HOUSING INDUSTRY ASSOCIATION

Submission to the
Senate Standing Committee on Education and Employment

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

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contents

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new housing stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

> *"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over $150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new residential construction and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional member committees before progressing to the Association's National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 23 centres around the nation providing a wide range of advocacy and business support.

1. INTRODUCTION

On 23 March 2017, the Senate referred an inquiry into the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (**Bill**) to the Education and Employment Committee.

HIA welcomes the opportunity to make a submission to this inquiry.

HIA notes that the Bill broadly reflects the Government's "Protecting Vulnerable Workers" Policy that was taken to the last Federal election. It includes a number of elements including:

- introducing a high civil penalty regime for 'serious contraventions' of the *Fair Work Act 2009* (**Act**);
- significantly increasing penalties for record-keeping breaches;
- making franchisors and holding companies responsible for contraventions of the Act by their franchisees or their subsidiaries, if they knew or could reasonably have been expected to have known the contraventions would occur in their business networks and failed to take reasonable steps to manage the risk;
- expressly prohibiting employers from unreasonably requiring their employees to make payments; and
- giving the Fair Work Ombudsman (**FWO**) the power to compel witnesses to answer questions on oath or affirmation.

Although HIA understands that the Government's policy and this legislation is largely driven to address the apparent systemic underpayment of workers by some employers operating under franchising business models, much of the Bill will apply to all businesses. In doing so, this Bill has potentially undesirable consequences.

Firstly, the increases in civil penalties apply to all employers, including small business, even though there has been no demonstrated case made that such increases are necessary. An assessment of the impact of the changes on small businesses also does not appear to have been made.

Further, whilst according to the Minister's Second Reading Speech *"the new provisions do not displace the obligations of employers to continue to comply with Australian workplace laws or introduce joint employment arrangements"*, provisions in the Bill contemplate that a franchisor can be directly sued by franchisee employees, their unions or the FWO for non-compliance.

This proposed approach goes beyond an enhanced accessorial liability regime and will add complexity and tension to franchisor-franchisee contractual arrangements - arrangements which by their very nature require a certain degree of independence between the relevant entities. It is the franchisee who on a day-to-day basis manages, pays, hires and fires their employees and regulates workplace behaviour. The Bill violates this operational division.

Finally, the Bill seeks to expand the powers of the FWO to that equivalent to some other Federal regulators, but without the same checks and balances or forms of oversight.

HIA elaborates on these concerns in greater detail below.

2. THE BILL

2.1 INCREASED PENALTIES

The Bill both increases the range of civil penalties under the Act and introduces new penalties for a "*serious contravention"*.

Evidently the introduction of large penalties for serious contraventions of the Act are targeted at addressing systemic and deliberate non-compliance of workplace laws by some high profile franchise operators.

However under the proposed amendments, all employers who fail to comply with the Act's record keeping and payslip requirements could face penalties of up to $10,000. This doubles the current penalties for this type of breach and will have an unduly negative impact on small business. The reality is that some of these employers struggle with their paperwork obligations.

HIA submits that the status quo be maintained in relation to the civil penalty provision, particularly those penalties that relate to breaches of s535 and 536 of the Act.

2.2 FRANCHISEES AND FRANCHISORS

A feature of most franchising models and agreements is that in exchange for having a licence to use their trademarked brand, intellectual property and systems, the head franchisor will impose and enforce various standards, systems and requirements on their franchisees.

Franchisees are however separate businesses and in most cases select, manage, and discipline their employees.

It is HIA's primary submission that franchisors should not be responsible for matters under which they have no contractual or operational control.

Section 558A

The Franchising Code of Conduct (Competition and Consumer (Industry Codes—Franchising) Regulation 2014) sets out established and well understood indicators of a franchise relationship. The Code broadly defines a Franchise Agreement as an agreement (written, verbal or implied) under which:

- one party (the franchisor) grants another party (the franchisee) the right to carry on a business supplying goods or services under a specific system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor;
- the business is associated with a particular trademark, advertising or a commercial symbol owned, used, licensed or specified by the franchisor or its associate;

- the franchisee is required to pay, or agree to pay an amount to the franchisor before starting or continuing the business (there are some exceptions).

The Bill does not adopt the approach of the Code.

Instead, the Bill creates definitions of the *franchisee entity* and *responsible franchisor entity*, largely based on a subjective assessment of the relationship between the entities. Terms such as *'substantially or materially'* and *'significant degree of influence or control'* are potentially difficult to interpret and apply, leading to uncertainty and potential litigation.

HIA considers that the Code definitions should apply to the extent that a franchisor actually exercises a significantly degree of influence or control over the workplace relations affairs of the franchisee.

Section 558B

Under the Bill, the trigger for liability of the responsible franchise entity is that the entity or an officer of the entity:

- *"knew or could reasonably be expected to have known that the contravention by the franchisee entity would occur";* or
- "*at the time of the contravention…knew or could reasonably be expected to have known that the contravention by the franchisee entity of the same or a similar character was likely to occur".*

As outlined in the Explanatory Memorandum:

> *"These provisions mean that the responsible franchise entity does not need to have actual knowledge that the franchisee entity's contravention would occur. It is enough that the responsible franchisor entity could reasonably be expected to have known the contravention of the same or a similar character was likely to occur, Mere suspicion is not enough – there must objectively be reasonable grounds to hold the belief"*[1]

While couched as an objective test, the test is inherently subjective and ultimately determined by the specific circumstances of a particular arrangement.

