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Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 Senate Education and Employment Legislation Committee

10 April 2017

Australian
Chamber of Commerce
and Industry

Australian Chamber of Commerce and Industry

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Introduction

1. The Australian Chamber and its members strongly and consistently oppose wilful non-compliance with Australia's employment laws, and any deliberate attempts by employers to deprive employees of their due employment entitlements.

2. Australia's employment laws must always be complied with by employers, employees, unions and registered employer bodies. The *Fair Work Act 2009* (Cth)(Act) is increasingly and damagingly inconsistent with the challenges confronting Australian employers in our modern globalised economy; but employers do not stand for the breaking of laws we don't agree with.

3. Non-compliance with the law can arise in a number of ways. Whilst errors are made in the context of Australia's highly complex labour law system, as in any other sphere, a small proportion of employers will always wilfully break employment laws.

4. It is regrettable that when people commit acts of wrongdoing, the community may form a negative view about of the cohort or group with which the person is associated. Employers are not immune from this. When cases of wilful and deliberate wrongdoing by employers emerge in the public arena this has the potential to create negative perceptions about employers generally. However the Fair Work Ombudsman (FWO) has stated:

> *In our experience, most employers want to do the right thing. There are a range of reasons why an employer may not be compliant with workplace laws, including the complexity of the system, or an oversight or misunderstanding of the legislation*.[1]

5. The Australian Chamber urges the Committee to acknowledge, as the FWO has, that most employers endeavour to do the right thing and to be mindful of the crucial role that private sector employers play in creating wealth, prosperity and opportunities for social and economic participation for Australians as it considers the Bill.

6. The challenge for Government is to deliver an employment law system which not only appropriately balances economic, employment and other considerations, but that also encourages, supports and enforces compliance to the maximum possible level.

7. The *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth)(Bill) doesn't seize on opportunities to improve compliance in Australia through reform of our employment system to improve its suitability for the end user– rather it seeks to add to the existing enforcement regime under the existing complex Act, in response to a series of publicly reported examples of non-compliance.

The need for improved enforcement

8. The Explanatory Memorandum to the Bill indicates that it:

> *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.*

[1] Fair Work Ombudsman, Annual Report 2014-2015, pp 42-43.

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9. The Australian Chamber network shares community concern at recent high profile examples of systematic non-compliance with wages obligations, and like all Australians does not want to see this repeated or perpetuated in future. It notes the increased focus on these areas of non-compliance. It can be expected that the increased attention, additional resources and move to more informed risk-based assessment will result in more cases coming to light.

10. In moving to address community concern the Bill gives effect to the Government's pre-election policy response as described in "The Coalition's Policy to Protect Vulnerable Workers". In particular, the Bill seeks to amend the Act by:

    a. increasing by tenfold maximum penalties for certain contraventions under the Act characterised as 'serious';

    b. holding franchisors and holding companies responsible for certain contraventions of the Act by their franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them;

    c. clarifying the prohibition on employers unreasonably requiring their employees to make payments in relation to the performance of work (i.e. 'cashback' arrangements);

    d. providing the Fair Work Ombudsman (FWO) with evidence-gathering powers similar to those available to corporate regulators such as the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission;

    e. prohibiting the hindering or obstructing of the FWO and or an inspector in the performance of his or her functions or powers, or the giving of false or misleading information or documents;

    f. increasing maximum penalties for strict liability contraventions relating to employee records and pay slips.

11. However, the high profile scandals do not of themselves make out the need for these changes:

    a. It is not clear that higher penalties will of themselves discourage systematic non-compliance with workplace relations law obligations.

    b. We have learnt in numerous other areas of law that endlessly increasing penalties:

        i. Cannot of itself secure the compliance outcomes sought.

        ii. Can only discourage a limited proportion of non-compliance.

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iii. Can only be effective (or effectiveness will be maximised) if accompanied and information and promotion of what the legal entitlements / obligations are.

12. In contrast to the Explanatory Memorandum and the policies both the Government and Opposition took to the last election, employers are not clear that recent high profile non-compliance cases, highly concerning and patently unacceptable as they are, "demonstrate that (compliance) laws need to be strengthened".

13. They might equally demonstrate that:

a. Existing laws need to be enforced more effectively (and we note that the Government has allocated substantial additional budget resources to the FWO in the wake of the 7-Eleven matters).

b. Community awareness needs to be raised. Particular efforts are needed with international employees who seek to work in Australia under visas with work rights attached to them. These employees would benefit from a better understanding of their rights and entitlements, and to know where to go for help a lot earlier. Employers need better information on both their employment obligations and their liabilities when things go wrong. Both dimensions come down to improved information and promotion.

c. We do need to consider whether Australia's employment obligations are excessively complex, difficult to understand, overwhelming and encouraging of strategies to avoid interaction with them.

14. We urge caution in assuming that compliance problems always demand, or will be solved by higher penalties, more inspectors or more inspectorial powers. We have recognised in other areas of law and regulation that wider efforts are required, and will secure improved, wider ranging and more sustained changes in behaviours.

How the FWO approaches its work

15. Australian Chamber members welcome the approach the FWO takes to compliance and enforcement work, and in particular the emphasis on partnerships and cooperation, informing both employers and employees, and securing voluntary compliance and redress.

16. It is worth noting the approach adopted in section 16(2) of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth)(ABCC legislation), which was part of the package that secured passage of the ABCC. It addresses how the ABC Commissioner is to approach his work:

> *(2) In performing the functions referred to in subsection (1), the ABC Commissioner must ensure that the policies and procedures adopted and resources allocated for protecting and enforcing rights and obligations arising under this Act, designated building laws and the Building Code are, to the greatest extent practicable having regard to industry conditions based on complaints received by the ABC Commissioner, applied in a reasonable*

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and proportionate manner to each of the categories of building industry participants.

17. Building on the spirit of section16(2) of the ABCC legislation, consideration should be given in future to capturing and codifying the positive ways in which the FWO approaches its work, and in particular the FWO's Compliance and Enforcement Policy.

