, *Submission 34*, pp. 3, 5; Housing Industry Association, Submission 10, pp. 5–6; Queensland Law Society, *Submission 30*, p. 3; Federated Chamber of Automotive Industries, *Submission 13*, p. 2

3.35 The committee also received evidence raising concerns with the proposed wording in section 558A(2)(b). The FCA argued that the use of the word 'affairs' was unnecessarily broad and that it created a connection that went beyond the stated intent of the bill:

> The connection between a franchisee and a franchisor is made by a new definition of 'responsible franchisor entity' in section 558A(2), with the requisite connection being 'the person has a **significant degree of influence** or control over the franchisee entity's **affairs**'.
>
> This connection goes beyond the stated intent of the law, and will catch many franchise systems where the franchisor has no capacity to control or direct workplace relations matters.[38]

3.36 The FCA recommended that the phrase 'workplace terms and conditions' be used instead of 'affairs'.[39]

3.37 Similarly, BlueRock Partners, who act for and on behalf of numerous franchisors and franchisees, stated that that requisite connection between a franchisee and a franchisor for the purposes of the amendments 'cast a wider net than is necessary':

> In particular, we consider that control should not be made with reference to the 'affairs' of the franchisee, rather, it should reflect the subject matter that the bill seeks to regulate – employment.[40]

3.38 BlueRock Partners emphasised that the effect of the provision as currently drafted would be to penalise franchisors that did not exercise control over the employment affairs of their franchisees, but did exercise control in other areas. BlueRock Partners underlined that this situation was quite common amongst smaller franchises, and highlighted that according to the FCA, 95 per cent of franchisors were small businesses.[41]

3.39 To combat this, BlueRock Partners recommended that the term 'affairs' be replaced with the phrase 'employment matters' or similar.[42]

3.40 The QLS also raised concerns about the breadth of the term 'affairs', and proposed 'workplace terms and conditions' as an alternative to ensure that the policy intent of the bill was not misinterpreated. It cautioned :

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37 WEstjustice, answers to questions on notice, 12 April 2017, p. 3 (received 26 April 2017).

38 Franchise Council of Australia, *Submission 9*, p. 24. Emphasis in original.

39 Franchise Council of Australia, *Submission 9*, p. 24.

40 BlueRock Partners, *Submission 21*, p. 3.

41 BlueRock Partners, *Submission 21*, pp. 3–4.

42 BlueRock Partners, *Submission 21*, p. 4.

> We are advised that the Fair Work Ombudsman suggested at a National Franchise Conference in Canberra in October 2016 that a franchisor that controls the use of its trademarks or how to make products or services would, in her view, have the ability to influence a franchisee's compliance with workplace legislation. Again, we urge caution against creating liability for those who are not in any way responsible for workplace terms and conditions.[43]

The responsibilities of 'responsible franchisor entities' and 'holding companies' for certain contraventions[44]

3.41 Although acknowledging that section 558B of the bill constituted an improvement on the existing accessorial liability provisions, Maurice Blackburn noted that the section had several shortcomings which undermined the effectiveness of the bill as a mechanism for extending liability to franchisors and holding companies.[45]

3.42 For example, the liability imposed by section 558B is attached only to a franchisor categorised as a 'responsible franchisor entity', defined in the bill as a franchisor that has a significant degree of influence or control over the franchisee entity's affairs. Maurice Blackburn raised concerns that this may encourage the construction of 'arms-length' franchise arrangements which work to create the appearance that the franchisor does not have the requisite influence or control.[46]

3.43 Maurice Blackburn also observed that proposed subsection 558B(3) entitles a responsible franchisor to escape liability if they took 'reasonable steps' to 'prevent' a contravention:

> The factors set out in s 558B (4) are productive of template 'tick-a-box' or 'checklist' compliance, whereby a franchisor:
>
> - designs its arrangements (e.g. the contract between the franchisor and franchisee) to minimize the perception of its ability to influence or control a franchisee; or
> - simply provides pro-forma information on the obligations imposed on the franchisee by civil remedy provisions but in reality takes no substantial measures to ensure compliance.[47]

3.44 Additionally, Maurice Blackburn identified that in a temporal sense, the 'reasonable steps' test may render irrelevant the issue of whether or not a franchisor has taken action to address a contravention, once it becomes aware of the contravention:

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43 Queensland Law Society, *Submission 30*, p. 4.

44 Proposed section 558B, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

45 Maurice Blackburn Lawyers, *Submission 24*, pp. 3–4.

46 Maurice Blackburn Lawyers, *Submission 24*, p. 4.

47 Maurice Blackburn Lawyers, *Submission 24*, p. 4.

> The word 'prevent' suggests that the franchisor need only take pre-emptive action in advance of the contravention, and will not be in breach of the provision if they fail to address a contravention once it has occurred or is occurring. This is an obvious flaw, because a franchisor could in essence do nothing after becoming aware of a contravention, and escape liability if it otherwise meets the 'prevention' test in s 558B.[48]

3.45 Maurice Blackburn also observed that proposed subsection 558B(4) should require a court to examine the underlying business model of the franchise to ascertain whether that model substantially contributed to the occurrence of the breach of the Fair Work Act. The submission gave the example of the 7-Eleven underpayments case, where the profit-splitting arrangement (in which the franchisor took 57 per cent of profits made by franchisees and imposed a significant number of business expenses on the franchisee) worked to incentivise franchisees' non-compliance with workplace laws in attempts to recover profits they had surrendered to the franchisor.[49]

3.46 Dr Hardy and Dr Tham emphasised that the proposal to include franchisor entities and holding companies in the expanded accessorial liability provisions was 'an essential and appropriate extension of the existing regulatory framework'.[50] Their submission argued that the proposed provisions rightfully recognised that it is no longer acceptable for lead firms, such as franchisors and holding companies, to 'have it both ways'—that is, exercise high levels of influence and control over the performance of work, yet remain legally insulated from the negative impacts that may be created.[51]

3.47 In response to concerns raised by the FCA that the expanded accessorial liability provisions would threaten the viability of the franchise model in Australia, Dr Hardy and Dr Tham argued:

> While it is true that the allocation of risk within the franchise arrangement may be recalibrated by the proposed reforms, it is doubtful whether the consequences will be nearly as dire a predicted.[52]

Further expansion of the provisions

3.48 The committee received evidence from several submitters recommending that accessorial liability be extended to supply chains and labour hire hosts, in addition to the franchisor entities and holding companies as proposed in the bill.

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48 Maurice Blackburn Lawyers, *Submission 24*, p. 4.

49 Maurice Blackburn Lawyers, *Submission 24*, p. 4.

50 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, pp. 4–5

51 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, pp. 4–5.

52 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, p. 9.

3.49 Dr Hardy and Dr Tham recommended that the expanded accessorial liability provisions outlined in the bill should be further extended to capture other types of organisational forms, including supply chains and labour hire arrangements:

> We would tend to agree that there are good reasons, and strong evidence, for capturing other types of fragmented organisational structures and business networks, including complex supply chains and labour hire arrangements. The failure to extend liability to these other lead firms represents a significant gap.[53]

3.50 Similarly, WEstjustice recommended that liability be extended to all relevant parties, so that in addition to protecting workers in franchises and subsidiary companies, supply chains and labour hire hosts would also be responsible for the protection of workers' rights.[54]

3.51 WEstjustice reasoned that as ways of workings have changed, Australian workplace laws have not kept up, with the existing Fair Work Act still largely focused on traditional employer/employee relationships as defined by common law. As a result, the legal framework fails to adequately regulate non-traditional working arrangements, where it is common for employment relationships to be fragmented. The submission noted:

> Many WEstjustice clients find themselves employed in positions at the bottom of complex supply chains, working for labour hire companies or in franchises, or engaged as contractors in sham arrangements. Each of these situations involves common features – often, there is more than one entity benefitting from the labour of our clients, and frequently at the top is a larger, profitable, and sometimes well-known company. We have seen some of the worst cases of exploitation occurring in these situations. Unfortunately, because of legislative shortcomings and challenges with enforcement, these arrangements often result in systemic exploitation and injustice for those most vulnerable workers.[55]

3.52 WEstjustice outlined how the recommendation to expand accessorial liability to include supply chains and labour hire hosts could be achieved:

> …WEstjustice suggest that 558B (2A) be inserted into Division 4A of the Vulnerable Workers Bill to define indirectly responsible entities, and extend responsibility to them. This will also require inserting a new clause 558A (3) to define indirectly responsible entity and/or amending section 550 of the FW Act. Note that for the suggested insertion of 558B (2A) and 558A (3) minor amendments will also need to be made to 558B (3) and in Part 7 – application and transitional provisions.[56]

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53 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, p. 11.

