WEstjustice

WESTJUSTICE SUBMISSION

SENATE COMMITTEE FOR EDUCATION AND EMPLOYMENT LEGISLATION

INQUIRY INTO THE FAIR WORK AMENDMENT (PROTECTING VULNERABLE WORKERS) BILL 2017

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Executive summary

The WEstjustice Employment Law Project welcomes the opportunity to make this submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the **Vulnerable Workers Bill**). We are available to discuss these recommendations with the Committee if this would be of assistance.

About WEstjustice and the Employment Law Project

WEstjustice (www.westjustice.org.au) is a community organisation that provides free legal assistance and financial counselling to people in the western suburbs of Melbourne on a range of everyday legal problems. With a long history of working with newly arrived communities, we identified a large unmet need for employment law assistance for these communities who are particularly vulnerable to exploitation at work.

In response, WEstjustice established the Employment Law Project in 2014, which seeks to improve employment outcomes for migrants and refugees. We do this by empowering migrant and refugee communities to understand and enforce their workplace rights, through an employment law legal service that provides comprehensive assistance to clients and an innovative education program, along with advocating for systemic change.

In the first two years of operation, the Employment Law Project provided legal assistance to over 200 migrant workers from 30 different countries, successfully recovering or obtaining orders for over $120,000 in unpaid entitlement and over $125,000 in compensation for unlawful termination, and trained over 600 migrant workers, as well as leaders from migrant communities and professionals supporting these communities.

Ten steps to stop exploitation of vulnerable migrant workers

Based on evidence from our work, and extensive research and consultation, WEstjustice has compiled the Not Just Work Report.[1] The Not Just Work Report documents systemic and widespread exploitation of migrant workers across numerous industries.

Exploitation not only harms vulnerable workers, but undermines the workplace relations framework: businesses that do the right thing are undercut by those breaking the law. As current systems are failing to stop the abuse, the Not Just Work Report details ten critical steps to stop exploitation of migrant workers.

[1] Catherine Hemingway, 'Not Just Work: Ending the exploitation of refugee and migrant workers', WEstjustice Employment Law Project Final Report, available at <www.westjustice.org.au/publications/policy-reports-121>.

Key changes to the Fair Work Act needed to protect vulnerable workers

In this context, WEstjustice welcomes the Vulnerable Workers Bill. The proposed amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) implement some elements of three of the critical steps to protect migrant workers that are set out in the Not Just Work Report: improved laws and processes to stop wage theft, increased accountability in labour hire, supply chains and franchises, and active and accessible agencies.

However, we suggest some further amendments and additions in each of these areas that will increase the Vulnerable Workers Bills' effectiveness in protecting vulnerable workers. In particular, our three key recommendations are:

1. **Improved laws and processes to stop wage theft:** To remove the incentive for employers to break the law and to assist vulnerable workers to recover unpaid wages where records have not been kept by creating a reverse onus of proof in wage disputes
2. **Increased accountability in franchises, labour hire and supply chains:** To ensure that anyone who benefits from the exploitation of vulnerable workers is held accountable, by making supply chains and labour hire hosts responsible for breaches of workplace rights, as well as franchisor entities and holding companies.
3. **Active and accessible agencies:** To ensure wages claims are resolved efficiently and effectively without the need to go to Court by expanding the Fair Work Ombudsman's (**FWO**) powers to issue Assessment Notices.

Our proposals are set out in more detail below, and we have also compiled an overview of our drafting suggestions to achieve these changes in Appendix One: Compilation of WEstjustice's drafting suggestions.

Additional reforms required to protect vulnerable workers

While we acknowledge that additional reforms are likely to be outside the scope of this Inquiry, we would like to direct the Committee's attention to the additional steps that need to be taken to protect vulnerable workers as set out in our Not Just Work Report.[2]

In particular, further changes to the FW Act will be required, to reduce sham contracting and implement strategic measures to help vulnerable sub-groups like migrant workers on temporary visas.

Sham contracting

To stop sham contracting, as well as improving the ABN regime, a statutory definition should be introduced into the FW Act that presumes workers are employees. In addition, the incentive to engage in sham contracting can be removed by amending the FW Act's 'recklessness/lack of knowledge' defence and placing an obligation on employers to ensure they classify workers appropriately.

[2] Hemingway, above n1.

Migrant workers on temporary visas

We need to take immediate steps to protect vulnerable workers on temporary visas. The Australian Government's Migrant Worker Taskforce announced in February this year that where temporary visa holders with a work entitlement attached to their visa may have been exploited and they have reported their circumstances to the FWO, the Department of Immigration and Border Protection (**DIBP**) will generally not cancel a visa, detain or remove those individuals from Australia, providing: the visa holder commits to abiding by visa conditions in the future; and there is no other basis for visa cancellation (such as on national security, character, health or fraud grounds).[3] This agreement between DIBP and FWO has now been published on FWO's website,[4] and will hopefully be widely communicated by the government.

While this is a positive development, alone it will not be sufficient to reassure vulnerable migrant workers on temporary visas that it is safe to come forward and report exploitation to the FWO without further legislative and other reform. The Not Just Work Report[5] makes multiple suggestions that would protect vulnerable migrant workers on temporary visas, including the following legislative changes:

- The FW Act should be amened to state that it applies to all workers, regardless of immigration status, and
- The *Migration Act 1958* (Cth) should also be amened to introduce a proportionate system of penalties in relation to visa breaches.

Community-based employment services

In addition to legislative reform, WEstjustice notes that without targeted education and assistance to understand and enforce their rights, vulnerable workers often cannot access the law at all, due to a variety of barriers explained in our Not Just Work Report[6] (including language, practical and cultural barriers).

Active and accessible government agencies are essential. However, there is a strong consensus that community based employment services are required to provide sustained direct engagement with communities and a link between communities and government agencies. Yet there is a lack of resources being directed towards funding these services that play a crucial role in providing meaningful access to justice and achieving positive systemic change. The Migrant Communities Employment Fund (or something similar) is urgently needed to address this issue.

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[3] Professor Allan Fels AO, *Chair's Public Statement February 2017,* Migrant Worker Taskforce, Australian Government Department of Employment, available at <https://www.employment.gov.au/chairs-public-statement-february-2017>.
[4] Available at <https://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants>.
[5] Hemingway, above n1, pp 224–299.
[6] Ibid Part Five.