18. As this Bill is considered we urge the Committee to bear in mind that the private sector makes the major contribution to employment in Australia creating around 10.3 million jobs, almost 87 per cent of all employment. Around 45 per cent of these jobs (or 4.8 million) are provided by small and medium enterprises. 'Corporations' come in all sizes. As such, we urge the Committee to exercise caution to avoid recommendations that would extend the reach of the Bill beyond its policy intent and to consider means of ensuring that the functions of the FWO are targeted and exercised in a way that is directed toward non-compliance of the most egregious kind. To the extent that non-compliance can be corrected through a facilitative approach, it is the Australian Chamber's strong view that this is the approach that should be adopted.

This submission

19. The following sections address specific Parts of Schedule 1 of the Bill.

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Sch1 Part 1 – Increased Penalties

New maximums for serious contraventions

20. The Coalition's Policy to Protect Vulnerable Workers made the commitment that a "new higher penalty category of 'serious contraventions' will be introduced, and will apply to any employer that has intentionally ripped off workers, regardless of the employer's size". In particular, it committed to:

> *introducing higher penalties (ten times the current maximum penalties) for employers who deliberately and systematically underpay workers and fail to keep proper records.*

21. In giving effect to this commitment, the Bill proposes the introduction of a new section 557A which provides that a contravention of a civil remedy provision by a person is a serious contravention if the person's conduct constituting the contravention was (without limitation):

    a. deliberate; and

    b. part of a systematic pattern of conduct relating to one or more other persons having regard to:

        i. the number of contraventions of the Act committed by the person; and

        ii. the period over which the relevant contraventions occurred; and

        iii. the number of persons affected by the contraventions; and

        iv. whether the person also contravened record keeping requirements; and

        v. whether the person also contravened pay slip requirements.

22. The Explanatory Memorandum explains that assessing whether a serious contravention has occurs will require 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. a 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*

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subsection 557A(1). Third, consider whether the conduct formed part of a systematic pattern of conduct.[2]

23. The Explanatory Memorandum also notes that while the "term 'deliberate' is noted defined, it is intended to be read synonymously with the term 'intentional' that is used elsewhere in the Fair Work Act".[3]

24. Considering the nature of the circumstances that gave rise to 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 doing 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. In this regard, the Australian Chamber encourages the Committee to consider whether the notion of 'deliberate' can be better qualified such that it is directed toward behaviours this nature.

25. This is particularly important given the these new higher penalties for 'serious contraventions' will apply to;

    a. Contraventions of the National Employment Standards (subsection 44(1));

    b. Contraventions of modern awards (section 45);

    c. Contraventions of an enterprise agreement (section 50);

    d. Contraventions of a workplace determination (section 280);

    e. Contraventions of a national minimum wage order (section 293);

    f. Contraventions of an equal remuneration wage order (section 305);

    g. Contravention of sections 323, 325 and 328 of the Act dealing with method and frequency of payment, prohibiting employers to spend amounts paid to them for the performance of work if the requirement is unreasonable and employer obligations in relation to a guarantee of annual earnings;

    h. Contraventions of pay slip and record keeping requirements (sections 535 and 536).

26. The Explanatory Memorandum further explains that a contravention will be more likely to be considered part of a systematic pattern of conduct if:

[2] Explanatory Memorandum, [21.], p.4.
[3] Explanatory Memorandum, [22.], p.4.

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i. *there are concurrent contraventions of the Fair Work Act occurring at the same time (e.g. breaches of multiple award terms and record-keeping failures);*

j. *the contraventions have occurred over a prolonged period of time (e.g. over multiple pay periods) or after complaints were first raised;*

k. *multiple employees are affected (e.g. all or most employees doing the same kind of work at the workplace, or a group of vulnerable employees at the workplace); and*

l. *accurate employee records have not been kept, and pay slips have not been issued, making alleged underpayments difficult to establish*.[4]

27. The new penalty provisions pick up non-compliance with aspects of the system that are highly prescriptive and complex in nature. The FWO has acknowledged the system's complexity in many of these areas, stating in a public address:

> *We are very much aware that workplace laws can be complex for the uninitiated.*
>
> *We know they also exist amongst a whole pile of rules you have to follow about all sorts of things…*
>
> *…*
> *For those who aren't industrial experts, the margin for error is high.*
> *…*
>
> *…there are many people who are a long way from understanding the intricacies of things such as the interaction between the National Employment Standards and awards, or the difference between above award payments, enterprise agreements and an Individual Flexibility Arrangement.*
>
> *This is why we are publicly acknowledging that the system could be simpler.*
>
> *That we should take every opportunity to make the framework clearer.*
>
> *…*
>
> *If we can decrease complexity then this reduces the red tape you have to grapple with.*
>
> *There is a clear productivity benefit.*[5]

28. The Australian Chamber shares the FWO's view that the system could be simpler and considers that broader reform is necessary to achieve this outcome. However while it

[4] Explanatory Memorandum, [24], p.4.

[5] Fair Work Ombudsman (Natalie James), Speech for the National Small Business Summit: FWO's Deal with Small Business, 8 August 2014, Melbourne.

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remains as it is it is highly possible that an employer could make an error (such as adopting an incorrect interpretation of an award or the NES) that could result in a large number of contraventions of the Act committed by the person over a long period and affecting a large number of persons.

29. Of note, section 557(1) of the Act currently deems two or more contraventions of certain civil remedy provisions to be one contravention if they are committed by the same person out of a course of conduct by that person. This provision applies to a range of contraventions such as contraventions of the National Employment Standards, modern awards, enterprise agreements etc. However problematically, new subsection 557A(4) of the Bill proposes that section 557(1) would not apply for the purposes of determining whether a person's conduct was a part of a systematic pattern of conduct which opens up the possibility that an error or misunderstanding with reach across a large payroll could be considered 'serious', i.e. because it affects a large number of persons. The Explanatory Memorandum states that "this allows the total number of relevant contraventions to be considered, so the entirety of the relevant conduct may be taken into account".[6] This also suggests that errors which are not discovered for a period of time, are more likely, by that fact alone, to be found to be serious contraventions, irrespective of whether they were wilful or not.