54 WEstjustice, *Submission 2*, p. 19.

55 WEstjustice, *Submission 2*, p. 13.

56 WEstjustice, *Submission 2*, p. 19.

3.53 JobWatch also agreed that liability for workplace breaches should extend up organisational hierarchy where appropriate, and supported WEstjustice's suggestion of extending liability to labour hire arrangements.[57]

Committee view

3.54 The committee considers it appropriate that the bill seek to supplement the existing accessorial liability provisions in the Fair Work Act. The committee considers that the Yogurberry case, although a signal that, in certain limited circumstances, franchisors can be held accountable for exploitation in their networks, is not a precedent that demonstrates that the existing provisions are adequate.

3.55 The committee recognises stakeholder concerns with the wording of proposed section 558A(2)(b) around the use of the term 'affairs'. The committee considers that the current wording is too broad and requires clarification to ensure that it is able to properly target non-compliance with workplace laws.

3.56 In light of recent commentary from the FWO which appears to indicate a lack of understanding around the diversity of business models across the franchising spectrum, the committee strongly believes such a clarification is necessary to ensure that the regulator does not misinterpret the intent of the bill and engage in regulatory overreach. This issue is discussed further in chapter 4.

Recommendation 1

3.57 The committee recommends that the government consider amending proposed paragraph 558A(2)(b) of the bill to clarify that the term 'affairs' be specifically associated with workplace relations matters.

3.58 The committee recognises that this bill seeks to address specific behaviour in a specific sector (i.e. franchising). However, the committee is also aware of evidence that indicates that other business models and employment structures, such as labour hire and supply chains, harbour a high risk of worker exploitation due to the complex and fragmented nature of the organisational structures and business networks involved. In this context, the committee notes that the government's Migrant Workers Taskforce is currently examining further the issues relating to worker exploitation, including in the context of labour hire.

Recommendation 2

3.59 The committee recommends that as part of the Migrant Worker Taskforce, the government consider whether any further reforms are necessary to address issues of exploitation and liability in the context of labour hire.

57 JobWatch, *Submission 27*, p. 6.

Chapter 4

Powers of the Fair Work Ombudsman

4.1 This chapter turns to issues relating to the strengthening of the evidence-gathering powers of the FWO proposed in Part 4 of Schedule 1 of the bill.

Current framework

4.2 The FWO is the national workplace relations regulator, responsible for ensuring compliance with Australian workplace relations laws. Fair Work inspectors have a range of powers under the Fair Work Act to gather evidence when assessing or investigating workplace compliance. These powers are set out in sections 708–716 of the Fair Work Act.[1]

4.3 Examples of these powers include:

- s. 708, which provides that a Fair Work inspector may enter premises, without force, in certain circumstances;
- s. 709, which provides that a Fair Work inspector with a range of powers that they can exercise while on premises;
- s. 711, which provides a Fair Work inspector may require a person to tell the Fair Work inspector their name and address in certain circumstances;
- s. 712, which provides that a Fair Work inspector may require a person to produce a record or document to the Fair Work inspector (i.e. a Notice to Produce); and
- s. 714, which provides that a Fair Work inspector may inspect, copy and keep a record or document produced to the Fair Work inspector.[2]

4.4 The FWO stated that although formal evidence-gathering powers are only used in approximately six per cent of the workplace disputes it handles each year, the powers are critical to the FWO's compliance and enforcement work, particularly relating to investigations of serious and complex allegations of non-compliance.[3] The FWO also noted that although in the majority of cases the current powers afforded to Fair Work inspectors are sufficient (as for the most part individuals are willing to engage), in situations where cooperation is not forthcoming, formal compliance powers, such as those outlined in the bill, are necessary.[4]

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1 Department of Employment, *Submission 1*, p. 8.

2 Fair Work Ombudsman, *Submission 4*, p. 16.

3 Fair Work Ombudsman, *Submission 4*, p. 16.

4 Fair Work Ombudsman, *Submission 4*, p. 17.

Proposed amendments

4.5 Part 4 of Schedule 1 would amend the Fair Work Act to grant the FWO new evidence-gathering powers similar to those already available to corporate regulators like the Australian Securities and Investment Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC).[5]

4.6 The new provisions will work to:

- enhance the FWO's ability to gather evidence where proper records do not exist or are being withheld; and
- deter employers, employees and other witnesses from hindering or obstructing the FWO and Fair Work inspectors in the exercise of their duties.[6]

4.7 Proposed section 712A will enable the FWO or specified senior FWO officers to issue a written FWO notice if it is reasonably believed that a person has information or documents relevant to an investigation, or is capable of giving evidence relevant to such an investigation. The notice can require the person to produce documents or attend before the FWO to answer questions.[7] This power would enable the FWO to 'secure positive investigation outcomes where there is no paper trail, and no cooperation'.[8]

4.8 According to the EM, the new evidence-gathering powers will give the FWO enforceable powers of questioning for the first time, an amendment which will be particularly important in cases where no relevant documents appear to be available and subsequently the investigation has stalled.[9]

4.9 The Department of Employment affirmed that there would be appropriate safeguards in place to regulate the exercise of the stronger powers, and that these safeguards are standard for corporate regulators with similar powers.[10]

4.10 Examples of such safeguards include that:

- before exercising the new powers, the FWO must have reasonable grounds to believe a person can help with an investigation (i.e. suspicion is not enough);

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5 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 14.

6 Department of Employment, *Submission 1*, p. 8.

7 Fair Work Ombudsman, *Submission 4*, p. 22.

8 Department of Employment, *Submission 1*, p. 9.

9 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 14.

10 Department of Employment, *Submission 1*, p. 9.

- the power to issue an FWO notice may only be exercised by the FWO personally, or by a delegate who is a substantive or acting Senior Executive Service (SES) staff member;
- an interview conducted under the new powers may only be conducted by the FWO personally, or by a substantive or acting SES staff member;
- an FWO notice must be in writing and in the form prescribed by the regulations (if any);
- a recipient of an FWO notice has a guaranteed minimum of 14 days to comply with the notice;
- a person attending a place to answer questions may be legally represented, and is entitled to be reimbursed for certain reasonable expenses, up to a prescribed amount;
- there is protection from liability relating to FWO notices; and
- self-incriminating information, documents or answers given in response to an FWO notice cannot be used against the person who gave the evidence in any proceedings.[11]

4.11 The FWO emphasised that the new powers would be critical to enabling it to obtain evidence required to pursue action under other new provisions in the bill, which, unlike the 'underpayment' provisions of Fair Work Act, would require proof of a range of things that are generally within the mind of the person or entity, such as intent. The FWO further stated:

> Without such powers, and absent clear documentary 'smoking guns' it would be particularly challenging to establish:
>
> - that conduct was deliberate for serious contraventions;
> - the degree of influence of control exercised by a franchisor and what they knew or ought reasonably to have known and when; and
> - whether a person knew that records, payslips or information provided in an investigation was false or misleading.[12]

4.12 The EM also detailed the need for the expanded powers:

> New examination powers will provide the Fair Work Ombudsman with a greater suite of options to investigate potential non-compliance with workplace laws. This will help achieve positive investigation outcomes where existing powers to require the production of documents fall short because there are no employee records or other relevant documents. This will enable the most serious cases involving the exploitation of vulnerable workers to be properly investigated—even if no documents are produced.

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11 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, pp. 14–15.

12 Fair Work Ombudsman, *Submission 4*, p. 22

> The bill will also give the Fair Work Ombudsman new avenues to pursue those who hinder or obstruct investigations, or provide false or misleading information to the regulator.[13]

Submitter views

4.13 Submitters presented a range of views, both for and against, the proposed strengthened evidence-gathering powers.

Support for the new powers

4.14 Professor Stewart informed the committee that he supported the proposals in the bill to strengthen the evidence-gathering powers of the FWO. Professor Stewart also noted the related protections contained within the bill:

> The proposed limitations and safeguards on the use of those powers appear to strike an appropriate balance between the objective of detecting breaches of labour standards and the protection of individual freedoms.[14]

4.15 7-Eleven informed the committee that it had no concerns with the provisions granting the FWO additional powers.[15] Similarly, the submission from the Justice and International Mission Unit, part of the Synod of Victoria and Tasmania of the Uniting Church in Australia, supported the proposals.[16]

4.16 Anti-Slavery Australia also supported the strengthening of the evidence-gathering powers of the FWO and acknowledged that the powers would assist in the effective investigation of cases of labour exploitation.[17]

4.17 The FCA also indicated that it supported enhancing the powers of the FWO to collect evidence, as outlined in the bill.[18] The NRA also stated that it supported the proposed amendments giving the FWO strengthened powers to obtain evidence.[19]

4.18 JobWatch noted that although it welcomed the move to increase the FWO's powers, any increase in powers would be futile if not accompanied by a corresponding increase in resources.[20]

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13 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. ii.