Overview of WEstjustice's recommendations

Issue	Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017	WEstjustice's recommended amendments Also see Appendix One: Compilation of WEstjustice's drafting suggestions.
1. Improved laws and processes to stop wage theft	• Higher penalties for failure to keep records. • Higher penalties for serious contraventions. • Expressly prohibiting employers from unreasonably requiring their employees to make payments.	To remove the incentive for employers to break the law and assist vulnerable workers to recover unpaid wages where records have not been kept, WEstjustice recommends: **Recommendation One: Reverse onus of proof in wage disputes** Create a reverse onus of proof for wage claims where employers fail to keep or provide employee records. **Recommendation Two: Extend 'cash-back' prohibitions to prospective employees** Expressly prohibit employers from requiring prospective employees to make unreasonable payments for employment.
2. Increased accountability in franchises, labour hire, supply chains	• Franchisors and parent companies will be liable for a civil penalty, where there has been a contravention of certain civil penalty provisions and they knew or could reasonably be expected to have known that a contravention by the franchisee entity or subsidiary (either the body corporate or an officer) would occur or a contravention of the same or similar character was likely to occur. • Defense: Need to take reasonable steps to prevent the contravention.	To ensure that franchisors, labour hire hosts, supply chain heads and directors take reasonable steps to prevent exploitation, WEstjustice recommends: **Recommendation Three: Extend liability to all relevant third parties** In addition to protecting workers in franchises and subsidiary companies, make supply chains and labour hire hosts responsible for the protection of workers' rights. **Recommendation Four: Widen the definition of responsible franchisor entity** Amend the proposed definition of responsible franchisor entity to ensure that all franchises are covered by removing the requirement for a significant degree of influence or control. **Recommendation Five: Clarify liability of all relevant third parties** Insert a provision to clarify that responsible

Issue	Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017	WEstjustice's recommended amendments Also see Appendix One: Compilation of WEstjustice's drafting suggestions.
		franchisor entities, holding companies and other indirectly responsible entities who contravene clause 558B should also be taken to have contravened the relevant provisions contravened by their franchisee entity/subsidiary/indirectly controlled entity. **Recommendation Six: Clarify the 'reasonable steps' defence to incentivise compliance** Ensure that the 'reasonable steps' defence incentivises proactive compliance, including independent monitoring and financially viable contracts.
3. Active & accessible agencies	• Increased FWO evidence gathering powers (dealt with below).	To ensure wages claims are resolved efficiently and effectively without the need for Court, WEstjustice recommends: **Recommendation Seven: Cost consequences for employers who refuse to engage with FWO** Make it clear that there will be costs consequences if an employer unreasonably refuses to participate in a matter before the FWO. **Recommendation Eight: FWO Assessment Notices for employers who refuse to engage** Where an employer refuses to participate in mediation, FWO issue an Assessment Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the Assessment Notice in the court proceeding. Where the applicant has an Assessment Notice, the applicant is taken to be entitled to the amounts specified in the assessment notice unless the employer proves otherwise.

1. Improved laws and processes to stop wage theft

The Not Just Work report sets out multiple recommendations to improve laws and processes and stop wage theft in Part 6. Relevantly for this inquiry we draw the Committee's attention to the following:

- Reverse onus of proof for wage disputes (discussed below), and
- The FWO should have greater power to resolve claims (discussed more in section 3).

This section sets out the case and sample drafting for a reverse onus for wage claims and an extension of prohibition on unreasonable payments to prospective employees.

1.1 The problem of wage theft

Underpayment (or non-payment) of wages and/or entitlements is the single-most common employment related problem that members of newly arrived and refugee communities present with at our service. For example, we have numerous clients who were paid less than the legal minimum wage, including some paid as little as $8 an hour and two workers paid one salary between them. We have also seen multiple clients who were working more than 12 hours a day, six or seven days a week but were not paid penalty rates (for example, for working on the weekend) or overtime as required by law.

As a first step to resolve an underpayment claim we typically ask the employer for a copy of employee records. Such a request is provided for in the *Fair Work Regulations 2009* (Cth) (**FW Regulations**), and employers are required to respond to a request by providing the records in the post within 14 days (or by allowing records to be inspected on site within 3 days).[7]

Where we are able to obtain employee records, we are able to calculate whether or not the correct rate of pay has been provided for the number of hours worked. Often a claim can be resolved quickly and easily at this point.

However, in our experience employers regularly fail to keep any records at all, or provide pay slips. On many occasions, employers have ignored our requests for employee records, or stated that no records were kept. Unless the worker has kept a diary of their hours, or we can somehow otherwise establish their claim (for example, through rosters or phone records), it is extremely difficult for them to bring their case to court with any certainty of success. The FWO will rarely assist a worker to pursue a claim without significant written documentation to prove their case. Few newly arrived workers know to keep a record of hours worked.

Without any employment records, it is extremely difficult for employees to prove what hours they worked and what they were paid. The evidentiary burden rests with workers to precisely establish these matters. This means that in the absence of legislative reform, there remains significant

[7] *Fair Work Regulations 2009 (*Cth) reg 3.42.

employer incentive to neglect record-keeping duties. The current legislative framework rewards employers who fail to keep employee records.

Reforms are needed to eliminate the incentive for businesses to avoid keeping employee records and providing them to workers in accordance with the law and to assist workers to recover unpaid wages where employee records have not been kept.

In addition to traditional underpayment or non-payment of wages and 'cash-back' schemes requiring unreasonable payments to an employer, WEstjustice has recently seen the emergence of employers claiming to be able to offer work in return for a vulnerable worker paying them an initial upfront fee and/or expending money on vehicles or equipment. In most circumstances, the job never eventuates and the vulnerable workers are left with the difficult task of trying to recover their funds.

CASE STUDY: DUGUNG

Dugung paid $10,500 to his employer for training to become a cleaner. He was told he would complete 10 days of training and once training was complete, that he would start work. He was promised a weekly income of $2600.

After 10 days of training, Dugung was told that he did not have a job as there was not enough work for him. His boss made two refund payments to him, one of $4500 and one of $3000. When Dugung asked for the remaining $3000 he was told that this money had been deducted for training costs.

Dugung was not paid for his training and came to see Western CLC for advice on getting his money back.

CASE STUDY: TANVIR

Tanvir found an advertisement for plastering work on a popular trading website. The employer told him he would need to pay $2500 as bond for the work vehicle and to the access for the building site. Tanir met the employer and paid the $2500 in cash. The employer told him he would get the contract on his first day of work.

After a week, Tanvir had still had not heard from the employer so he called him a number of times. The employer did not respond at all and has now disappeared.

CASE STUDY: QUAN

Quan was working as a courier. He was offered work but he told he was required to pay $15,000 to the employer for a "run" (opportunity to work). Quan signed a contract which guaranteed $2000 per week income. Quan paid the $15,000 and signed the contract. However, the employer only paid him about $1000 per week and he was still owed $5000 in wages.