30. Where errors and misunderstandings arise, employers should take steps to address them and the system should support them in doing so however the Australian Chamber does not consider such circumstances to warrant the policy response contained in the Bill, even if the error gives rise to a significant liability for back payment. The more appropriate enforcement response would be to assist the employer in taking steps to remedy the non-compliance.

31. 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".[7] 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.

32. The consequences of being found to have committed a serious contravention are significant. As it stands an employer could face significant liability for back payment, penalty as well as reputational damage. The Bill proposes the maximum penalties for serious contraventions will be 600 penalty units for individuals and 3,000 penalty units for bodies corporate (up to $540,000).

[6] Explanatory Memorandum, [27], p.5. This 'grouping exercise' is however to be undertaken in relation to the determination pf penalties for serious contraventions.
[7] Explanatory Memorandum, [25], p.4.

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33. New subsection 557A(6) requires an applicant seeking the higher penalties for "serious contraventions" to make this clear in their application for relief. The Explanatory Memorandum suggests "This ensures procedural fairness by requiring applicants to put respondents on notice about the seriousness of the allegations being made against them from the beginning of proceedings".[8] However it must be recognised that other implications may arise where an employer is confronted with an application for relief where a serious contravention is alleged. The size of the penalties proposed mean that a serious contravention has the capacity to cause significant financial damage to an employer which may impact the employer's viability. Corporations come in all sizes and many small businesses would not be able to continue to trade should maximum penalties of the nature proposed be imposed. The capacity for individual liability may not only give rise to circumstances of business loss but also personal bankruptcy as a result of significant penalties.

34. The Explanatory Memorandum suggests that the current penalties:

> *…are currently too low to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business. The Bill will increase relevant civil penalties to an appropriate level so the threat of being fined acts as an effective deterrent to the potential wrongdoers.*

35. As it stands, section 539 of the Act specifies the persons that can make applications for orders in relation to the contraventions of civil remedy provisions and this will extend to breaches caught within the remit of the new serious contravention provisions. These persons will typically be an employee, union or FWO inspector. In this regard the Australian Chamber recommends that if the new penalties are imposed applications alleging a serious contravention should only be capable of being made by an FWO inspector to limit the capacity for misuse of the provisions. In giving consideration to this recommendation the Committee might also wish to note that proposed s 557A(7) allows a person bringing a serious contravention charge to fail in that contention but not necessarily fail to make out the underlying breach charge. The FWO is a model litigant and it is able to respond to reported conduct as well as conduct which it has uncovered through targeted investigation.

36. Should the new provisions become law their use should be triggered sparingly by the FWO and only in the most egregious cases. If there are to be strengthened penalties they would be better directed toward circumstances where an employer is a repeat offender (i.e. has been held liable for breaches in the past) or fails to cooperate with the FWO to achieve compliance when wrongdoing has been detected.

37. The Bill also doubles penalties for 'strict liability' contraventions relating to employee records and pay slips in sections 535 and 536 from 30 to 60 penalty units for individuals, and from 150 to 300 penalty units for bodies corporate. These new maximum penalties also extend to false or misleading employee records or payslips (which the contravening

[8] Explanatory Memorandum, [29],

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employer knows to be false or misleading) with the maximum penalty for these contraventions increases from 20 penalty units under the Regulations to 60 penalty units under the new provisions for individuals, and from 100 to 300 penalty units for bodies corporate. Record keeping requirements prescribed by the *Fair Work Regulations 2009* (Cth) (Regulations) are contained within Part 3-6 of Chapter 3 and are highly prescriptive and it the margin for error for those without sophisticated human resources and payroll systems is high. In the Australian Chamber's submission 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 of the offence risks capturing administrative breaches that do not give rise to egregious conduct of the nature that gave rise to the Bill.

38. It would seem likely that this increased focus on the importance of records and the consequences of their absence, provided accompanied by sufficient publicity and education will of itself address a number of the problems identified in the high profile cases which have prompted this policy.

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Sch1 Part 2 – Franchisors and Holding Companies

39. The Act and FWO compliance policy already provides significant deterrence for businesses knowingly involved in contraventions of the Act even though they do not directly employ those affected. Aside from the risk of significant reputational damage the Act provides a mechanism through which persons other than the employer can be considered an accessory to contraventions of the Act which the FWO is increasingly availing itself of. In particular, section 550 of the Act provides that:

> *(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 of 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.*

40. The FWO has increased its focus on accessorial contraventions under section 550 in recent times and the consequences of a contravention are significant. For example, in its 2014-2015 Annual Report, the FWO reported that in that year 26 matters involved an accessory with $571,889 in penalties ordered against the individuals.[9] This suggests an active enforcement mechanism in relation to employers who are in deliberate breach of their obligations or in relation to third parties involved in contraventions.

41. Notwithstanding this, the Coalition's Policy to Protect Vulnerable Workers committed to introduce "new offence provisions that capture franchisors and parent companies who fail to deal with exploitation by their franchisees". In particular, it promised that:

> *The Fair Work Act will be amended to make franchisors and parent companies liable for breaches of the Act by their franchisees or subsidiaries in situations where they should reasonably have been aware of the breaches and could reasonably have taken action to prevent them from occurring. Franchisors who have taken reasonable steps to educate their franchisees, who are separate and independent businesses, about their workplace obligations and have assurance processes in place, will not be captured by these new provisions.*

[9] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 801.

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42. The Bill proposes new provisions in the Act to give effect to this commitment with the Explanatory Memorandum describes the problem it is trying to address as follows:

> *Some franchisors and holding companies have established franchise agreements and subsidiaries in their corporate structure that operate on a business model 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.*

43. The Explanatory Memorandum states that "[t]he new responsibilities will only apply where franchisors and holding companies have a significant degree of influence or control over their business networks". It notes that a person cannot be held accountable under the existing accessorial liability provisions if they genuinely "did not know" and that that under the new provisions "turning a blind eye to contraventions is not an option".[10]

44. Attribution of liability for breaches to persons who are not the direct employer is a significant step to take and can result in negative or unintended consequences. In the recent case of *Fair Work Ombudsman v ACC Services (Aust) Pty Ltd T/as Rapid Pak & Anor* [2017] FCCA 516 (22 March 2017) court observed:

> *31 The regulator claims that as a result of its remit to seek compliance with Australian workplace laws by all participants in the industry, the media release naming the customers was a part of a general process aimed at deterring contraventions of workplace laws in the "supply chain in which the First Respondent operates". Such a bold statement appears to me to be simplistic and reflecting a view narrowly confined to the regulator's interests. The argument overlooks other aspects of business relationships and in particular the extent of knowledge that may be reasonably available to those in a "supply chain". If a customer is paying a reasonable price (as appears to be the case here), to a business in Australia (that is subject to regulation by the Applicant) it is difficult to see they should be expected to make any further enquiries.*
>
> *32 Given that there has been criticism in the press of the manufacturers that were customers of the First Respondent, I note two important factors. First, on the evidence the manufacturers appear to have been paying rates high enough to enable the First Respondent to pay proper entitlements and still make a profit, but the Second Respondent chose instead to make a million dollar profit at the expense of entitlements of workers. Thus, on the material before me it does not appear to be open to argue that the manufacturers must have some form of imputed knowledge of the breaches as a result of the contract rates (unlike cases where payments to suppliers are so low that it is apparent that workers must be being underpaid or the business making a loss). Secondly,* ***whilst shifting a degree of responsibility for supervision of employee entitlements to contracting parties would relieve the Applicant of some of its workload and further the goals of the Applicant in the narrow field of employee entitlements, it also has the potential to cause significant adverse impacts upon***

[10] Explanatory Memorandum, [40].

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> ***small business. If small businesses are routinely expected to open their books to major customers with respect to payrolls, this gives major customers even greater market place power to drive hard bargains against small businesses.*** *A whole separate arm of government is established to ensure competitive structures and arrangements are in place, yet* ***such disclosures are further likely to weaken the bargaining positions of small businesses*** (emphasis added).

45. The Australian Chamber urges the Committee to ensure these implications are considered in its consideration of the Bill.

When will franchisors and holding companies be held liable for contraventions by a franchisee or subsidiary?

46. The Bill proposes a new section 558B(1) which provides that a responsible franchisor entity will be found to have contravened the Act if it (or an officer) knew or could reasonably be expected to have known that a particular contravention by a franchisee entity would occur or (at the time of the contravention) that a contravention of a similar character by the franchisee entity was likely to occur.

47. The Bill defines 'franchisee entity' and 'responsible franchisor entity' as follows:

> *(1) A person is a franchisee entity of a franchise if:*
> *(a) the person is a franchisee (including a subfranchisee) in relation to the franchise; and*
> *(b) the business conducted by the person under the franchise is 8 substantially or materially associated with intellectual property relating to the franchise.*[11]
>
> *(2) A person is a responsible franchisor entity for a franchisee entity of a franchise if:*
>
> *(a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and*
> *(b) the person has a significant degree of influence or control over the franchisee entity's affairs.*[12]

48. It should be noted that these new provisions will apply to commercial franchise arrangements already in place and a practical problem arises in circumstances where liability is sought to be imposed in circumstances where a franchisor may exercise influence or control but not with regard to the matters set out in the Act. In order to manage the risk of liability a franchisor may need to fundamentally revisit these arrangements however they may be unable to do this unilaterally where legal agreements setting out the parameters of the franchise arrangement are in place. Amendments to the Bill to better

[11] S 558A(1)(a).
[12] S 558A(1)(b).

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direct liability toward those franchisors who have control over the franchisee's compliance with the relevant matters identified in the Act are worthy of consideration.

49. The Explanatory Memorandums states that the Act "does not extend to impose these obligations on corporations operating completely outside Australia. That is, companies that do not have any operations in Australia and have simply entered into a master franchisor relationship with an Australian company (even if the Australian company is a subsidiary of the foreign company)".[13]

50. Subsection 558B(2) deems holding companies to have contravened the Act where subsidiaries have contravened the Act in the same way that franchisors are held liable for contraventions by subsidiaries. A subsidiary has the same meaning as contained within the Corporations Act 2001.

51. 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 or control. Other organisations may elect to conduct their operation 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.

What defences are available to franchisors and holding companies?

52. The Bill proposes that a defence will be available if the person took reasonable steps to prevent the contravention by a franchisee entity or subsidiary, with proposed subsection 558B stating that the court may have regard to all relevant matters, including the following:

a. the size and resources of the franchise or body corporate;

b. the extent to which the person had the ability to influence or control the convening employer's conduct;

c. any action the person took directed towards ensuring that the contravening employer had a reasonable knowledge and understanding of certain requirements of the Act, including but not limited to those relating to:

i. the National Employment Standards, modern awards and enterprise agreements,

ii. methods and frequency of pay;

iii. unreasonable requirements to spend or pay amounts pursuant to section 325(1);

[13] Explanatory Memorandum, [41].

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iv. sham contracting;

v. record keeping and payslips;

d. the person's arrangements for assessing the contravening employer's compliance with certain requirements under the Act (including those referred to above);

e. the person's arrangements for receiving and addressing possible complaints about alleged underpayments or other contraventions of the Act.

53. The use of the term "may" in this context provides the Court with discretion as to whether these matters are taken into account. Alternative language such as use of the word "must" would have the effect that the Court is required to considered to take into account these mitigation factors however if such a change is made there would be merit in a consequential change to clarify that the list is not exhaustive.

54. The Explanatory Memorandum points to the FWO website for "practical steps franchisors and companies can take to help franchisees and subsidiaries meet their obligations"14 and that, depending on their size and influence or control, suggests that the following activities may constitute reasonable steps to avoid a contravention:

a. ensuring that the franchise agreement or other business arrangements require franchisees to comply with workplace laws;

b. providing franchisees or subsidiaries with a copy of the FWO's free Fair Work Handbook;

c. encouraging franchisees or subsidiaries to cooperate with any audits by the FWO;

d. establishing a contact or phone number for employees to report any potential underpayment to the business;

e. auditing of companies in the network.[15]

55. While the Bill also proposes a new section 558C that will enable a franchisor or holding company to recover from the franchisee of subsidiary amounts paid to rectify an underpayment but no provision is made for the recovery of pecuniary penalties imposed by a court. This has the practical effect that franchisors and holding companies will be exposed to greater risk as a result of the changes proposed an may adopt measures to manage that risk that give rise to consequences not intended by the Bill.