14 Professor Andrew Stewart, *Submission 3*, p. 2. See also Professor Andrew Stewart, private capacity, *Proof Committee Hansard*, 12 April 2017, p. 12.

15 7-Eleven, *Submission 28*, p. 4.

16 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 15*, p. 3.

17 Anti-Slavery Australia, *Submission 29*, p. 6.

18 The Hon Bruce Billson, Executive Chair, Franchise Council of Australia, *Proof Committee Hansard*, 12 April 2017, p. 36.

19 National Retail Association, *Submission 7*, p. 3.

20 JobWatch, *Submission 27*, p. 8.

4.19 QLS also observed that any increase in FWO powers required a significant investment in training, culture and capacity to ensure that all powers were managed appropriately.[21]

Concerns about the new powers

4.20 A number of organisations expressed concerns about the expansion of the FWO evidence-gathering powers.

4.21 The ACTU stated that it opposed giving the FWO any additional coercive powers, as such powers could 'further frighten workers and stop them from reporting abuse'.[22] The ACTU also argued that the new investigative powers created notably different use and derivative use immunities for the two different types of coercive powers, creating a potential for regulatory error and confusion.[23]

4.22 The Ai Group also informed the committee that it was not convinced that the FWO needed the compulsory examination powers:

> As we understand the rationale for those powers, it has been more around using those powers to force, if you like, people to submit to interview. If the purpose is around the use of them with employees, then we do not think the powers are warranted. If it is about employers, we do not think there is any evidence that in any widespread way employers are failing to provide information or participate in interviews.[24]

4.23 ACCI stated that the EM for the bill did not adequately make the case for increasing the powers of the FWO, and that without such evidence, employers 'cannot see that there is a basis for additional investigatory and examination powers'.[25]

4.24 Additionally, ACCI compared the proposed FWO notice framework to the examination notices that the Australian Building and Construction Commission (ABCC) may issue under the *Building and Construction Industry (Improving Productivity) Act 2016*. ACCI stated that employers would prefer to see the FWO notices 'brought into line with the strictures and restrictions' on the comparable notices issued under the ABCC legislation.[26]The Ai Group also suggested a similar approach.[27]

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21 Queensland Law Society, *Submission 30*, p. 6.

22 Australian Council of Trade Unions, *Submission 8*, p. 11.

23 Australian Council of Trade Unions, *Submission 8*, p. 11.

24 Mr Stephen Smith, Head of National Workplace Relations Policy, Australian Industry Group, *Proof Committee Hansard*, 13 April 2017, p. 13. See also Australian Industry Group, *Submission 6*, pp. 5–6.

25 Australian Chamber of Commerce and Industry, *Submission 5*, pp. 20–22.

26 Australian Chamber of Commerce and Industry, *Submission 5*, p. 22.

27 Australian Industry Group, *Submission 6*, p. 3.

4.25 HIA also put forward a similar viewpoint, noting that under the ABCC legislation, examination notices must be issued through the Administrative Appeals Tribunal. HIA argued that it was problematic that no such equivalent check on FWO notices was included in the bill.[28]

4.26 HIA also emphasised that in its experience, the FWO's focus to date had been on working collaboratively with businesses to resolve workplace issues. HIA argued that the inclusion of coercive powers of regulation displaces this 'responsive' approach to regulation.[29]

4.27 The Department of Employment provided the committee with a clear comparison of the proposed new evidence-gathering powers of the FWO and the existing powers of the ABCC:

Table 4.1—Comparison of safeguards for ABCC powers and proposed FWO powers[30]

SAFEGUARD	ABCC	FWO (Bill)
Trigger for use of power The decision-maker must have '*reason to believe'* a person has information or documents relevant to an investigation	✓	✓
Notice to attend The legislation requires that a person required to attend to answer questions is given at least 14 days written notice, subject to extension	✓	✓
Express right to legal representation The legislation includes an express entitlement for an attendee to be represented by a lawyer during the examination	✓	✓
Reasonable expenses reimbursed (examinations only) A person who attends an examination is entitled to be reimbursed for prescribed, reasonable expenses	✓	✓

28 Housing Industry Association, Submission 10, p. 8.

29 Housing Industry Association, Submission 10, p. 8.

30 Department of Employment, answers to questions on notice, 12 April 2017 (received 1 May 2017).

SAFEGUARD	ABCC	FWO (Bill)
Attendees cannot be required to give a confidentiality undertaking The examiner is expressly prohibited from requiring an attendee to give a confidentiality undertaking in relation to their examination	✓	X—there is no express prohibition in relation to ASIC or the ACCC, the corporate regulators
Additional Commonwealth Ombudsman oversight The legislation requires the Commonwealth Ombudsman to: • be notified when an examination notice is issued • be provided with a recording/transcript of all examinations, and • report to Parliament at least annually on the exercise of the powers	✓	X— based on powers given to ASIC and the ACCC, the corporate regulators. The FWO will be subject to the general oversight of the Commonwealth Ombudsman
AAT oversight The legislation: • requires examination notices to be issued by a nominated AAT presidential member, upon application, and • provides a notice (which is not served) expires within 3 months of issue	✓	X—based on powers given to ASIC and the ACCC, the corporate regulators

4.28 It is clear from this table that the majority of the safeguards contained in the bill are equivalent to those prescribed for the ABCC. Furthermore, it is clear that, as is articulated in both the explanatory memorandum and the second reading speech,[31] the proposed expanded evidence-gathering powers are similar to those already available to the corporate regulators ASIC and the ACCC.

4.29 In response to the concerns raised by several submitters, the FWO provided further information about how the provisions would operate within the broader context of its enforcement work:

> With the examination powers, we would see them as a power of last resort because, in particular, there is this issue about wanting to ensure that we are able to use the evidence against the appropriate target, so to speak. The way

31 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 14; and the Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 1 March 2017, p. 1874.

> the immunity provisions work is, if we ask you to attend an examination, the information you give us effectively cannot be used against you unless you lie to us, in which case we can use it against you in an action around the lying. So we would need to consider very carefully who might be the subject of an examination, and what we would really be looking to is witnesses – people who can help us build a case against a primary target – not the primary targets themselves. There would be almost no utility, I think, in bringing in a person who was our primary target, because then we would not be able to use that information against them. We would also see it as something that we would reach for once we had done quite a bit of work in an investigation and we were very much convinced there was a serious breach of the law going on and an inability to get the evidence we needed through other means.[32]

4.30 In addition, Mr Michael Campbell, Deputy Fair Work Ombudsman outlined how the FWO would approach the new powers available to it should the bill be passed:

> We would not reach to use this [strengthened evidence-gathering power] at the commencement of an investigation. This is something that is going to assist us in the most difficult and complex cases, where witnesses are unwilling to work with us for fear of retribution or some other feature, where you can see within a company that there is an attitude to noncompliance which is getting to a point where managers are refusing to talk to us because there is some pressure being put on them by the directors of the company, or where the directors of a company are choosing not to involve themselves in our investigations. This is to crack the hardest of nuts, and we have seen plenty of those cases over the last 12 months.[33]

4.31 When questioned by the committee as to what experience the FWO had in handling interrogative powers, Mr Campbell answered:

> We have a lot of experience with compulsory evidence gathering powers. While we have not had the ability to require someone to attend an examination, we have had the power to compel the production of documents since the agency was effectively established in 2006. I am pretty sure the Commonwealth Ombudsman did an own-motion inquiry into our use of compulsory evidence gathering powers maybe three or four years ago, which indicated that we are pretty good at it. I would suppose that I would offer, in terms of any powers that this bill might ultimately see this agency have, that we would take the same approach that we do with all of our other compulsory evidence- gathering powers: we would put processes

32 Ms Natalie James, Fair Work Ombudsman, *Proof Committee Hansard*, 12 April 2017, pp. 63–64.

33 Mr Michael Campbell, Deputy Fair Work Ombudsman, *Proof Committee Hansard*, 12 April 2017, p. 65.

and policies in place around how they are to be used, when they are to be used and who they are to be used on.[34]

Committee view

4.32 The committee acknowledges the concerns raised regarding the expansion of the FWO's evidence-gathering powers. Indeed, the committee treats with caution any proposal for additional or strengthened powers of coercion.