After a lawyer assisted Quan to draft a letter of demand for both the unpaid wages and the $15,000 he had paid for the work, the employer gave him a cheque for $15,000; however when Quan banked the cheque it was dishonoured. The employer then began repaying the debt by installments, however this too stopped after two installments.

Reforms are also needed to assist employees, or prospective employees, in this situation and to deter this kind of behaviour from employers.

1.2 Current Fair Work Act framework for wages

Employee records

Currently, under section 535 of the FW Act, employers are required to make and keep employee records for seven years as prescribed by the regulations (this is a civil remedy provision). Subdivision 1 of Division 3 of the FW Regulations prescribes the relevant employee records. Under regulation 3.42 employers are required to make a copy of an employee record available for inspection and copying on request by the employee.

Payslips

Under section 536 of the FW Act, employers are required to provide employees with a payslip within one working day of making payment (this is a civil remedy provision). Such payslips must contain particular information including employer name, gross amount of pay, net amount of pay, number of hours worked and any penalty rates or overtime.[8]

Minimum wages

Minimum wages for most of these employees will be contained in (and enforceable as) terms of modern awards. In other cases, minimum wages may be contained in (and enforceable as) terms of an enterprise agreement or some other instrument (such as a workplace determination or a minimum wage order):

- Section 45 of the FW Act provides that a person must not contravene a term of a modern award. A legislative note indicates that section 45 is a civil remedy provision, and
- Section 50 of the FW Act provides that a person must not contravene a term of an enterprise agreement. A legislative note indicates that section 50 is a civil remedy provision.

[8] *Ibid* reg 3.46.

Payments and deductions from wages

Section 324 of the FW Act provides that an employer may make deductions from wages if they are properly authorised (subject to section 326 requirement that the deductions are reasonable).

Under section 325 of the FW Act, 'An employer must not directly or indirectly require an employee to spend any part of an amount payable to the employee in relation to the performance of work if the requirement is unreasonable in the circumstances' (this is a civil remedy provision).

In addition, section 326 of the FW Act explains that a term in a modern award, enterprise agreement or employment contract has no effect to the extent that it permits an unreasonable payment or unreasonable deduction. What is a reasonable deduction for the purposes of section 326(1) is set out in the FW Regulations, regulation 2.12.

Civil remedies

Part 4-1 of the FW Act deals with civil remedy provisions:

- Division 2 of Part 4-1 deals with orders including applications for orders under Subdivision A and orders under Subdivision B, and
- Division 3 contains the small claims procedures and Division 4 contains general provisions relating to civil remedies.

The requirements set out above are civil remedy provisions, meaning an employer can be fined up to 30 penalty units – currently around $27,000 (for a company) or $5400 (for an individual) per breach.

1.3 Vulnerable Workers Bill proposals to stop wage theft

Particularly relevant to wage theft, the Vulnerable Workers Bill seeks to increase maximum penalties for serious contraventions of certain civil remedy provisions, including sections 535 and 536. It also provides that failure to keep or make employment records or provide pay slips are relevant considerations when determining whether a serious contravention has occurred to another listed civil remedy provision (Schedule 1, Part 1 cl 557A(2)(d)(e) Vulnerable Workers Bill).

In addition, in relation to payment of wages the Vulnerable Workers Bill attempts to strengthen the civil remedy provisions of the FW Act by prohibiting employers from requiring employees to make unreasonable payments from their wages to the employer (or a party related to the employer) (Schedule 1, Part 3, sections 325-327 Vulnerable Workers Bill).

In the main we agree with these proposals; however we note that increased penalties alone are not sufficient to deter businesses from wage theft. To achieve these aims we suggest a new section which provides a reverse onus in wage claims (set out in more detail in 1.4 below). In addition, we suggest broadening the civil remedy provision around unreasonable payments to expressly prohibit employers from unreasonably requiring prospective employees to make payments for employment.

1.4 WEstjustice's recommendations to stop wage theft

Recommendation One: Reverse onus of proof in wage disputes
Create a reverse onus of proof for wage claims where employers fail to keep or provide employee records.

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 use of CCTV 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 has not kept and/or provided employee records as required by sections 535, 536 of the FW Act or regulation 3.42 of the FW Regulations. For details see Appendix One: Compilation of WEstjustice's drafting suggestions.

Recommendation Two: Extend 'cash-back' prohibitions to prospective employees
Expressly prohibit employers from requiring prospective employees to make unreasonable payments for employment.

WEstjustice supports the Vulnerable Workers Bill clarification of sections 325-327 of the FW Act to ensure that it expressly prohibits employers from unreasonably requiring their employees to make payments (e.g. demanding a proportion of their wage be paid back in cash). However, we would like this to be extended to expressly include prospective employees.

To achieve this we suggest minor alterations to the proposed text in these sections to refer to employee and prospective employees, and performance of work or employment. For details see Appendix One: Compilation of WEstjustice's drafting suggestions.

2. Increased accountability in labour hire, supply chains and franchises

The Not Just Work Report sets out multiple recommendations to improve laws and processes to increase accountability for all third party entities that benefit from an employee's labour in Part 7.[9]

Most relevantly to this inquiry it recommends that amendments to the FW Act should be made to ensure that all third party entities who receive the benefit of being an "employer" are also required to comply with the FW Act provisions relating to underpayments and termination. It sets out various ways this could be achieved, including a vicarious liability model such as that suggested by the Vulnerable Workers Bill Schedule 1 Part 2.

This section sets out the case and sample drafting for extending the liability of franchisor entities and holding company proposed in the Vulnerable Workers Bill, to all third party entities that benefit from an employee's labour. It also discusses strengthening the proposed Vulnerable Workers Bill by expanding the definition of franchise/franchisor, clarifying liability of all third parties that benefit from an employee's labour and clarifying the reasonable steps defence to incentivise proactive compliance.

2.1 Exploitation in labour hire, supply chains and franchises

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.