56. Despite the existence of a defence and limited right of recovery, the provisions do raise some concerns. The proposed new provisions have the practical effect of promoting a level of intrusion by a holding company or franchisor into the affairs of the subsidiary or franchisee that goes beyond the policy intent of preventing exploitation of vulnerable

[14] Explanatory Memorandum, [66.], p.10.
[15] Explanatory Memorandum, [67], p.10.

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workers through deliberate and systematic underpayment. Any monitoring and auditing costs will give rise additional costs for both the holding company and subsidiary and franchisor and franchisee.

57. This is part driven by the broad scope of breaches for which a franchisor or holding company can be held liable including:

a. subsection 44(1) (which deals with contraventions of the National Employment Standards);

b. section 45 (which deals with contraventions of modern awards);

c. section 50 (which deals with contraventions of enterprise agreements);

d. section 280 (which deals with contraventions of workplace determinations);

e. section 293 (which deals with contraventions of national minimum wage orders);

f. section 305 (which deals with contraventions of equal remuneration orders);

g. subsection 323(1) (which deals with methods and frequency of payment);

h. subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);

i. subsection 325(1) (which deals with unreasonable requirements to spend or pay amounts);

j. subsection 328(1), (2) or (3) (which deal with employer obligations in relation to guarantees of annual earnings);

k. subsection 357(1) (which deals with misrepresenting employment as an independent contracting arrangement);

l. section 358 (which deals with dismissing an employee to engage as an independent contractor);

m. section 359 (which deals with misrepresentations to engage an individual as an independent contractor);

n. subsection 535(1), (2) or (4) (which deal with employer obligations in relation to employee records);

o. subsection 536(1), (2) or (3) (which deal with employer obligations in relation to pay slips).[16]

[16] S 558B(7).

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58. In the complex system in which these provisions operate the margin for error is high and the practical need for a holding company or franchisor to implement a system of monitoring and audit with regard to all of the above matters would appear beyond the policy intent. There is merit in considering a narrowing of the types of offences for which holding companies and franchisors can be held liable to better target efforts toward breaches of the nature described in the policy, i.e. practices of systemic and deliberate payment. Matters such as a failure to provide a Fair Work Information statement in breach of the NES or failure to strictly adhere to the prescriptive record keeping requirements may not necessarily amount to systematic and deliberate underpayment under the Act but could nevertheless give rise to significant liability for a franchisor or holding company if the Bill passes unamended.

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Sch1 Part 3 – Unreasonable Requirements

59. Employers do not support any attempts to claw back or somehow recover remuneration paid to employees, with the result that (a) minimum pay obligations are ultimately not met, and (b) employees are denied reasonable remuneration for their work. Where pursued to recover moneys reasonably payable to employees for their work, this is as unacceptable as a direct underpayment (and has the same effect).

60. However there are legitimate examples of deductions from wages or reasonable expenses that can quite legitimately be borne initially be employers and recovered from employees. Examples may include:

    a. Employer provided accommodation and meals, depending on the agreed terms.

    b. Where employers organise to purchase tools of trade in bulk at a discount, or to advance payments for annual travel passes

61. On its face the terms of the new s.325 and 326 do not appear contrary to the practice of such legitimate deductions.

Contracts of employment?

62. Clarification is sought on the impact of rendering ineffective any terms of the "contract of employment" (in proposed new s.326). Presuming this applies to all national system employees, without qualification by remuneration or occupation.

63. This could be problematic, particularly for executive and professional employment.

64. Put simply, the higher the remuneration, and when we get into the professions, complex contractual and remuneration arrangements emerge. We are concerned that disputed payments and legitimate recovery of goods could be caught up in this, particularly where executives are in dispute or exit a company rapidly.

65. We ask that the Committee consider whether it is appropriate to create a new avenue for litigation or dispute between highly remunerated employees and their employers/ex-employers.

66. Perhaps this provision might be quarantined using the high-income threshold under the Act, or to those who are covered by modern awards.

Why awards?

67. Proposed s.326 would override unreasonable deductions under enterprise agreements or contracts of employment, but also under awards.

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68. We are not clear why this would be the case. If the FWC has made an award consistent with the Modern Awards Objective, and the award provides for deductions, it would seem axiomatic that such a deduction would be reasonable.

69. Turned the other way, how could it ever be unreasonable for an employer or employee to take an action specifically permitted by an award?

70. The concern is one of confusion. How would an employer be able to know that their deduction could be invalidated, when they have proceeded in good faith under the award?

71. Consideration should be given to removing references to awards from s.326.

72. Theoretically the FWC should also not be approving agreements that can have an unreasonable effect, but we press this point only in relation to awards.

Overpayments

73. Overpayments are a real risk under a system as complex, multilayered and overlapping as Australia's; a situation which has not been improved by the making and subsequent review of modern awards. The sheer levels of Australian minimum wages (often the highest in the world) makes the risk of overpayment even more pervasive.

74. We note with approval the following from the Explanatory Memorandum:

> *Requests for overpayments to be returned*
> *93. The provision has no operation in relation to legitimate, mutual negotiations for overpayments to be paid back by an employee to their employer in lieu of legal proceedings. These kinds of requests are reasonable, so are not caught by the prohibition.*

75. This is welcome, but overpayments are too common and potentially too divisive a phenomenon in our workplace relations system to have guidance on how they should be addressed tucked away in the Explanatory Memorandum.

76. We urge consideration of taking paragraph 93 of the Explanatory Memorandum and making it a statutory note to new s.325.