The plethora of possible states of awareness by a franchisor of the activities of a franchisees make applying the provision in an objective way near impossible as the gap between being aware of *"a series of complaints about alleged underpayment"*[2] (and hence responsible for and required to respond to under the Bill) and not needing to prove that the franchisor *"knew exactly who was being underpaid and on what basis"*[3] in order to act, sit at 2 ends of a very broad spectrum.

[1] Explanatory Memorandum at paragraph 58
[2] Explanatory Memorandum at paragraph 59
[3] ibid

The Explanatory Memorandum suggests that the following activities might constitute reasonable steps to avoid a contravention of the Act:

- Ensure the franchise agreement or other business arrangements require franchisees to comply with workplace laws.
- Provide franchisees or subsidiaries with a copy of the FWO's free Fair Work Handbook.
- Encourage franchisees or subsidiaries to cooperate with audits by the FWO.
- Establishing a contact or phone number for employees to report any potential underpayment to the business.
- Audit companies in the network.

The FWO also recommends a range of measures that franchise operators may consider implementing to manage and monitor the compliance by franchisees with workplace laws.[4]

But there has been no assessment of the costs or regulatory impact on businesses, both franchisor and franchisee of implementing the 'reasonable steps' recommended in the Explanatory Memorandum or by the FWO. It is likely that to meet these standards franchisors and franchisees will need to implement very costly, onerous and intrusive assurance mechanisms.

In HIA's submission, the trigger for franchisor liability should simply be where the franchisor actually exercises a degree of substantial control over the workplace relations arrangements, terms and conditions of the franchisee.

2.3 Powers of the Fair Work Ombudsman

The Bill proposes to strengthen the powers of the FWO to give it coercive and evidence gathering powers similar to that of other agencies, such as the Australian Building and Construction Commission (ABCC), the Australian Securities and Investment Corporation (ASIC) and Australian Competition and Consumer Commission (ACCC).

Significantly, the FWO will be able to issue a person with an 'FWO Notice' if the FWO reasonably believes that the person has information or documents relevant to an investigation, or is capable of giving evidence that is relevant to such an investigation. The FWO Notice may require the person to give information, produce documents or attend before the FWO to answer questions (with legal representation if the person so wishes).

The equivalent powers of the ABCC are most relevant as they apply to workplace relations participants in the building and construction industry.

[4] https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/franchise-assistance/information-for-franchisors

In order to carry out effective investigations into unlawful behaviour on building sites, the ABCC requires access to coercive information gathering powers including the provision of information, production of documents and attendance to answer questions.

The circumstances in the building and construction industry triggering the need for such coercive powers have been well documented, including in the detailed body of evidence presented before the 2015 Heydon and 2002 Cole Royal Commissions.

As Commissioner Heydon concluded in his Final Report there is *"a strong case for the building industry regulator to have information gathering powers that are equal to those of other major statutory regulators."*

The same however cannot be said in relation to the proposed provisions of the Bill as they relate to the powers of the FWO.

The FWO have been quite effective using their existing powers. For instance, the FWO managed to secure a formal Proactive Compliance Deed with 7-Eleven, which committed them, as the franchisor, to introduce and oversee a number of systems that created obligations on its head office to closely monitor franchisees to ensure compliance and strong accountability for all operators in its network. The agreement also included admissions by 7-Eleven of its moral and ethical responsibility as a franchisor, to ensure compliance with the law in relation to all employees, and to meet Australian community and social expectations.

Section 550 of the Act is also a powerful tool already at the FWO's disposal. According to its 2015 – 16 Annual Report the Ombudsman pursued accessories to alleged breaches of the Act in 92% of the cases it lodged[5] and, in its report arising out of the Inquiry into 7-Eleven the Ombudsman noted that:

> *"Section 550 is a critical tool for us to use to bring culpable individuals to account…"*[6]

It is also clear that:

> *"The new provisions supplement and do not override the existing accessorial liability provisions."*[7]

In HIA's experience the FWO's focus to date has been working with businesses to resolve workplace issues. The inclusion of coercive powers of regulation displaces such a "responsive" approach to regulation. The proposed provisions without any guidance may undo that work and have a number of unintended consequences.

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[5] 2015-16 Fair Work Ombudsman Annual Report at pg.2
[6] April 2016 at pg. 69
[7] Explanatory Memorandum paragraph 35

According to the Explanatory Memorandum the new powers will be particularly important in cases *"where no relevant documents appear to be available and the investigation has stalled"* but the proposed powers are not limited to those circumstances.

Finally, under the ABCC legislation, examination notices must be issued through the Administrative Appeals Tribunal (AAT).

There is no such equivalent check on the issue of FWO notices under the Bill.