Ways of working have changed, and our law has not kept up. At present, the FW Act is largely focused on traditional employer/employee relationships as defined by common law. This framework fails to adequately regulate non-traditional working arrangements, for example, where there is more than one employing entity. In doing so, the law ignores the fact that 'it is not now uncommon for the employment relationship to be fragmented and for multiple organisations to be involved in shaping key working conditions.'[10]

This can lead to situations where although multiple organisations will benefit from the labour of one worker, only one can be held accountable under the FW Act. For example, in a labour hire arrangement, in addition to the labour hire agency, 'the client or host employer may receive the

[9] Hemingway, above n1 pp 165–186.
[10] Dr Tess Hardy, Submission No 62 to Senate Inquiry, *The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders*, 8.

benefits of an employer by being able to control the agency labour (and their terms of engagement) and yet avoid any form of labour regulation because it has no employment relationship with the labour.'[11] Although 'both of [these] entities enjoy the benefits of acting as an employer, one will unfairly circumvent labour regulation.'[12] We have seen this 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.

Example: Labour Hire

The labour hire relationship is characterised by a worker who is engaged by a labour hire agency (**agency**) and assigned to work for an organisation (**host employer**). This means that the worker is not employed directly by the place that they work. In this triangular relationship, there is a contract between the agency and the host employer, and a contract between the worker and the agency — but there is no contract between the worker and the host employer. In these circumstances, if a worker is unfairly dismissed or underpaid, the worker would not usually be entitled to seek relief against the host employer, unless the worker could be characterised as an "employee" of the host employer, having regard to the usual indicia.[13]

For example, in a meat factory, the factory (host employer) may pay a labour hire company (agency) to provide additional staff in times of high demand. These contractors would work at the meat factory, but their employer would be the labour hire company. Even though the meat factory may be run by a large well-resourced company, the labour hire company is responsible for the workers' wages. If the labour hire company underpays its staff, the worker must pursue the labour hire company. When the labour hire company "disappears" or is "deregistered," the vulnerable worker is left with no recourse unless they can prove actual knowledge of the breach in the mind of the host company.

CASE STUDY: JOYCE

Living in that hostel made me see a very different side of Australia, the dark and uncivilised side. We can leave anytime but we were trapped there because they kept giving us reason to stay for another week. Sometimes I feel that it's worse than a prison as we have to pay money for a bed, the hostel was a mess but no one cares and we have to beg very hard for a job…

They gave me a tomato picking job at the 3rd week. We waited for the bus from the farm to pick us up before 5 am. We were all nervous about where they will drive us to because they never really tell us anything about how much they'll pay us, which farm will they take us to... All we know was working for this place allowed us to collect the 2nd year visa…

[11] Craig Dowling, 'Joint Employment and Labour Hire Relationships – Victoria Legal Aid – Professional Legal Education', 5 October 2015, 1-2.
[12] Ibid.
[13] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16. See also *Damevski v Giudice* (2003) 133 FCR 438, where the Court found that the host employer was the relevant employer.

The machine started to move straight away once we all sit on our seats. You couldn't stop picking or go the loo when the machine was running. They only gave us 2 five minutes break and 20 minute lunch break for a 9.5-hour-shift. There was no toilet so we had to pee wherever we were. There were no sheds at all so some of the workers had hot stroke sometimes, also because we didn't get chance to have a sip of water. As I remembered they said we earned 95 bucks each that day. The farm bus picked up the Cherry Tomato picking backpackers on the way back. The poor girls worked all day non-stop but they were only told that they earn 25~40 bucks for 9.5 hours work. Sounds terrible but the worse thing happened after that was we never got paid at all.

Nobody complained to Fair work. I guess we were all a bit scared to say anything or to fight too much. What if they do anything to us when we are in the middle of nowhere? The universal feeling we had was a mixture of confusion, anger, helpless and loss-of-dignity. It embarrassed me every time I think about the experience and I wish I have done something to reveal the ugly truth. In the end, I decided to stop pursuing the 2nd year visa and returned to the city. I wasn't treated much better in the city either, I felt bad to say that. The Asian-run shops and restaurants were mostly offering 8 AUD~12AUD for an hour of work. They posted their recruiting ads on the Mandarin-speaking forums (such as Backpackers and Yeeyi), some of them didn't include how much they pay you at all, some of them publically posted "12 AUD an hour".

Joyce was not able to contact the labour hire intermediaries about her non-payment, as they disappeared. Nor was she able to show that others in the supply chain were knowingly concerned in the exploitation that occurred. She was left without recourse.

Example: Franchises

Franchises are characterised by the licensing of intellectual property rights between franchise operators and retailers. We have observed exploitation in franchise models. For example:

CASE STUDY: SALLY

Sally worked as a salesperson in a shop belonging to a large franchise chain. When she started, she was told that she would undergo a "probation" period for three months. She was paid a flat rate of $100 per day, including weekend work. Sally worked full time, undertook training and met sales targets. When she discovered that she was not being paid legally, Sally quit her job.

WEstjustice assisted Sally to write a letter to the employer in her own name, setting out calculations of her lawful entitlements and seeking payment. The employer responded saying that Sally never worked at the shop – she was a volunteer and they had offered her the opportunity to learn new skills in case a job came up in the future. WEstjustice wrote a letter directly to the employer setting out the evidence that Sally was working for them. This included emails and text messages saying things like "you're working on Saturday", sales records for all staff that included Sally's name, and Myki travel records. The employer promptly paid Sally her entitlements. Sally said she spoke to staff from other franchises at a training session and her experience was not unique.

CASE STUDY: MASAKO

Masako worked in an entry level position in a large franchise in the hospitality industry. She didn't speak any English and was grateful to have a job. Masako noticed she wasn't being paid for all the hours she worked. Her rosters and payslips did not show the same figures. Masako asked questions of her boss and was subsequently dismissed.

The 7-11 case is not unique. Exploitation in franchises is widespread. To ensure compliance with the law, legislation must be introduced that encourages franchisors to take active steps to prevent and deter exploitation within their franchise.

Example: Supply chains

Supply chains involve sub-contracting arrangements whereby there are a number of interposing entities between the ultimate work provider and a worker. An example of a supply chain in the construction context is the engagement by a business operator of a principal contractor who engages a contractor firm, which engages a subcontractor.[14] It has been suggested that the 'very structure of the supply chain is conducive to worker exploitation,' as parties near the bottom of the supply chain tend to have low profit margins and experience intense competition.[15]

Many of our clients find themselves at the bottom of long and complex supply chains, riddled with sham arrangements. Often, the entity at the top is a large, profitable, well-known company. We have also seen significant exploitation arising from multi-tiered subcontracting arrangements:

CASE STUDY: HAMID

Hamid worked as a truck driver and delivery worker. He worked 6 or 7 days a week, usually 12-14 hours per day. Hamid was employed as an independent contractor by Sami. Sami was a contractor for another large distribution company, who was engaged by a large supermarket. Hamid worked under an ABN but he had no control of work hours, where to go or how to do the work. He wore a uniform with the supermarket's logo. Hamid was not paid for his last two weeks of work so he came to see WEstjustice.