4.33 The committee also notes the various safeguards set out in the bill such as the:

- reasonable grounds requirement;
- authorising officer constraints;
- need for FWO notices to be in a prescribed form and in writing;
- guaranteed minimum timeframes;
- right to legal representation and finally;
- prohibition on use of self-incriminating evidence.

4.34 Furthermore, the committee notes the FWO's evidence about its historically low use of its existing coercive powers (in six per cent of cases annually) and of its previous record of appropriate use of coercive powers, as demonstrated by a Commonwealth Ombudsman audit.[35]

4.35 Regarding the prospective use of its expanded powers, the committee is satisfied with the FWO's evidence that it would use these as a last resort and only for most difficult and complex cases where the FWO is 'convinced there was a serious breach of the law going on and an inability to get the evidence we needed through other means.'[36]

4.36 If the bill passes, the committee expects the FWO to detail the use of its expanded evidence-gathering powers in its annual report, and that the government will closely monitor the appropriateness of the use of these powers.

Franchise diversity

4.37 As flagged in chapter 3, although recognising the important role of a national workplace regulator, the committee is concerned that the FWO may be underestimating the diversity of business models across the franchising spectrum.

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34 Mr Michael Campbell, Deputy Fair Work Ombudsman, *Proof Committee Hansard*, 12 April 2017, pp. 64–65.

35 Commonwealth Ombudsman, *Fair Work Ombudsman: exercise of coercive information-gathering powers*, June 2010, p. 1.

36 Ms Natalie James, Fair Work Ombudsman, *Proof Committee Hansard*, 12 April 2017, pp. 63–64.

Comments made by the Fair Work Ombudsman appear to indicate that the FWO does not fully appreciate the multiplicity of franchisor-franchisee relationships and models, or that there is not always a direct line of sight between a franchisor and a franchisee. For example, during remarks at the National Franchise Convention in October 2016, the Fair Work Ombudsman, Ms Natalie James stated:

> If a franchise can ensure that the hamburger I purchase at Melbourne Central is identical to the one I purchase in Townsville in look and taste; or that I get the same friendly service from the gardener I hire in Canberra as in Adelaide – if the franchising system can deliver such uniformity of product and service throughout all outlets, then claims that it cannot also ensure that its workforce is properly paid, do not stack up.[37]

4.38 The committee understands that some franchisors do not have any, or only very limited business systems or control of their franchisee's business.[38] For small business franchisors this is a particularly pertinent distinction. As the FCA informed the committee:

> It is unsafe to presume that there is a single model of franchising and that high profile cases are typical of the commercial arrangements between two separate businesses that characterises the franchisor-franchisee relationship.[39]

4.39 On this matter, the committee is supportive of the bill's intent as expressed by the Department of Employment:

> The Department recognises that franchising in Australia includes a diverse range of businesses and business models. For this reason the proposed amendments [in the bill relating to liability of franchisors and holding companies] do not impose a one-size-fits all requirement for franchisors and holding companies. The new requirements are flexible (not prescriptive) about what needs to be done. What is reasonable will depend on factors such as the size and resources of the franchisor or holding company.[40]

4.40 The committee is concerned that the FWO may be misinterpreting the intent of the bill and therefore seeking to extend the provisions into spaces where they were not intended. As such, the committee strongly urges the FWO to remain mindful of the diversity amongst franchises, and take a reasonable and measured approach to its compliance activities.

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37 Ms Natalie James, Fair Work Ombudsman, *'Getting ahead of the curve on franchise regulation' - Opening remarks - Keynote Panel Session, National Franchise Convention 2016*, 10 October 2016, p. 3, www.fairwork.gov.au/about-us/news-and-media-releases/speeches (accessed 5 May 2017).

38 Franchise Council of Australia, *Submission 9*, p. 24.

39 Franchise Council of Australia, *Submission 9*, p. 6.

40 Department of Employment, *Submission 1*, p. 7.

Recommendation 3

4.41 The committee recommends that the government consider amending the bill to ensure that its reach and intent, as articulated in the Explanatory Memorandum and second reading speech, is clarified.

4.42 The committee encourages the FWO to take an appropriately targeted and measured approach to oversighting the measures within the bill once passed.

Chapter 5

Others measures contained in the bill

5.1 This chapter turns to several other parts of the bill raised by submitters, including:

- the higher scale of penalties for 'serious contraventions' of workplace laws;
- the increased penalties for record-keeping failures; and
- the amendment expressly prohibiting employers from unreasonably requiring their employees to make payments.

Higher scale of penalties for 'serious contraventions'

5.2 The bill seeks to increase maximum civil penalties for certain 'serious contraventions' of the Fair Work Act.[1] The maximum civil penalty for a 'serious contravention' involving deliberate conduct will be 600 penalty units for individuals, and 3000 penalty unites (or five times higher) for bodies corporate.[2] This equates to a maximum of $108 000 for individuals, and $540 000 for bodies corporate.[3]

5.3 Proposed section 557A establishes the regime for 'serious contraventions' under the Fair Work Act, and provides that a contravention is only a 'serious contravention' if the contravening conduct was 'deliberate' and 'part of a systematic pattern of conduct relating to one or more other persons'.[4]

5.4 The EM sets out that the new penalties apply in addition to those already contained in the accessorial liability provisions of the Fair Work Act:

> The new regime for 'serious contraventions' supplements the existing penalty regime in the Fair Work Act, under which intention does not need to be proved (i.e. it is strict liability).[5]

5.5 The EM also provided guidance on how proposed section 557A may operate:

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1 See Part 1 of Schedule 1, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

2 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 2.

3 Department of Employment, *Submission 1*, p. 5. Note: The Department of Employment also noted that if the Crimes Amendment (Penalty Unit) Bill 2017 passes both houses of Parliament, Commonwealth penalty units will increase from $180 to $210 on 1 July 2017.

4 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 4. See also proposed subsection 557A(1).

5 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 2.

> The new section requires several steps to be taken. First, identify the relevant proscribed conduct in the applicable civil penalty provision (e.g. a term of a modern award has been contravened under section 45; or employee records have not been made or kept under section 535(1)). The proscribed conduct may consist of an act or omission. Second, consider whether the conduct was deliberate (e.g. the term of a modern award was deliberately contravened, or employees' records were purposefully not made or kept). New section 557B explains how a body corporate's conduct may be assessed to determine whether it 'deliberately' contravened the law for the purposes of new subsection 557A(1). Third, consider whether the conduct formed part of a systematic pattern of conduct.[6]

5.6 The bill provides some guidance to the second element of the new serious contraventions arrangements, that is the meaning of 'deliberate':

> a contravention…by a body corporate is deliberate if it expressly, tacitly or impliedly authorised the contravention.[7]

5.7 Regarding the third element, the Department of Employment stated that a contravention is more likely to be considered part of a systematic pattern of conduct if:

- there are a number of contraventions of the Fair Work Act occurring at the same time;
- the contraventions have occurred over a prolonged period of time, or after complaints were first raised;
- multiple employees are affected; and
- accurate employee records have not been kept, and pay slips have not been issued, making alleged underpayments difficult to establish.[8]

Need for the new penalty regime

5.8 The Department of Employment noted that the need for stronger penalties to deter the exploitation of employees was highlighted in the Senate Education and Employment References Committee's 2016 report into the exploitation of temporary work visa holders. For example, the report stated:

> Evidence from a broad range of submitters drew attention to the fact that the current penalty regime under the FW Act does not deter deliberate contraventions of workplace law. Professor Allan Fels, for example the

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6 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 4.

7 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, proposed subsection 557B(1).

8 Department of Employment, *Submission 1*, p. 5. Note: the Department of Employment also noted that the factors listed are intended to be indicative only, and a 'serious contravention' may still be established if one or more of the factors are not present.