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Sch1 Part 4 – Powers of the FWO

Introduction – the case for new examination powers is not made out

77. Part 4 of Schedule 1 seeks to amend the Fair Work Act to grant the FWO new evidence-gathering powers similar to those already available to ASIC, the ACCC[17], the ABCC and a number of other agencies.[18]

78. The stated purpose is:

> *Strengthening the evidence-gathering powers of the Fair Work Ombudsman to ensure that the exploitation of vulnerable workers can be effectively investigated…*[19]
>
> *The Bill will also enhance the Fair Work Ombudsman's powers by including new formal evidence-gathering powers to facilitate investigations. 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.* [20]

79. The Explanatory Memorandum explains how the Bill has been drafted, but it does not make out the case for increasing the powers of the FWO. In particular, it is not established that:

a. There are demonstrated failures or inadequacies of the FWO's existing investigatory powers (which are extensive and have expanded significantly during the past 10-15 years).

b. The FWO cannot (and is not) capable of investigating concerns raised with it under its existing powers.

c. Expanded powers need to be pursued, concurrently with increased penalties (which is what the Bill in essence does).

d. The high profile compliance investigations and prosecutions said to justify the Bill actually required or would have been improved by the FWO having such powers. Quite specifically, the 7-Eleven, Baiada Chicken complaints seem to have been acted upon by the FWO without such powers, and their existence no matter how concerning, does not automatically justify an increase in powers.

[17] Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, Explanatory Memorandum, p.14
[18] Administrative Review Council, The Coercive Information-Gathering Powers Of Government Agencies, Report no. 48 May 2008
[19] Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, Explanatory Memorandum, p.i
[20] Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, Explanatory Memorandum, p.ii

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80. Compliance concerns in the Australian labour market, which are relatively stable based on FWC data, do not appear to justify these additional powers.

81. Lawmakers should always be very cautious in reacting to the discovery of 'scandals' in any part of our legal system by increasing investigatory / regulatory powers, particularly where such powers are compulsory in nature. Policing / enforcement and the understanding of the law, and even penalties should be examined prior to any consideration of ramping up investigatory powers.

82. The 7-Eleven and Baiada Chicken matters were very serious, do need to be reflected on, and lessons need to be understood to avoid future recurrence. However:

a. The Committee cannot legitimately conclude that the emergence of such hard and concerning cases of itself justifies additional / expanded powers for regulators.

b. It may be argued that 7-Eleven and Baiada Chicken employees would have benefitted from increased promotion and information (perhaps complaints / concerns may have emerged quicker), perhaps more FWO boots on the ground were needed, and some would argue for increased penalties and franchiser responsibilities (as set out elsewhere in the Bill) – but a failure of investigation due to deficient powers does not necessarily follow from bad things happening in isolated pockets of our labour market.

83. It also does not simply follow that because other regulators have them, the FWO should too. The powers of the ABCC followed specific remedial recommendations of a Royal Commission, and ASIC justifies such powers on its website, as follows:

> *our responsibilities are so broad that we conduct a large number of surveillances and investigations (e.g. we oversee, license and regulate a wide range of entities and individuals in the financial services, markets and corporate sectors, including financial advisers, fund managers, financial markets and their participants, insurance brokers, credit providers, registered managed investment schemes, companies, auditors and liquidators);*
>
> *the areas regulated by ASIC are often complex (e.g. financial transactions are largely document-based and often large scale, and in some cases there are a large number of entities and individuals involved); and*
>
> *many entities and individuals will not provide documents to ASIC on a voluntary basis because, among other things, they want the statutory protection from a potential breach of confidentiality or other liability that arises when a compulsory request is complied with.*[21]

84. It is not clear that the same rationales apply in the case of the FWO.

[21] http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-compulsory-information-gathering-powers/

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85. The Committee(?) should be asking for some evidenced basis for taking the action proposed in the Bill, namely adding to the already considerable powers of the FWO. Absent of that, employers cannot see that there is a basis for additional investigatory and examination powers. The Australian Chamber is very conscious of the fact that the increased publicity to date and the increased focus of the FWO have not yet had the opportunity to raise the level of compliance and reduce serious non-compliance.

Apply the same protections as apply in the building industry / the ABCC

86. The Australian Chamber has compared the proposed FWO Notices to the Examination Notices that the ABCC may issue under the Building and Construction Industry (Improving Productivity) Act 2016 that the Senate passed late last year.

87. Various "protections" were inserted into the ABCC legislation, in the interests of protecting employees / building industry participants.

88. If the Parliament is minded to expand the FWO's powers, why shouldn't such protections also be extended to those subject to FWO Notices, many of whom will be small business people at risk of very serious risk of personal bankruptcy, business loss and asset losses where they are found to have breached the law?

89. Various protections included in the ABCC legislation are not attached to the exercise of comparable powers proposed for the FWO. We encourage the Committee to query this and to ask, for example:

    a. Why would FWO Notices not require the 'protection' of only being issued by a Presidential member of the AAT[22]?

    b. Why would the FWO be able to issue notices on its own initiation, where the ABCC must apply to the AAT to do so?

    c. Why should Examination Notices only be available to the ABCC where other approaches have failed / are not relevant[23], but on its face the FWO notices would be available to the FWO at any point it chooses?

90. Employers would like to see the proposed FWC notices brought into line with the strictures and restrictions on the comparable notices issued by the ABC Commissioner, specifically:

    a. FWO notices only becoming available on application to a Presidential member of the AAT, via the addition of provisions equivalent to s.61A and B of the *Building and Construction Industry (Improving Productivity) Act 2016.*

    b. FWO notices only becoming available where other measures have been exhausted, via the addition of provisions equivalent to s.61C(1)(c) of the *Building and Construction Industry (Improving Productivity) Act 2016.*

[22] Building and Construction Industry (Improving Productivity) Act 2016 – s.61A
[23] Building and Construction Industry (Improving Productivity) Act 2016 – s.61C(1)(c)

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c. The FWO being required to inform the Commonwealth Ombudsman of the issuing of any FWO notices, via the addition of provisions equivalent to s.64 and 65 of the *Building and Construction Industry (Improving Productivity) Act 2016.*

Proper purpose

91. ASIC's website makes it clear that:

> *ASIC must use its powers for a 'proper purpose'. This means that the use of a power must be designed to advance our inquiry.*
>
> *We recognise that we must use these powers responsibly and that it is important that there are safeguards in place to ensure these powers are not misused.*[24]

92. Such a proper purpose test could usefully be added to the new powers proposed for the FWO, to ensure any risks of misuse or speculation/fishing were minimised.

93. Building on this, we are not clear from the amendments in Part 4 when the FWO would trigger its compulsory examination powers, or which matters this would apply to. There should be some test or conditionality on the use of such powers, and there should be some justification or test that such powers are required for the investigation at hand.