We explained that Hamid had been underpaid by thousands of dollars as an employee. We assisted Hamid to make a complaint FWO, who investigated the matter and issued infringements and a notice of caution. However, unfortunately Sami had disappeared overseas and so no further action could be taken

[14] Richard Johnstone et al, *Beyond employment: the legal regulation of work relationships* (The Federation Press, 2012) 49.
[15] Ibid 67.

CASE STUDY: JOHN

John worked as a security guard six nights a week. Although he worked night shifts and significant overtime (he usually worked around 70 hours a week), he was paid a flat rate of $20 per hour – significantly under the Award. John was owed over $30,000 after just a few months of work. John was sacked when he asked about unpaid wages. However, his employer company had limited funds to repay the debt and John had limited knowledge of the agreement between John's bosses and the larger company that engaged them.

In Hamid and John's stories, we see our client, who is the most vulnerable and least well-resourced in the chain, without any ability to pursue his lawful entitlements. At least two companies profited from Hamid's labour without any responsibility for protecting his workplace rights. The requirement to prove these other companies were 'knowingly concerned in or party to the contravention' under section 550 accessorial liability provisions of the FW Act is too onerous to provide any meaningful assistance to enforce vulnerable workers rights. There should be a positive obligation on those higher in the supply chain to ensure workplace rights are protected.

Self-regulation insufficient

Unfortunately, self-regulation and voluntary compliance is failing. For example, the FWO recently invited eight franchisor chief executives to enter into compliance partnerships with FWO, underpinned by proactive compliance deeds. The initiative was openly supported by the Franchise Council of Australia. However, only one franchisor has engaged with the process, one franchisor refused to participate, and six franchisors ignored the FWO entirely.[16] To affect meaningful change, the law must be amended to remove incentives to exploit or ignore worker rights and instead ensure that directors, supply chain heads, franchisors and host companies are held accountable.

2.2 Current Fair Work Act framework for third party liability

Currently, the only way to attribute responsibility to a third party under the FW Act is via the accessorial liability provisions in section 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.*

[16] 'Franchisors spurning partnership proposals, says FWO', *Workplace Express,* 2 September 2016.

As can be seen, section 550 only attributes liability in limited circumstances, including where there is aiding, abetting, counselling or procurement or the accessory is "knowingly concerned." The requirement of actual knowledge is an extremely high bar to establish assessorial liability of the host employer or those at the apex of a supply chain or franchise. Although the FWO may be able to rely on previous warnings or compliance notices issued to particular companies or individuals to show knowledge in some cases, for others, it is often unobtainable.

WEstjustice has found that vulnerable workers who speak little English and work night shift in a franchise or do delivery work at the bottom of a supply chain rarely have the ability prove what the head office or controlling minds of the organisation actually know – in fact it is impossible for them. Indeed, by requiring actual knowledge, section 550 serves to reward corporations who deliberately remain uninformed about the conduct of others in their supply chain/business model. The law should not reward those who turn a blind eye to exploitation – especially those who are directly benefitting from the exploitation and in a position to take reasonable steps to stop it.

Although the FWO has recently used section 550 with some success,[17] Hardy notes that there have only been a "handful" of cases where section 550 has been used to argue that a separate corporation is "involved" in a breach. Although not yet determined in a substantive proceeding, 'court decisions which have dealt with similar accessorial liability provisions arising under other statutes suggest that the courts may well take a fairly restrictive approach to these questions.'[18]

2.3 Vulnerable Workers Bill proposals to extend liability to franchises and holding companies

The Vulnerable Workers Bill seeks to insert a Division 4A into the FW Act which attributes responsibility to responsible franchisor entities and holding companies for certain contraventions. Under these provisions, holding companies and responsible franchisor entities contravene the Act if they knew or could reasonably be expected to have known that a contravention (by a subsidiary or franchisee entity) would occur or was likely to occur.

As already discussed, in our experience, workers in supply chains and labour hire arrangements are frequently exploited. The problem is not limited to franchise situations only. Similar to franchisors, supply chain heads and labour hire hosts should be required to take reasonable steps to prevent exploitation.

Clauses 558A and 558B of the Vulnerable Workers Bill define "franchisee entity" and "responsible franchisor entity" and provide for responsibility of responsible franchisor entities and holding companies for certain contraventions. This definition of responsible franchisor entity is too narrow and an unnecessarily difficult burden for vulnerable workers to prove. The requirement to show that

[17] For example, Joanna Howe explains how the FWO brought a claim against Coles for labour hire company Starlink's treatment of trolley collectors. The FWO secured an enforceable undertaking with Coles in which it agreed to rectify underpayments. See Joanna Howe, Submission 109 to Economic, Development, Jobs, Transport and Resources, *Inquiry into Labour Hire and Insecure Work*, 2 February 2016 <http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0007/1314619/Submission-Dr-Howe.pdf>.
[18] Hardy, above n 5, 10.

the franchisor has 'a significant degree of influence or control over the franchisee entity's affairs' is too onerous for workers: who lack access to necessary documents and information.

In addition, unlike section 550 of the FW Act (which deems that parties involved in a contravention of a provision are taken to have contravened that provision), it is not clear from the drafting that responsible franchisor entities and holding companies will be liable for the breaches of the franchisee entity or subsidiary. Rather it appears that they will only be liable for breaching the new provisions. This seems contrary to the intention of the Vulnerable Workers Bill as expressed in the Explanatory Memorandum outline, and needs to be clarified.

2.4 WEstjustice's recommendations to extend liability for breaches of the FW Act

Recommendation Three: Extend liability to all relevant third parties
In addition to protecting workers in franchises and subsidiary companies, make supply chains and labour hire hosts responsible for the protection of workers' rights. For details see Appendix One: Compilation of WEstjustice's drafting suggestions

To achieve this 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), 558C and in Part 7 – application and transitional provisions. We do not provide drafting suggestions for these minor amendments.

Recommendation Four: Widen definition of responsible franchisor entity
Amend the proposed definition of responsible franchisor entity to ensure that all franchises are covered by removing the requirement for a 'significant degree of influence or control.'
For details see Appendix One: Compilation of WEstjustice's drafting suggestions.

We propose that 558A(2)(b) be removed to broaden the definition of responsible franchisor entity by removing the requirement for significant control. The degree of control able to be exercised by a franchisor is already a relevant consideration when determining liability – see Schedule 1, Part 2 clause 558B(4)(b) Vulnerable Workers Bill, which says that in determining whether a person took reasonable steps to prevent a contravention, the extent of control held by the franchisor is relevant (see Recommendation Six below for a more detailed discussion). For details see Appendix One: Compilation of WEstjustice's drafting suggestions.