> former chairman of the ACCC, noted that the penalties and enforcement arrangements under the FW Act are 'obviously weak'…
>
> Indeed, the current penalty regime under the FW Act almost invites unscrupulous employers to treat the law with impunity. The current penalties on company directors under the FW Act operate as the equivalent of a parking fine for some of the unscrupulous 7-Eleven franchisees, and directors of labour hire companies, who have built the systematic exploitation of visa works into their business models.[9]

5.9 The FWO submission detailed the deterrent value of the proposed arrangements:

> This two-tier penalty regime, where courts can order more severe penalties for serious contraventions, would act as a more effective deterrent to employers engaged in systematic exploitation of workers, while also ensuring the penalty regime does not become disproportionately harsh where other less serious contraventions occur.[10]

5.10 The FWO stated that under the current system there was evidence suggesting that unscrupulous employers considered the financial incentive of breaching the law to be greater than the deterrent effect of possible action by the FWO or possible penalties by the courts. The FWO also stated that it had numerous examples of cases where it had sought court ordered penalties for Fair Work Act contraventions against an employer, only to have the same employer continue to display non-compliant behaviour, even after being penalised:

> Arguably, in these cases, the penalties ordered in the first instance were not sufficient to deter the employer from reoffending and were also unlikely to deter other similar operators from breaching workplace laws.[11]

Adequacy of proposed penalties

5.11 A number of submitters indicated support for the higher scale of penalties proposed, including the Uniting Church of Australia (Synod of Victoria and Tasmania); the ACTU; 7-Eleven; the Salvation Army; the ICA; and WEstjustice.[12]

5.12 Dr Hardy and Dr Tham observed that some of their recent research on employer behaviour indicated that the relationship between deterrence and compliance was not necessarily straightforward (i.e. that high sanctions did not automatically lead

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9 Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, p. 324.

10 Fair Work Ombudsman, *Submission 4*, p. 31

11 Fair Work Ombudsman, *Submission 4*, p. 27.

12 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 15*, p. 1; Australian Council of Trade Unions, *Submission 8*, p. 7; 7-Eleven, *Submission 28*, p. 3; Salvation Army, *Submission 25*, p. 4; Independent Contractors Australia, *Submission 32*, p. 1; WEstjustice, *Submission 2*, p. 11.

to greater compliance outcomes). Although acknowledging that the increase in penalties for serious contraventions was designed to act as an effective deterrent, Dr Hardy and Dr Tham argued that in additional to increasing the available penalties, it was equally critical to increase the perceived risk of detection. On this point, they noted that it was crucial that the FWO, as the workplace regulator, be adequately resourced and supported in its goals. Dr Hardy and Dr Tham stated that the proposed reforms to record-keeping and investigative powers contained in the bill were therefore vital in this respect.[13]

Definitional issues

5.13 Professor Stewart raised concerns about the threshold for establishing a 'serious' contravention. While acknowledging the appropriateness of the amendments requiring that the contravention be 'part of a systematic pattern of conduct relating to one or more other persons', he expressed concern about the requirement that the contravention be 'deliberate':

> For individual defendants (i.e. those who are not corporations), this clearly requires that the contravention not be innocent or inadvertent. But what degree of knowledge must be shown on the part of the defendant? Must they have known exactly what provision of the FW Act (or of a particular modern award or enterprise agreement, etc) they were contravening? Or is it sufficient – as I would argue it should be – that they were recklessly indifferent to the existence of a particular requirement under the Act (or an award or agreement, etc)?[14]

5.14 Professor Stewart's submission emphasises why the term 'deliberate' is not entirely helpful:

> Paragraph 22 of the EM states: 'The term "deliberate" is not defined, but is intended to be read synonymously with the term "international" that is used elsewhere in the Fair Work Act'. With respect, however, that is not very helpful. The relatively few uses of the term 'intentional' in the rest of the Act involved particular *conduct* needing to be intentional (such as hindering an entry permit holder, or damaging property), rather than a *contravention*.
>
> A more relevant analogy might be found in s 550 of the FW Act, which imposes 'accessorial' liability for being 'involved' in someone else's contravention. There has been extensive case law on this and similar provisions in other legislation…[15]

5.15 To remedy this, Professor Stewart recommended that proposed section 557A be reworded to make it clearer what level of knowledge is required.[16]

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13 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, p. 4.

14 Professor Andrew Stewart, *Submission 3*, pp. 2–3.

15 Professor Andrew Stewart, *Submission 3*, p. 3. Emphasis in original.

16 Professor Andrew Stewart, *Submission 3*, p. 3.

5.16 ACCI also queried the meaning of the term 'deliberate', suggesting that the term be better qualified in the bill:

> …the Australian Chamber had understood that the Government's 'serious contravention' policy response was intended to capture employers that are aware their behaviours and actions are illegal when committing breaches of employment law. They are intending to avoid the law, and do so knowingly or recklessly, rather than not understanding the law properly or not being able to give it proper effect. If this policy intent is to be reflected in the bill, it should be necessary to establish not only that the employer intended to commit the act/omission giving rise to the breach, but that in doing so they also knew they were falling foul of the relevant provisions of the Act.[17]

5.17 Additionally, the Law Council of Australia raised concerns that the term 'deliberate' was not defined in the bill, and recommended it be changed to 'intentional':

> The Law Council considers that the word 'deliberate' is nebulous and vague, as it does not appear in the Fair Work Act nor other relevant Commonwealth legislation that may be instructive. Therefore, to ensure that the provision is effect, and can be interpreted by a court in a way that is consistent with the intention of the provision, if 'deliberate' is intended to be used analogously with the word 'intentional', that it should be substituted for the word 'intentional'.[18]

5.18 Professor Stewart was equally concerned about proposed section 557B in the bill:

> The same point can be made about proposed s 557B, which states that a corporation's contravention is to be regarded as deliberate if it has 'expressly, tacitly or impliedly authorised' the contravention. The issue again is whether a corporation can be said to have authorised a contravention (as opposed to the conduct that amounts to a contravention) if the relevant managers were not aware (or not precisely aware) of the legal requirements being contravened. Again, this should be clarified.[19]

5.19 Professor Stewart also noted that there was some ambiguity around the interaction with the accessorial liability provisions of the Fair Work Act contained in section 550, and recommended that it be clarified:

> If a person is knowingly 'involved' in another person's serious contravention, would that expose them to the higher penalties proposed in the bill? And if not, why not? The FWO has repeatedly used s 550 to pursue managers, directors and advisors who are involved in an employer's contravention. This is especially important where the employer is a company that goes into liquidation without sufficient assets to meet its liabilities. It is at least arguable that the 'guiding mind(s)' behind a serious

17 Australian Chamber of Commerce and Industry, *Submission 5*, p. 6.

18 Law Council of Australia, *Submission 36*, p. 10.

19 Professor Andrew Stewart, *Submission 3*, pp. 3-4.

> contravention should be exposed to the higher level of penalties, bearing in mind that the maximum will always be one fifth of that set for a corporation.
>
> As the bill stands, it is unclear whether s 550 would apply to a serious contravention (as opposed to the underlying 'ordinary' contravention). The EM does not appear to address the matter. Whatever the intent here, it could usefully be clarified.[20]

Breadth of application

5.20 Dr Hardy and Dr Tham welcomed the changes relating to 'serious contraventions', but cautioned that the amendments did not extend to breaches of Part 3-1 of the Fair Work Act:

> In our view, this is a serious omission. There is clear evidence that the exploitation of migrant workers is *not* restricted to non-payment under-payment and, in many cases, involves breaches of the rights under Part 3-1 of the Fair Work Act, including provisions relating to adverse action and sham contracting.[21]

5.21 As such, Dr Hardy and Dr Tham recommended that the provisions in the bill relating to 'serious contraventions' be amended to include breaches of the general protections contained in Part 3-1 of the Fair Work Act.[22]

5.22 In this regard Dr Hardy and Dr Tham considered that the exclusion of the sham contracting provisions of the Fair Work Act from the increased penalty regime relating to 'serious contraventions' constituted a significant omission, given the growing body of evidence that businesses incorrectly classify employees as independent contractors as a way to circumvent minimum employment standards.[23]

Committee view

5.23 Given the serious nature of several high-profile breaches of the Fair Work Act that have occurred in a small number of franchises, the committee believes that the proposed penalty regime is an appropriate and balanced response to the underpayment of vulnerable workers.

Increased penalties for record-keeping failures

5.24 If passed, the bill will increase the maximum penalty for certain record-keeping obligations imposed by the Fair Work Act, and insert a new civil penalty

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20 Professor Andrew Stewart, *Submission 3*, p. 4.

21 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, p. 3. Emphasis in original.

22 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, p. 4.