Legal representation

94. Proposed new s.712A(4)[25] allows a person attending a compulsory examination to be represented by a lawyer "if the person chooses".

95. We are concerned that many of the small business people that are at risk of being examined under these powers may not comprehend the potential liabilities they are facing (such as the increased penalties under Schedule 1, Part 1 of the Bill) which risk business loss, personal bankruptcy and loss of one's property and assets. To put it crudely, small business people's businesses and family homes are at risk when they are examined, particularly given the increased maximum penalties, and they need protection.

96. We are also concerned about an asymmetry of information between those examining and those examined.

97. These concerns could usefully be addressed by adding a new s.712(4)(a):

> *Legal representation*
>
> *(4) A person attending before the Fair Work Ombudsman, or a member of the staff mentioned in paragraph (2)(c), may be represented by a lawyer if the person chooses.*
>
> *(a) FWO Notices issued under s.712A must inform the person to whom the notice is directed of their right to be represented by a lawyer.*

[24] http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-compulsory-information-gathering-powers/
[25] *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*, Sch 1, Item 38, p.20, Proposed s.712A(4) of the *Fair Work Act 2009*.

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Costs

98. Proposed s.712C 'Payment for expenses incurred in attending as required by a FWO notice'. This should be amended in two ways:

a. To specifically identify 'travel and accommodation' amongst the examples of reasonable expenses that can be recouped for those required to attend an FWO examination. On our reading of the new examination provisions a small business person could be required to travel from Cape York to Brisbane, Port Hedland to Perth, or Mildura to Melbourne (and probably shut their business while away), simply to help the FWO with their inquiries. This cannot legitimately be at their own cost.

b. To, consistent with our proposal on legal representation, require the FWO notice to inform notice recipients of their right to payment for their expenses. This might be along the lines of the following additional provision.

99. Combined, this could be along the following lines:

> ***712C Payment for expenses incurred in attending as required by an FWO notice***
>
> *(1) A person who attends as required by an FWO notice is (subject to subsection (2)) entitled to be paid fees and allowances, fixed by or calculated in accordance with the regulations, for reasonable expenses (including legal, travel and accommodation expenses) incurred by the person in so attending.*
>
> *…*
>
> *(4) FWO Notices issued under s.712A must inform the person to whom the notice is directed of their entitlement to be paid fees and allowances for reasonable expenses, and how this may be applied for.*

Protection from liability from giving information

100. Proposed new s.712D(b) protects someone answering a notice and answering questions from:

> *civil proceedings for loss, damage or injury of any kind suffered by another person because of that conduct.*

101. It is a little unclear how such loss, damage or injury could occur. If it is the case that questions answered under such notices may defame persons, or damage the enterprise, we question how that information could cause damage in public, given that it is being given to the FWO. Is this directed to what the FWO communicates externally?

102. The FWO should be keeping any damaging information that is not directly related to the employment compliance litigation at hand strictly confidential.

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103. This provision might usefully be qualified along the following lines:

> *…provided that, no matters of a commercial, operational, market, competitive or non-employment nature that arise during the answering of questions under a FWO Notice, may be released or communicated by the FWO, any delegated office or staff member.*

104. This is also relevant to the Committee's consideration of proposed new s.714A 'Reports not to include information relating to an individual's affairs'

Within ethnic / linguistic community non-compliance

105. Employers central question on Part 4 is what justification there is for the addition of new compulsory examination powers, and what proof there is that they are needed.

106. However, in the spirit of assisting the Committee, we can offer one area where they may be of some assistance.

107. One interesting area for which compulsory powers may be relevant is employment non-compliance within ethnic communities. This can encompass situations in which the employee and employer speak LOTE, day to day interactions are conducted in LOTE, there may be ties to migration and visa considerations, and there may be covert linkages between employment in Australia and matters within the country or origin of both employer and employee.

108. Commenting on a series of prosecutions, the most recent in February this year, the FWO Natalie James has stated that she is:

> *"increasingly concerned about the number of employers from culturally and linguistically diverse backgrounds who are exploiting workers from within their own ethnic communities"* (See Attachment A)

109. There is a danger that such investigations may be hindered by wider community interactions, here and in home countries, that may serve to silence witnesses or claimants, to render matters opaque and difficult to pursue, or see pressures on those alleging underpayment to withdraw their concerns.

110. Compulsory examinations in which information and documentation must be produced[26], and questions must be answered[27] may be of assistance in making members of ethnic communities more comfortable with working with regulators and less concerned about shunning and recriminations within their communities for cooperating with the regulator.

[26] *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*, Sch 1, Item 38, Proposed s.712BI1)(a) of the *Fair Work Act 2009*.
[27] *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*, Sch 1, Item 38, Proposed s.712BI1)(d) of the *Fair Work Act 2009*.

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Sch1 Parts 5, 6 and 7

(Part 5) Hindering and Obstructing the FWO

111. Proposed new s.707A would introduce new prohibitions on hindering or obstructing the FWO or an inspector. This appears to have been approached sensibly in drafting the changes, however the question must once again be asked as to why this is necessary and how such changes are justified.

112. The FWO website contains extensive information on the existing law and the existing powers of inspectors, which includes the following:

> *…if a person seeks to hinder or obstruct a Fair Work Inspector in the course of their duties, they may face criminal charges.*[28]

113. This begs the question, if there are existing criminal protections against hindering or obstructing inspectors, how are the changes in Part 5 justifiable / said to be necessary? This isn't clear from the information at hand to date.

Qualifiers

114. The Explanatory Memorandum provides various welcome clarifications on how the new prohibitions on hindering and obstruction are to operate (emphasis added):

> *172. The phrase 'intentionally hinder or obstruct' is not defined, but is intended to take its ordinary meaning in the industrial context. The phrase generally refers to any act or conduct that actually makes it more difficult for the person who is being hindered or obstructed to discharge their functions. This does not include an act or conduct that is accidental.*
>
> *173. The act must be of such a nature that it is an 'appreciable' obstruction or interference. A trivial act, or even an act which could not reasonably be regarded as an obstruction or interference, would not fall within the new provision. A subjective intention to hinder or obstruct must also be established.*
>
> *174. The new provision is not intended to cover conduct already covered by a more specific civil penalty provision, like failing to comply with a notice to produce or compliance notice (sections 712, 716). In any event the rules against civil double jeopardy would apply to prevent any 'double punishment' in relation to that conduct (section 556).*

115. Consideration should be given to adding these matters to the Bill as indicative, not exhaustive, statutory notes to new s.707A.