Recommendation Five: Clarify liability of all relevant third parties

Insert a provision to clarify that responsible franchisor entities, holding companies and other indirectly responsible entities who contravene clause 558B should also be taken to have contravened the relevant provisions contravened by their franchisee entity/subsidiary/indirectly controlled entity. For details see Appendix One: Compilation of WEstjustice's drafting suggestions.

As it is currently drafted, the Vulnerable Workers Bill does not appear to make franchisor entities or holding companies liable for the breaches of their franchises or subsidiaries. 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 7/11 could not pursue head office for their underpayments. They could only seek that the head office pays a penalty for breach of 558B. This can be easily clarified by a minor addition to the Bill as set out in our drafting suggestions.

Recommendation Six: Clarify the 'reasonable steps' defence to liability

Ensure that the 'reasonable steps' defence incentivises proactive compliance, including independent monitoring and financially viable contracts.
For details see Appendix One: Compilation of WEstjustice's drafting suggestions.

We would support additional measures to ensure that reasonable steps are being taken to comply with workplace law. However, at a minimum we suggest encouraging proactive compliance by including the examples provided for in paragraph 67 of the Vulnerable Works Bill Explanatory Memorandum as a legislative note into section 558B(4).

3. Active and accessible agencies

Newly arrived and Migrant workers are particularly vulnerable. Yet, as a result of low rights awareness, language, literacy, cultural and practical barriers, newly arrived workers rarely contact mainstream agencies for help. When they do make contact, meaningful assistance is needed. Agencies and commissions must take further steps to ensure that they are more accessible and responsive. Particularly relevant for this inquiry, this includes regulators having sufficient funding and powers to address non-compliance and promote systemic reform. In order to make any enhanced enforcement powers effective FWO will require additional resources.

As discussed in the Executive Summary, in addition to legislative reform WEstjustice notes that without targeted education and assistance to understand and enforce their rights, vulnerable workers often cannot access the law at all, due to a variety of barriers explained in our Not Just Work Report[19] (including language, practical and cultural barriers).

Active and accessible government agencies are essential. However, there is strong evidence that community based employment services are also required to provide sustained direct engagement and a link between communities and government agencies. Yet there is a lack of resources being directed towards funding these services that play a crucial role in providing meaningful access to justice and achieving positive systemic change. The Migrant Communities Employment Fund (or something similar) is urgently needed to address this issue.

3.1 The need for regulators to have sufficient funding and powers to address non-compliance and promote systemic reform

Currently, there are limited incentives for employers to resolve claims prior to court. This is especially the case for smaller companies, where fear of reputational damage is less significant. It is also the case for unscrupulous employers of newly arrived workers – these employers know that their workers lack the capacity to enforce their rights in court without help, and are unlikely to access assistance to take action.

At present, employers cannot be compelled to attend FWO mediations. When pursuing underpayment claims, WEstjustice usually sends a letter of demand to the employer setting out our calculations and the amount owed. We routinely find that employers ignore this correspondence. For some cases, we have found that assistance from the FWO to investigate and mediate disputes has meant that employers are more likely to participate in settlement negotiations.

However, in the experience of WEstjustice, it is unfortunately common for employers to refuse to attend mediation with employees in cases of non-payment of wages. For many clients, this has meant that the FWO has closed the file as the FWO cannot compel attendance. For example:

[19] Hemingway, above n1.

CASE STUDY: SUMIT

Sumit cannot read or write in his own language, or in English. He worked as a cleaner and was engaged in a sham contracting arrangement. Sumit had never heard of the difference between contractors and employees, nor was he aware of the minimum wage.

We assisted Sumit to calculate his underpayment, and write a letter of demand to his former employer. Sumit could not have done this without assistance, and no government agencies can help with these tasks.

Sumit's employer did not respond, so we assisted Sumit to complain to the FWO. The employer did not attend mediation, and the FWO advised Sumit that the next step would be a claim in the Federal Circuit Court - however they could not assist Sumit to complete the relevant forms. There is no agency to assist Sumit write this application. He could not write it without help. WEstjustice helped Sumit to write the application.

Similarly, in cases where a client has worked for an employer for less than two months, FWO may refuse to schedule mediation, as the claim is considered too small. It is very difficult to explain to a client who has worked for two months without pay that they should have continued working for at least another month in order to receive help from the regulator.

In practice, failed mediations have the effect that an individual's only means of recourse is to start proceedings in court. This process is costly, time consuming, and confusing. Applications must be filled out and are best accompanied by an affidavit (a formal legal document that must be witnessed). The application must then be served on the Respondent. Where the Respondent is an individual, personal service is required. This means that vulnerable employees must find and face their employer, or hire a process server at a not-insignificant cost.

Compulsory mediation (where employers are compelled to attend) would greatly improve the efficient resolution of complaints and avoid the expense and delay of unnecessary court actions for small underpayments matters. There is currently no provision in the FW Act that obliges employers to attend mediations conducted by the FWO.

Ideally, the FWO would have powers to make binding determinations where mediation is unsuccessful, to further facilitate cost-effective and efficient resolution of entitlements disputes. For example, if an employer refuses to attend, the FWO should have the power to make an order in the Applicant's favour. This should similarly be the case in circumstances where there is a dispute – the FWO should be empowered to make a binding determination.

Similarly to the Financial Ombudsman Service (**FOS**), the Applicant should be able to determine whether or not they accept the binding determination. If they do not accept it, they retain the option of proceeding to Court. Importantly, the FWO should also be empowered to hold individual

directors jointly and severally liable for any amount owing, including penalties. Again, this will act as an incentive to resolve disputes sooner.

The FOS allocates a case owner to each matter within its jurisdiction. The case owner reviews the file and contacts each of the parties to clarify issues/request further information. The case owner will try and assist parties to resolve their issue, but if agreement cannot be reached, the FOS has the power to make a binding determination. As the FOS website explains:[20]

> *The Ombudsman or Panel will take into account all information provided by the parties during our investigation of the dispute, the law, any applicable industry codes of practice, as well as good industry practice...*
>
> *A Determination is a final decision on the merits of a dispute. There is no further "appeal" or review process within the Financial Ombudsman Service. An Applicant has the right to accept or reject the Determination within 30 days of receiving it (or within any additional time we have allowed). If the Applicant accepts the Determination, then it is binding on both parties. If the Applicant does not accept the Determination, it is not binding on the [Financial Service Provider] FSP and the Applicant may take any other available action against the FSP, including action in the courts*.