23 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, pp. 3–4.

provision for 'serious contraventions'.[24]The maximum penalty for 'strict liability' contraventions relating to employee records and payslips in sections 535 and 536 of the Fair Work Act doubles from 30 to 60 penalty units for individuals ($10 800), and from 150 to 300 penalty units for bodies corporate ($54 000).[25]

5.25 The Department of Employment stated that the current penalties in the Fair Work Act are, in many cases, too low to deter businesses which have manipulated records in order to disguise underpayments:

> These higher penalties are an acknowledgement of the important role employment records and payslips play in proving and recovering underpayments for employees, and deterring employers who may be considering undertaking these practices.[26]

5.26 The Department of Employment also noted that the higher penalties proposed in the bill are not intended to apply to genuine mistakes or errors:

> The Fair Work Ombudsman is required to act as a model litigant and must only bring proceedings in cases where penalties are appropriate. Courts also have discretion in determining penalties, and will reserve the highest penalties for the most serious cases.[27]

5.27 The EM also clarified that the increase in penalties is designed to target deliberate record-keeping failures:

> …it is aimed deterring the small minority of employers who deliberately fail to keep records as part of a systematic plan to underpay workers and disguise their wrongdoing.[28]

5.28 ACCI expressed concern with the increased penalties for record-keeping failures and noted that the record-keeping requirements prescribed in the Fair Work Regulations are highly prescriptive, and as such the margin for error for those businesses without sophisticated human resource and payroll systems is high. As such, the submission noted:

> …it is appropriate to distinguish between those who fail to comply because they are seeking to disguise their deliberate non-compliance with the law and those who do fail to comply for other reasons. The strict liability nature

24 See Item 12 of Part 1 of Schedule 1, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

25 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 3. See also Department of Employment, *Submission 1*, p. 6.

26 Department of Employment, *Submission 1*, p. 6.

27 Department of Employment, *Submission 1*, p. 6.

28 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 3.

> of the offence risks capturing administrative breaches that do not give rise to egregious conduct of the nature that gave rise to the bill.[29]

5.29 HIA also stated that the increased penalties for record-keeping breaches would have an unduly negative impact on small business, as 'the reality is that some of these employers struggle with their paperwork obligations'. The HIA suggested that the penalties that relate to breaches of the employee records and pay slips provisions of the Fair Work Act be maintained at the existing levels.[30]

5.30 The South Australian Wine Industry Association (SAWIA) informed the committee that it did not take comfort from the assurances in the EM that the increased penalties would not target those who genuinely overlooked record-keeping requirements and noted as 'there is nothing other than the Fair Work Ombudsman's internal policy position that will guide whether a business that has made an honest mistake in relation to record-keeping will be subject to prosecution or not'. As such, SAWIA stated that it opposed the blanket increase in penalties.[31]

5.31 The National Farmers' Federation also put forward a similar position, noting that there was no exception in the bill that indicated the higher penalties would not apply in cases where the breach was unintentional.[32]

5.32 The Ai Group stated that it supported the increased penalties for breaches of employee record and pay slip requirements, noting that the increase would bring the penalties into line with penalties for breaches of other provisions of the Fair Work Act.[33] The ACTU, the Australian Manufacturing Workers' Union, 7-Eleven and Anti-Slavery Australia also supported the measures.[34]

Committee view

5.33 The committee believes that stronger penalties for breaches relating to record-keeping requirements are necessary to deter a small minority of employers who deliberately fail to keep appropriate records as part of a systematic plan to underpay workers and disguise their wrongdoing.

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29 Australian Chamber of Commerce and Industry, *Submission 5*, p. 10.

30 Housing Industry Association, *Submission 10*, p. 5.

31 South Australian Wine Industry Association, *Submission 18*, p. 6.

32 National Farmers' Federation, *Submission 14*, pp. 12–13.

33 Australian Industry Group, *Submission 6*, p. 5.

34 See Australian Council of Trade Unions, *Submission 8*, p. 8; Australian Manufacturing Workers' Union, *Submission 17*, p. 1; 7-Eleven, *Submission 28*, p. 3; Anti-Slavery Australia, *Submission 29*, p. 6.

Preventing cash-back practices

5.34 The bill seeks to amend the Fair Work Act in order to address the problem of a small number of unscrupulous employers requiring their employees to pay back part of their wages.[35] The EM sets out the specific detail of the amendment as follows:

> Item 22 amends subsection 325(1) to clarify the section prohibits employers from directly or indirectly requiring an employee to give 'cashback' or pay any other amount of the employee's money or the whole or any part of an amount payable to the employee in relation to the performance of work (whether to the employer or another person) if:
>
> - the requirement is unreasonable in the circumstances; and
> - the payment is directly or indirectly for the benefit of the employer or a party related to the employer (e.g. an owner or director of an employer, or a relative of the owner or director of an employer).[36]

5.35 A cash-back arrangement can be used by unscrupulous employers to underpay their employees. It involves an employer paying the correct wages to an employee, only to then require the employee to withdraw a portion of those wages in cash and return them to the employer.[37]

5.36 The Department of Employment stressed the need for the amendments in its submission:

> While the Fair Work Ombudsman's investigation into 7-Eleven highlighted the 'cashback' practice, it is important to emphasise that this behaviour is not contained in the franchising sector. In recent years, there have been reports of this practice occurring across a range of business models.[38]

5.37 JobWatch provided several examples of the cash-back arrangements. It stated that it frequently dealt with many young, immigrant, or otherwise vulnerable workers who experienced such conduct, and that the behaviour was not isolated or limited to large corporations.[39]

5.38 The FWO stated that its inspectors had observed increased instances of cash-back practices in recent years, often in situations involving vulnerable workers. The FWO provided details on the operation and impact of cash-back arrangements:

> In the FWO's experience, cash-back arrangements have been a particular concern in matters involving visa holders. In these cases, cash-back

35 See Part 3 of Schedule 1, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

36 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 12.

37 Fair Work Ombudsman, *Submission 4*, p. 38.

38 Department of Employment, *Submission 1*, p. 8.

39 JobWatch, *Submission 27*, pp. 7-8.

> arrangements are often being used as a way of creating the perception that visa requirements are being met and that employees are being paid their lawful wages. Visa holders often comply with unreasonable requests to repay their wages for fear of losing sponsorship or residency rights under other visas.[40]

5.39 The FWO emphasised that such conduct was deliberate, insidious, and often extremely challenging to detect and take action against under the current framework. The existing section 325 of the Fair Work Act precludes employers from unreasonably requiring employees to spend amounts of their wages, including where the intention of the cash repayments is to simply return a portion of the wages to the employer. The FWO informed the committee that in practice, however, it was difficult for it to satisfy all of the necessary elements of the provision, such that a court would determine that the provision had been breached. This was particularly the case given that cash-back arrangements were 'off the books', and as such it was extremely challenging for the FWO to obtain the necessary evidence.[41]

5.40 The FWO stated that the amendments proposed in the bill would assist it in proving contraventions of section 325, leading to better outcomes for affected employees:

> As worded currently, cash-back payments are only expressly prohibited where the monies paid back to the employer are directly linked to the employee's wages. The broadened scope of 'an employee's money' can apply to any amounts possessed by the employee that are required to be spent in an unreasonable way and for the benefit of the employer; removing the need to prove the link between the cash payments and the employee's wages.[42]

5.41 Numerous submitters indicated they supported the cash-back amendments, including the Ai Group, SAWIA, the ACTU, 7-Eleven, the Salvation Army, JobWatch, and the ICA.[43]

5.42 WEjustice recommended that the cash-back prohibitions be extended to prospective employees and suggested some proposed text to achieve it.[44]

5.43 Dr Hardy and Dr Tham suggested a similar extension, noting that as currently drafted the amendments did not include prospective employers and employees, and

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40 Fair Work Ombudsman, *Submission 4*, p. 38.

41 Fair Work Ombudsman, *Submission 4*, pp. 38–39.

42 Fair Work Ombudsman, *Submission 4*, p. 39.

43 See Australian Industry Group, *Submission 6*, p. 5; South Australian Wine Industry Association, *Submission 18*, p. 6; the Australian Council of Trade Unions, *Submission 8*, p. 10; 7-Eleven, *Submission 28*, p. 4; Salvation Army, *Submission 25*, p. 2; JobWatch, *Submission 27*, p. 7; Independent Contactors Australia, *Submission 32*, p.1.

44 WEstjustice, *Submission 2*, p. 12. For proposed text, see p. 25 of the submission.

would therefore not assist with combating the practice of prospective employers extracting payments from 417 visa holders.[45]

Committee view

5.44 The committee supports the cash-back amendments as it believes that they will improve the FWO's ability to pursue cash-back arrangements being used by a small number of unscrupulous employers to underpay vulnerable workers.

Concluding comments

5.45 The committee has a long-standing interest in the protection of vulnerable workers in Australian society. As noted at various points in this report and in the EM to the bill, the committee's references counterpart, the Senate Education and Employment References Committee, conducted a significant inquiry into the exploitation of temporary work visa holders which drew attention to the unsatisfactory behaviour of some employers.