[28] https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/about-us/powers-of-fair-work-inspectors

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116. It is also welcome that proposed s.707A(1) would operate subject to s.707A(2), which clarifies that an offence will not be committed where a person has a reasonable excuse[29], or where proper identification and explanation is not provided by the inspector seeking cooperation/access.[30]

117. Employers propose the following additions to this Part / new s.707A(2):

a. A note adding (non-exhaustive) detail on what reasonable excuses might be, which may include:

i. A misunderstanding of the rights of the inspector / the obligations of the employer

ii. A delay in access / cooperation while an employer is taking reasonable steps to obtain advice on the powers of the inspector, and how the employer should proceed.

iii. Reasonable steps to protect sensitive client and customer information, or sensitive or confidential products or processes, or where access may threaten the production or commercial operations of the business.

118. Proposed s.707A(2) should also address scenarios other than reasonable excuses and failures to show an ID card.

119. Proposed s.707A(2)(b) should be expanded upon to also specifically address scenarios in which the FWO / an inspector fails to adequately explain:

a. Why they have presented at the workplace.

b. What they are seeking.

c. Why they are seeking it / the basis on which they have presented at the workplace.

d. Their powers of inspection.

[29] *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*, Sch 1, Item 48, Proposed s.707A(2)(a) of the *Fair Work Act 2009*.
[30] *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*, Sch 1, Item 48, Proposed s.707A(2)(b) of the *Fair Work Act 2009*.

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Attachment A: FWO cautions against exploitation of overseas workers by their own

Workplace Express, 7 February 2017

In the wake of a court imposing a fine of more than $200,000 on two companies and their directors that underpaid five overseas workers $150,000, the FWO says it is "increasingly concerned" about migrant employers exploiting workers "from within their own ethnic communities".

The FWO pursued the two sole directors of Brisbane Japanese-style food outlets Teppanyaki Lovers, Nigi Nigi and Ku-O after its investigations revealed that five employees on student, bridging and partner visas were all paid flat rates as low as $10 an hour between 2011 and 2014.

In his judgment, published in December, Federal Circuit Court Judge Salvatore Vasta fined directors Lee Wee Song and Siew Lay Yeoh $40,500 and $32,400 after finding their multiple breaches of workplace laws "extremely serious".

He also penalised their companies Tsuyoetsu Pty Ltd and Taikuken Pty Ltd $99,000 and $29,200 respectively.

While Song and Yeoh agreed that they breached IR laws by underpaying the employees, failing to notify them of classifications or keep records and issue payslips, they maintained that mitigating factors included their minimal experience in Australian businesses and their naivety.

They also submitted that Song was not even aware that an instrument such as an award dictated minimum pay rates in the industry until the FWO came knocking at his door.

"Naivety" didn't stop owners setting up multiple businesses, says judge

Judge Vasta refused to accept the owners' account was the "true state of affairs", but rather Song was at the "very best" acting with a "large degree of wilful blindness as to what his obligations were".

The judge also observed that for people with a level of naivety, it seemed they were able to set up and incorporate multiple businesses "so the level of naivety has to be seen in that light".

Song and Yeoh also asked the court to exercise its discretion to ensure neither of them was punished twice for the same act and argued that declarations were unnecessary because they had already agreed to a statement of facts, they would be paying penalties and they had repaid the employees.

Judge Vasta, however, said there was "great utility" in making declarations to register the community's "denunciation" of Fair Work Act breaches and he would do so.

He also refused to group multiple breaches so the court could classify them as stemming from two courses of conduct: a decision to pay a flat hourly rate that led to all contraventions; and a failure to acknowledge any entitlement to paid leave.

"As attractive as those submissions may be, to my mind, it really would tend to somehow minimise and sanitise the effect of the FW Act to accede to those submissions," said Judge Vasta, choosing instead to discount penalties based on mitigating factors such as repayments, apologies, some naivety and Yeoh's lesser role in decision-making.

Noting that the directors and the employees all came from Malaysia, Judge Vasta also said there was an "obligation on them to ensure that workers from a similar culture to the employers are not exploited".

"It would seem that if someone from a particular culture comes to Australia and is employed by somebody else from the same background, there would be an automatic level of trust and comfort in that fact," he said.

"In many ways, by not complying with the law of this country there has been an exploitation of the five workers that is extremely serious," he continued, noting that not failing to pay the minimum wage affects those workers in a far greater way than it would for workers who are 'up the scale'".

76% of FWO litigation involves a visa holder: James

Fair Work Ombudsman Natalie James said the judgment sent a clear message to migrant employers that exploiting overseas workers is particularly serious conduct.

However James said she is "increasingly concerned about the number of employers from culturally and linguistically diverse backgrounds who are exploiting workers from within their own ethnic communities".

In the 2015-16 financial year, 38 of the FWO's 50 court cases involved a visa holder, and more than $3 million was recovered for all visa-holders (see Related Article).

This month a mobile accessory chain also agreed to revamp its workplace practices after the FWO found two Korean nationals on 417 working holiday visas were underpaid more than $13,000.

Happytel made an enforceable undertaking with the FWO, as did associated entity Oscar Mobile, which commits the companies to audits and to donating $7500 to Asian Women at Work.

A Melbourne fine dining restaurant also agreed to fix its workplace practices after a FWO investigation found it had underpaid six overseas workers more than $35,000.

Last month, the director of a Gold Coast Japanese Restaurant rectified more than $24,000 in underpayments to 10 workers and signed an enforceable undertaking with the FWO after investigations revealed it payed flat below-award rates and deducting a "deposit" from the wages of some visa holders.

Fair Work Ombudsman v Song & Ors [2016] FCCA 2827 (20 October 2016)

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The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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