Depending on the matter, it will either be determined by the Ombudsman, or by a panel of three decision makers chaired by an Ombudsman.

The FWO's structure is different from that of the FOS (which is membership-based) and it is unlikely that the same approach could be adopted as it would involve the FWO making binding determinations as to legal entitlements, which is the role of the judiciary rather than the executive.

WEstjustice calls for a review of current FWO powers and processes, and recommends that powers be expanded to enable such determinations. This recommendation echoes the Senate Education and Employment References Committee's call for an independent review of the resources and powers of the FWO.[21]

Further, to promote the efficient resolution of disputes, WEstjustice is of the view that stronger enforcement by the FWO of the existing FW Act provisions relating to the provision of employee records, including seeking penalties, would promote greater compliance and more efficient resolution of disputes. We understand that significant resources are required to facilitate this, but without more effective law enforcement, employers will continue to act with impunity.

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[20] Financial Ombudsman Service Australia, *Dispute resolution process in detail* (2016) <https://www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail/ >

[21] Education and Employment References Committee, The Senate, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016), xiv, 278–283; 327–328.

3.2 Vulnerable Workers Bill proposals to improve the FWO's enforcement powers

While in the main we agree with the proposals to strengthen the FWO's evidence-gathering powers set out in the Vulnerable Workers Bill we wish to emphasise the need to protect vulnerable workers, particularly those on temporary working visas (as discussed in the Executive Summary).

We also suggest some additional reforms aimed at ensuring that wages claims are resolved efficiently and effectively without the need for Court.

3.3 WEstjustice's recommendations to improve FWO's enforcement powers

Recommendation Seven: Costs consequences for parties who refuse to engage with FWO
Make it clear that there will be costs consequences if an employer unreasonably refuses to participate in a matter before the FWO.
For details see Appendix One: Compilation of WEstjustice's drafting suggestions.

We propose to amend section 570(2)(c)(i) to refer to matters before the FWO as well as the FWC, and to amend section 682 in relation to Functions of the Ombudsman.

Recommendation Eight: FWO Assessment Notices for parties who refuse to engage
Where an employer refuses to participate in mediation, FWO issue an Assessment Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the Assessment Notice in the court proceeding. Where the applicant has an Assessment Notice, the applicant is taken to be entitled to the amounts specified in the assessment notice unless the employer proves otherwise. For details see Appendix One: Compilation of WEstjustice's drafting suggestions.

Subject to the views of the drafter, we propose to include a new section 717A to provide for the issue of assessment notices that:

- applies where an employer has failed to attend a mediation conducted by the FWO and an inspector reasonably believes that a person has contravened one or more of the relevant provisions, and
- requires the notice to include certain information (see drafting suggestions).

We also propose to include a new section 557B in Division 4 of Part 4-1 that will have the effect of reversing the onus of proof where an applicant has an assessment notice.

Appendix One: Compilation of WEstjustice's drafting suggestions

Proposed changes to the Vulnerable Workers Bill (VWB)
Schedule 1 – Amendments

Part 1 – Increasing maximum penalties for contraventions of certain civil remedy provisions		
Type of change	**Section**	**WEstjustice's drafting suggestions** (Subject to the views of the drafter)
Insert into VWB to add to new section FW Act	535	*Note: Section 557A provides that, in an application for a contravention of certain civil remedy provisions, a matter is taken to be as alleged by the applicant if the employer has not complied with regulation 3.42 (which obliges the employer to permit inspection or copying of records required to be made or kept under section 535) upon request by the applicant.* See Recommendation One for background information.
Insert into VWB to add new section to FW Act	557C	*(1) If:* *(a) in an application in relation to a contravention of a civil remedy provision referred to in subsection (2), any matter is alleged in respect of which the employer is required to make and keep records under section 535 of this Act; and* *(b) the employer has not complied with regulation 3.42 of the Fair Work Regulations 2009 upon request by the employee or former employee to whom the application relates,* *it is presumed that the matter is as alleged by the applicant, unless the employer proves otherwise.* *(2) The civil remedy provisions are the following:* *(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 amounts);* *(j) any other civil remedy provisions prescribed by the*

		regulations *(3) Subsection (1) does not apply where, despite all reasonable care having been taken by the employer, the employer is unable to comply with regulation 3.42 due to exceptional circumstances beyond the employer's control.* See Recommendation One for background information.

Part 2 – Liability of responsible franchisor entities and holding companies: Division 4A – Responsibility of responsible franchisor entities and holding companies for certain contraventions		
Type of change	**Section**	**WEstjustice's drafting suggestions** (Subject to the views of the drafter)
Add to VWB to repeal and substitute existing section in FW Act	550(2) Alternatively, or in addition to section 558B below.	*(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, promises or otherwise;* *(c) has conspired with others to effect the contravention; or* *(d) has been in any way, by act or omission, directly or indirectly concerned in the contravention; and* *(i) was a party to the contravention; or* *(ii) was knowingly concerned in the contravention; or* *(iii) failed to ensure that persons other than employees of the person are not exposed to contraventions of this Act arising from the conduct of the undertaking of the person.* *(3) For the purposes of subsection (2)(d)(iii) a person will not be involved in the contravention if that person took all reasonable steps, so far as reasonably practicable, to ensure that persons other than employees of the person are not exposed to contraventions of this Act arising from the conduct of the undertaking of the person.* *(4) For the purposes of subsection (3), steps include:* *(a) conducting independent compliance audits;* *(b) facilitating the making of complaints to the person; and* *(c) giving consideration to whether prices payable under contracts with the person are sufficient to enable the contract to be performed without contraventions of this Act.* *Note: For the purposes of subsection (2)(d)(iii) a person will form part of the conduct of the undertaking of a person if they, for the purpose of the business of his or her employer, perform work for a franchise of the person, or as part of a labour hire or supply chain arrangement entered into for the purpose of providing goods or services to the person.* See Recommendation Three for background.