5.46 The committee strongly believes that the deliberate and systematic exploitation of workers by a small minority of employers is unacceptable, and as such it sees the merit in appropriate measures that seek to deter unlawful practices and stamp out non-compliant behaviour.

Recommendation 4

5.47 Subject to the recommendations contained elsewhere in this report, the committee recommends that the Senate pass the bill.

Senator Bridget McKenzie

Chair

45 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, pp. 15–17.

Labor Senators' Additional Comments

1.1 Labor senators welcome the provisions of the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the bill) which will reduce the exploitation of some vulnerable workers in Australia.

1.2 However, Labor senators consider that in some aspects, the bill as currently drafted falls well short of addressing the range of ways that workers are exploited. As such, Labor senators believe that a number of amendments are required in order to provide a more comprehensive solution to the deliberate and systematic exploitation of workers in Australian workplaces.

Liability of franchisors and holding companies

1.3 Labor senators agree with the conclusions contained in the main report that it is appropriate for the bill to seek to supplement the accessorial liability provisions in the Fair Work Act.

However, Labor senators note the concerns raised by submitters such as WEstjustice that the bill as currently drafted does not make it clear that responsible franchisor entities and holding companies will be liable for the breaches of the franchisee entity or subsidiary. As the WEstjustice submission noted:

> All it does is introduce a new civil remedy provision for failing to prevent a contravention. This means that under the current bill, it appears that workers at 7-Eleven could not pursue head office for their underpayments. They could only seek that the head office pays a penalty for a breach of [proposed section] 558B [of the Fair Work Act].[1]

1.4 Similarly, after citing the problems encountered in the 7-Eleven wage scandal, the ACTU submitted:

> The ACTU believes this [franchise] relationship and responsibility needs to change. However, the present proposals, by requiring that franchisors cannot be held liable unless they have a 'significant degree of influence or control over the franchisee entity's affairs', may perpetuate these types [7-Eleven] of indemnification arrangements and as a consequence may not be effective in making franchisors liable.[2]

1.5 In this regard, Labor senators note ACCI's concern that businesses may restructure their operations to avoid responsibility under the bill:

> The significant scope for liability pursuant to the Bill's terms does create some risk that businesses will restructure their affairs in such a way that they are not captured by the provisions. For franchisors this may see a withdrawal of support of the nature that could give rise to a finding of

1 WEstjustice, *Submission 2*, p. 20.

2 Australian Council of Trade Unions, *Submission 8*, pp. 8–9.

> influence or control. Other organisations may elect to conduct their operation completely outside Australia.[3]

1.6 Labor senators contend that this evidence supports the need for liability to be extended so that franchisors cannot avoid responsibility by merely rearranging their affairs.

Recommendation 1

1.7 Labor senators recommend that the government amend the bill to clarify that responsible franchisor entities and holding companies will be liable for the breaches of the franchisee entity or subsidiary.

Expansion to labour hire and supply chain relationships

1.8 Labor senators consider that the bill does not go far enough in its amendments to expand accessorial liability. As the FCA argued, 'no evidence provided makes the case for singling out franchising when Fair Work compliance concerns are an economy-wide issue'.[4] The FCA also submitted:

> Any new legislation should reflect the economy-wide nature of the employee underpayment concern. An economy-wide approach may be assisted by contemplating if the definition of 'parent' company was extended beyond parent and subsidiary to a situation where one party exercised reasonable allocation of responsibilities and significant control over another party, such as in a closely controlled supply chain or a franchise, licence or product distribution arrangement.[5]

1.9 Similarly, the Asia-Pacific Centre for Franchising Excellence stated:

> Franchising should not be singled out. The proposed amendments appear to have evolved as a reaction to recent media involved the underpayment of employees by franchisees in some high-profile franchise brands. However, it is disingenuous and patently unfair to target franchise organisations…[6]

1.10 Labor senators agree that the problem of the underpayment of vulnerable workers is not restricted to franchise arrangements, and that the franchising sector should not be singled out. As such, Labor senators consider it necessary that accessorial liability be extended to supply chains and labour hire hosts.

1.11 In this regard, Labor senators draw attention to the evidence in the main report received from WEstjustice, Dr Tess Hardy and Dr Joo-Cheong Tham, the ACTU and JobWatch that supports this view.[7]

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3 Australian Chamber of Commerce and Industry, *Submission 5*, p. 14.

4 Franchise Council of Australia, *Submission 9*, p. 16.

5 Franchise Council of Australia, *Submission 9*, p. 16.

6 Asia-Pacific Centre for Franchising Excellence, *Submission 11*, p. 2.

7 See WEstjustice, *Submission 2*, pp. 13, 19; Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, p. 11; Australian Council of Trade Unions, *Submission 8*, pp. 4–5; JobWatch, *Submission 27*, p. 6.

Recommendation 2

1.12 Labor senators recommend that the government expand the scope of the bill to address worker exploitation in labour hire arrangements and supply chain networks.

Preventing cash-back practices

1.13 Labor senators support the provisions in the bill to address the problem of unscrupulous employers requiring their employees to pay back part of their wages.

1.14 However, Labor senators are of the opinion that the cash-back prohibitions should be extended to offer protection to prospective employees as well.

1.15 Labor senators highlight the evidence submitted by WEstjustice, and Dr Hardy and Dr Tham and the ACTU on this matter.[8]

Recommendation 3

1.16 Labor senators recommend that the government amend the bill to expand the cash-back prohibitions to include prospective employees.

Definitional issues

1.17 Labor senators recognise the concerns raised by submitters regarding the definitions of several terms used in the bill.

1.18 For example, as set out in chapter 5 of the main report, Professor Andrew Stewart, ACCI and the LCA argued that the term 'deliberate' used in the bill was ambiguous and required further clarification.[9]

Recommendation 4

1.19 Labor senators recommend that the government amend the bill to clarify the meaning of the term 'deliberate' in proposed section 557A.

1.20 Additionally, Labor senators draw attention to the evidence from Professor Stewart, outlined in chapter 5 of the main report, that indicated there was ambiguity around the interaction of the 'serious contravention' provisions in the bill with the accessorial liability provisions of the Fair Work Act contained in section 550. As Professor Stewart noted:

> As the bill stands, it is unclear whether s 550 would apply to a serious contravention (as opposed to the underlying 'ordinary' contravention). The EM does not appear to address the matter. Whatever the intent here, it could usefully be clarified.[10]

8 See WEstjustice, *Submission 2*, pp. 12. 25; Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, pp. 15–17; Australian Council of Trade Unions, *Submission 8*, p. 5.

9 See Professor Andrew Stewart, *Submission 3*, p. 3; Australian Chamber of Commerce and Industry, *Submission 5*, p. 6; Law Council of Australia, *Submission 36*, p. 10.

10 Professor Andrew Stewart, *Submission 3*, p. 4.

Recommendation 5

1.21 Labor senators recommend that the government amend the bill to clarify whether section 550 of the Fair Work Act would apply to serious contraventions.

1.22 Labor senators also consider that further detail is required in the bill to clarify the factors which may be considered in determining whether a contravention was part of a systematic pattern (and therefore likely to be a 'serious contravention'). In this regard, Labor senators highlight evidence received from ACCI:

> While noting the list of criteria for establishing whether a contravention is a 'serious contravention, the explanatory memorandum also suggests that beyond those expressly stated 'other factors may also be relevant, such as a failure to address complaints about alleged underpayments'. In the Australian Chamber's submission, this is an important consideration and the express inclusion of this behaviour in the list of criteria for establishing a serious contravention may assist in driving enhanced compliance outcomes and supporting a facilitative approach on the part of the FWO.[11]

Recommendation 6

1.23 Labor senators recommend that the government amend the bill to include a failure to address complaints about alleged underpayments to the list of conduct in proposed subsection 557A(2) to be considered when assessing whether conduct constitutes a serious contravention.

Increased penalties for record-keeping failures

1.24 Labor senators support the increased penalties for record-keeping failures proposed in the bill.

1.25 However, in addition to increased penalties, Labor senators consider that a reverse onus of proof in wage disputes where an employer fails to keep or provide employee records is also necessary to encourage compliance with record-keeping obligations.

1.26 As the WEstjustice submission detailed:

> In order to eliminate the incentive for employers to avoid keeping employee records, and create a culture of compliance, we propose that a reverse onus of proof be imposed on employers who are respondents to claims for unpaid wages and have failed to keep or produce employee records where required by law. Employers who had not kept records could still discharge the onus in another way, for example via us of CCTA footage or rosters.
>
> To achieve this we suggest including a new provision in Division 4 of Part 4-1 to reverse the onus of proof in respect of civil remedy provisions concerning payment of wages where the employer had not kept and/or provided employee records as required by sections 535, 536 of the Fair Work Act or regulation 3.42 of the Fair Work Regulations.[12]

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11 Australian Chamber of Commerce and Industry, *Submission 5*, p. 8.

12 WEstjustice, *Submission 2*, p. 12.

Recommendation 7

1.27 Labor senators recommend that the government amend the bill to create a reverse onus of proof for wage claims where employers fail to keep or provide employee records.

Senator Gavin Marshall
Deputy Chair

Australian Greens' Additional Comments

1.1 Widespread underpayment and exploitation of workers, particularly migrant workers, has been exposed all across Australia. The extent to which this is occurring indicates that practices such as wage theft have become customary amongst some of Australia's major employers.

1.2 The ACTU noted in its submission that 'unfortunately the prevalence of wage theft in some recent examples of exploitation of vulnerable workers is a clear sign that this has been the prevailing business model'.[1]

1.3 Current workplace laws and policies are failing to keep up with the changing and dynamic nature of contemporary workplaces in Australia. They are not sufficient to prevent the exploitation of vulnerable workers. The Greens support this bill, the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, as a start in addressing the shortcomings of our current system, however it does not go far enough in addressing the systemic exploitation of workers prevalent in many sectors across Australia.

1.4 Whilst the Greens support making franchisors accountable for underpayments by their franchisees or subsidiaries, we believe the provisions in this bill are too narrow. The Greens have previously introduced the Fair Work Amendment (Recovery of Unpaid Amounts for Franchisee Employees) Bill 2015.

1.5 The bill should provide for employees employed by a franchisee to recover unpaid remuneration from the franchisor or head office entity and broaden the scope of 'responsible franchisor entity' by removing the requirement for significant degree of control or influence.

1.6 Allowing workers to claim any underpayments directly from head office will bring about a culture shift. Instead of leaving it to vulnerable workers to uphold the law through expensive legal action, head offices would take more responsibility for what happens in the stores that carry their name.

1.7 The failure of an employer to keep records can result in the burden of proof falling to vulnerable workers when attempting to prove wage theft. In these instances, as WEstjustice points out, the current legislative framework rewards employers who fail to keep employee records. It is also apparent that penalties do not always act as an adequate deterrent to exploiting workers, particularly if the penalties can be easily absorbed by the franchisor. The Greens support the increase of penalties, however the bill should be amended to reverse the onus of proof when employees make claims and the employer has failed to keep records in accordance with the law. This will incentivise employers to maintain adequate records.

1.8 Current provisions in the *Fair Work Act 2009* cannot be relied upon to hold all third party organisations in labour hire arrangements or supply chains accountable and in some cases, can encourage deliberate ignorance regarding the exploitation of

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1 Australian Council of Trade Unions, *Submission 8*, p. 4

vulnerable workers. WEstjustice noted in its submission, 'we have seen…in situations where clients in labour hire arrangements, supply chains or franchises are left without a remedy against a host employer, principal or franchisor, who in many circumstances should be held, wholly or partly, responsible for the terms and conditions of the worker.'[2]Whilst this bill extends responsibility to franchisors, the bill should be amended to extend responsibility for some contraventions to 'indirectly responsible entities', which includes supply chain heads and labour hire hosts.

Recommendation 1

1.9 The bill should be amended to broaden the scope of 'responsible franchisor entity', so that 'head office' franchisors are liable to meet any underpayment of their franchisees' employees, leaving open the ability of the franchisor to later pursue the franchisee to recoup the amount of the underpayment.

Recommendation 2

1.10 The bill should be amended to incentivise employers to maintain records by reversing the onus of proof in claims where the employer has failed to keep proper records.

Recommendation 3

1.11 The bill should be amended to extend the responsibility of workers terms and conditions to include other third parties such as supply chain heads and labour hire hosts.

Senator Lee Rhiannon

2 WEstjustice, *Submission 2*, p. 14

Appendix 1

Submissions and additional information

Submissions

Submission Number	Submitter
1	Department of Employment
2	WEstjustice
3	Professor Andrew Stewart
4	Fair Work Ombudsman
5	Australian Chamber of Commerce and Industry
6	Ai Group
7	National Retail Association
8	Australian Council of Trade Unions
9	Franchise Council of Australia
10	Housing Industry Association
11	Asia-Pacific Centre for Franchising Excellence
12	Australian Lottery and Newsagents Association
13	Federal Chamber of Automotive Industries
14	National Farmers' Federation
15	Uniting Church in Australia, Synod of Victoria and Tasmania
16	Australasian Convenience and Petroleum Marketers Association
17	Australian Manufacturing Workers' Union
18	South Australian Wine Industry Association
19	International Franchise Association
20	Federation of Ethnic Communities' Councils of Australia
21	BlueRock Partners
22	Franchise Advisory Centre
23	Australian Fleet Lessors Association
24	Maurice Blackburn Lawyers
25	The Salvation Army
26	Dr Tess Hardy and Dr Joo-Cheong Tham
27	JobWatch
28	7-Eleven Stores Pty Ltd
29	Anti-Slavery Australia
30	Queensland Law Society

31	Electrical Trades Union of Australia
32	Independent Contractors Australia
33	Confidential
34	Australia Post
35	Business Council of Australia
36	Law Council of Australia
37	Mr Kia Silverbrook
	Response to submission 37 by the Fair Work Ombudsman

Answers to questions taken on notice

1 Answers to questions taken on notice by the Australian Chamber of Commerce and Industry at a public hearing in Sydney, 13 April 2017; received 21 April 2017.

2 Answers to question taken on notice by the Fair Work Ombudsman at a public hearing in Canberra, 12 April 2017; received 21 April 2017.

3 Answers to questions taken on notice by WEstjustice at a public hearing in Canberra, 12 April 2017; received 26 April 2017.

4 Answers to questions taken on notice by the Franchise Council of Australia at a public hearing in Canberra, 12 April 2017; received 27 April 2017.

5 Answers to questions taken on notice by the Department of Employment at a public hearing in Canberra, 12 April 2017; received 1 May 2017.

6 Answers to questions taken on notice by the Council of Small Business Australia at a public hearing in Canberra, 12 April 2017; received 8 May 2017.

Tabled documents

1 Document titled 'Responsibility beyond the employers (franchisees)' tabled by the Fair Work Ombudsman at a public hearing in Canberra, 12 April 2017.

2 Document titled 'Regulation of and compliance with industrial relations in franchises' tabled by the Fair Work Ombudsman at a public hearing in Canberra, 12 April 2017.

Appendix 2

Public hearings

Parliament House, Canberra, 12 April 2017

Committee members in attendance: Senators McKenzie, Marshall and Cameron.

Witnesses

Council of Small Business Australia
Mr Peter Strong, Chief Executive Officer

Professor Andrew Stewart, private capacity

Australian Council of Trade Unions
Mr Trevor Clarke, Director, Legal and Industrial

Shop, Distributive and Allied Employees Association
Mr Gerard Dwyer, National Secretary

Franchise Council of Australia
The Hon Bruce Billson, Executive Chair
Mr Damian Paull, Chief Executive Officer
Mr Stephen Giles, Director

National Retailers Association
Ms Dominique Lamb, Chief Executive Officer

WEstjustice
Ms Tarni Perkal, Senior Solicitor Employment Project

Department of Employment
Ms Kelly Hoffmeister, A/g Chief Counsel, Workplace Relations Legal Group
Dr Alison Morehead, Group Manager, Workplace Relations Policy Group
Ms Jody Anderson, Branch Manager
Ms Rachel Volzke, Senior Executive Lawyer

Fair Work Ombudsman
Ms Natalie James, Fair Work Ombudsman
Mr Michael Campbell, Deputy Fair Work Ombudsman

Fair Work Commission
Ms Ailsa Carruthers, Acting General Manager
Mr Murray Furlong, Director Tribunal Services
Mr Brendan Hower, Manager, Member Support Team Tribunal Services

Sydney, New South Wales, 13 April 2017

Committee members in attendance: Senators McKenzie, Marshall, Cameron and Rhiannon.

Witnesses

Australian Chamber of Commerce and Industry
Ms Alana Matheson, Deputy Director Workplace Policy
Mr Dick Grozier, Associate Director Workplace Policy

Ai Group
Mr Stephen Smith, Head of National Workplace Relations Policy
Mr Brent Ferguson, National Manager, Workplace Relations Advocacy and Policy

Mr Gerard de Valence, private capacity

Australian Federation of Employers and Industries
Mr Garry Brack, Chief Executive Officer