Add to VWB to insert new section to FW Act	550A	*A person must ensure, so far as is reasonably practicable, that persons other than employees of the person are not exposed to contraventions of this Act arising from the conduct of the undertaking of the person. This is a civil remedy provision.* *Note: For the purposes of this subsection a person will form part of the conduct of the undertaking of a person if they, for the purpose of the business of his or her employer, perform work for a franchise of the person, or as part of a labour hire or supply chain arrangement entered into for the purpose of providing goods or services to the person.* See Recommendation Three for background.
Add to VWB to insert new section into FW Act	558AA	*A person who is responsible for a contravention of a civil remedy provision is taken to have contravened that provision.* See Recommendation Five for background information.
Alter VWB to insert new section into FW Act	558A(3)	*Meaning of franchisee entity, responsible franchisor entity and indirectly responsible entity* *(3): A person is an indirectly responsible entity if there is a chain or series of 2 or more arrangements for the supply or production of goods or services performed by a person (the worker); and* *(a) the person is a party to any of the arrangements in the chain or series and has influence or control over the worker's affairs or the affairs of the worker's employer; or* *(b) the worker forms part of the conduct of the undertaking of the person, including if they, for the purpose of the business of his or her employer, perform work as part of a labour hire or supply chain arrangement entered into for the purpose of providing goods or services to the person.* See Recommendation Three for background information. *Note that minor amendments will also need to be made to 558B(3), 558C and in Part 7 – application and transitional provisions. We do not provide drafting instructions for these minor amendments.*

Alter VWB to insert new section into FW Act	558B(2A)	*A person contravenes this subsection if:* *(a) an employer contravenes a civil remedy provision referred to in subsection (7) in relation to a worker; and* *(b) the person is an indirectly responsible entity for the worker; and* *(c) either* *a. the indirectly responsible entity or an officer (within the meaning of the Corporations Act 2001) of the indirectly responsible entity knew or could reasonably be expected to have known that the contravention by the employer would occur; or* *b. at the time of the contravention by the employer, the indirectly responsible entity or an officer (within the meaning of the Corporations Act 2001) of the responsible indirectly responsible entity knew or could reasonably be expected to have known that a contravention by the employer of the same or a similar character was likely to occur.* *Note: This subsection is a civil remedy provision (see this Part).* See Recommendation Three for background information.
Alter VWB to insert new legislative note into FW Act	558B(4)	*Note: Reasonable steps that franchisor entities, holding companies and indirectly responsible entities can take to show compliance with this provision may include: ensuring that the franchise agreement or other business arrangements require all parties to comply with workplace laws, providing all parties with a copy of the FWO's free Fair Work handbook, encouraging all parties to cooperate with any audits by FWO, establishing a contact or phone number for employees to report any potential underpayment or other workplace law breaches and undertaking independent auditing.* See Recommendation Six for background information.

Part 3 – Unreasonable requirements		
Type of change	**Section**	**WEstjustice's drafting suggestions** (Subject to the views of the drafter)
Alter VWB to repeal and substitute existing section in FW Act	325	*(1) An employer must not directly or indirectly require an employee, or prospective employee, to spend, or pay to the employer or another person, an amount of the employee's, or prospective employee's, money or the whole or any part of an amount payable to the employee, or prospective employee, in relation to the performance of work or employment, if:* *(a) the requirement is unreasonable in the circumstances; and* *(b) for a payment—the payment is directly or indirectly for the benefit of the employer or a party related to the employer.* *Note: This subsection is a civil remedy provision (see Part 4-1).* See Recommendation Two for background information.

Alter VWB to repeal and substitute existing in FW Act	326	*Unreasonable deductions for benefit of employer* *(1) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee, or prospective employee, in relation to the performance of work or employment, if the deduction is:* *(a) directly or indirectly for the benefit of the employer or a party related to the employer; and* *(b) unreasonable in the circumstances.* *(2) The regulations may prescribe circumstances in which a deduction referred to in subsection (1) is or is not reasonable.* *Unreasonable requirements to spend or pay an amount* *(3) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:* *(a) permits, or has the effect of permitting, an employer to make a requirement that would contravene subsection 325(1); or* *(b) directly or indirectly requires an employee, or prospective employee, to spend or pay an amount, if the requirement would contravene subsection 325(1) if it had been made by an employer.* *Deductions or payments in relation to employees under 18* *(4) A term of a modern award, an enterprise agreement or a contract of 2 employment has no effect to the extent that the term:* *(a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an 5 employee in relation to the performance of work or employment; or* *(b) requires, or has the effect of requiring, an employee, or prospective employee, to make a payment to an employer or another person;* *if the employee, or prospective employee, is under 18 and the deduction or payment is not agreed to in writing by a parent or guardian of the employee, or prospective employee.* See Recommendation Two for background information.
Alter VWB to repeal and substitute existing section in FW Act	327(b)	*(b) any amount that the employee, or prospective employee, has been required to spend or pay contrary to subsection 325(1), or in accordance with a 18 term to which subsection 326(3) applies, is taken to be a deduction, from an amount payable to the employee, or prospective employee, made by the employer otherwise than in accordance with section 324.* See Recommendation Two for background information.

Part 4 – Powers of the Fair Work Ombudsman		
Type of change	**Section**	**WEstjustice's drafting suggestions** (Subject to the views of the drafter)
Add to VWB to insert new section into FW Act	557B	*(1) If in an application in relation to a contravention of a civil remedy provision referred to in subsection (2), the Fair Work Ombudsman has issued an assessment notice to the employer in relation to the applicant, it is presumed that the employer owes the amounts specified in the notice to the applicant, unless the employer proves otherwise.* *(2) The civil remedy provisions are the following:* *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); and* *(f) section 305 (which deals with contraventions of equal remuneration orders).* See Recommendation Eight for background information.
Add to VWB to amend FW Act	570(2)(c)(i)	At the end of section 570(2)(c)(i) and the words *'or the FWO'* after 'FWC'. See Recommendation Seven for background information.
Add to VWB to insert new section into FW Act	682	1(ca) *make assessments of amounts owed by employers to employees.* See Recommendation Eight for background information.
Add to VWB to insert new section into FW Act	717A	***717A Assessment notices*** *(1) This section applies if:* *(a) an employer has by notice been invited to attend a conference conducted by the FWO;* *(b) the employer unreasonably refused to participate in that conference; and* *(c) the FWO reasonably believes that the employer has contravened one or more of the following:* *(i) a provision of the National Employment Standards;* *(ii) a term of a modern award;* *(iii) a term of an enterprise agreement;* *(iv) a term of a workplace determination;*

		(v) a term of a national minimum wage order; *(vi) a term of an equal remuneration order.* *(2) The FWO may give the employer a notice (assessment notice) that sets out:* *(a) the name of the employer to whom the notice is given;* *(b) the name of the person in relation to whom the FWO reasonably believes the contravention has occurred;* *(d) brief details of the contravention;* *(e) the FWO's assessment of the amounts that the person referred to in paragraph (c) above is owed by the person referred to in paragraph (a) above; and* *(e) any other matters prescribed by the regulations.* See Recommendation Eight for background information.