Australian Government
Department of Employment

Senate Education and Employment Legislation Committee

Inquiry into the

Fair Work Amendment

(Protecting Vulnerable Workers) Bill 2017

Submission of the

Department of Employment

April 2017

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Introduction

1. The Department of Employment welcomes the opportunity to make a written submission to the Senate Education and Employment Legislation Committee (the Committee) inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the Bill).

2. The Australian Government made an election commitment in May 2016 to protect vulnerable workers.[1] This was in response to several high profile cases of worker exploitation and a range of evidence indicating existing laws need to be strengthened to deter unlawful behaviour.

3. This Bill implements the Government's election commitment by introducing a range of provisions that, if passed, will more effectively deter unlawful practices including those that involve the deliberate and systematic exploitation of workers. It will also ensure that the Fair Work Ombudsman has adequate powers to investigate serious cases and deal with any deliberate obstruction of its investigations.

4. The Bill was introduced into the House of Representatives on 1 March 2017 and complements other measures the Government has taken to address worker exploitation, including increasing funding to the Fair Work Ombudsman ($20.1 million over four years), and establishing the Migrant Workers' Taskforce, chaired by Professor Allan Fels AO.

5. The exploitation of vulnerable workers has been examined in a range of reports, including:
   - the Senate Education and Employment References Committee report *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016 (the National Disgrace Report)[2];
   - two Fair Work Ombudsman reports: *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven*, April 2016 (the 7-Eleven Report)[3], and *A Report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, June 2015[4]; and
   - the Productivity Commission's *Productivity Commission Inquiry Report: Workplace Relations Framework*, No. 76, November 2015.[5]

6. Many more examples of worker exploitation have emerged subsequent to these reports, a number of which are associated with some of Australia's most recognised business brands. This suggests the problem is broader than the cases of 7-Eleven and the Baiada Group.

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[1] Liberal Party of Australia: *The Coalition's Policy to Protect Vulnerable Workers.* Available at: https://www.liberal.org.au/coalitions-policy-protect-vulnerable-workers

[2] Senate Education and Employment References Committee report *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016). Available at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education.../Report

[3] *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (April 2016) (the 7-Eleven Report). Available at: https://www.fairwork.gov.au/ArticleDocuments/763/7-eleven-inquiry-report.pdf.aspx

[4] *A Report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales* (June 2015). Available at: https://www.fairwork.gov.au/ArticleDocuments/763/baiada-report.pdf.asp

[5] Productivity Commission: *Productivity Commission Inquiry Report: Workplace Relations Framework*, No. 76 (November 2015). Available at: http://www.pc.gov.au/inquiries/completed/workplace-relations#report

7. Deliberate and systematic non-compliance with workplace laws is unacceptable in Australia. This non-compliance has a number of negative impacts, including denying workers the minimum wages and conditions to which they are entitled; undercutting law-abiding employers in the labour market and putting them at a competitive disadvantage; and damaging Australia's international reputation as a desirable place to visit and work.

Consultation

8. The Department undertook targeted consultation in developing the Bill between October 2016 and February 2017, including with:
   - employer and industry groups, unions, non-government organisations, and academics;
   - the Fair Work Ombudsman;
   - state and territory governments; and
   - the Committee on Industrial Legislation under the National Workplace Relations Consultative Council.

Changes to the *Fair Work Act 2009*

Key measures in the Bill

9. While the majority of employers do the right thing, recent cases have identified that existing provisions in the *Fair Work Act 2009* (Fair Work Act) have not been sufficient to deal with circumstances in which vulnerable workers have been exploited. Currently, unscrupulous employers who deliberately and systematically exploit workers either think there is little or no risk of being caught, or the penalties associated with being caught are low and are an acceptable cost of doing business. The Bill addresses a growing body of evidence that parts of the Fair Work Act need to be strengthened to protect vulnerable workers. The Department considers that these proposed amendments to the Fair Work Act will more effectively deter unlawful practices including those that involve the deliberate and systematic exploitation of workers, as well as increase the ability of businesses to compete on a level playing field.

11. The amendments will:
   - introduce a higher scale of penalties for 'serious contraventions' of prescribed workplace laws;
   - increase penalties for record-keeping failures;
   - introduce specific provisions that will make franchisors and holding companies liable for breaches of the Fair Work Act in their networks in certain circumstances;
   - expressly prohibit employers from unreasonably requiring their employees to make payments (e.g. demanding a proportion of their wages be paid back in cash); and
   - strengthen the evidence-gathering powers of the Fair Work Ombudsman to ensure that the exploitation of vulnerable workers can be properly investigated.

Higher penalties for serious contraventions of prescribed workplace laws

12. The Bill introduces a new category of 'serious contraventions' that will apply to any employer who deliberately and systematically contravenes certain payment and records-related provisions of the Fair Work Act. This will increase the penalties involving deliberate and systematic contraventions 10 times the current maximum amount to:
    - 600 penalty units for individuals ($108,000)[6]; and
    - 3,000 penalty units for bodies corporate ($540,000).

13. The need for stronger penalties to deter the exploitation of employees was highlighted in the National Disgrace Report, which noted that:

    "the current penalty regime under the Fair Work Act almost invites unscrupulous employers to treat the law with impunity. The current penalties on company directors under the Fair Work Act operate as the equivalent of a parking fine for some of the unscrupulous 7-Eleven franchisees, and directors of labour hire companies, who have built the systematic exploitation of visa workers into their business models."[7]

14. Higher penalties for serious contraventions of prescribed workplace laws are directed towards employers who have been found to have exploited employees in a deliberate and systematic way.

15. A contravention is more likely to be considered part of a systematic pattern of conduct if:
    - there are a number of contraventions of the Fair Work Act occurring at the same time;
    - the contraventions have occurred over a prolonged period of time or after complaints were first raised;
    - multiple employees are affected; and
    - accurate employee records have not been kept, and pay slips have not been issued, making alleged underpayments difficult to establish.

16. The factors listed above are intended to be indicative only, and a 'serious contravention' may still be established if one or more of these factors are not present. For example a pattern of systematic conduct may affect an individual or group of employees. Other factors may also be relevant, such as a failure to address complaints about alleged underpayments.

[6] If the Crimes Amendment (Penalty Unit) Bill 2017 passes both houses of Parliament, Commonwealth penalty units will increase from $180 to $210 on 1 July 2017.
[7] Senate Education and Employment References Committee's report *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016), p 324. Available at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education.../Report

Increasing maximum penalties for record-keeping and payslip failures

17. The Bill increases the maximum penalties for record keeping and payslip failures to bring them into line with other penalties in the Fair Work Act:
    - penalties for employers that fail to keep proper employee records and payslips will double to 60 penalty units for individuals ($10,800)[8] and 300 penalty units for bodies corporate ($54,000); and
    - penalties for keeping or making use of false or misleading employee records will triple to 60 penalty units ($10,800) for individuals and 300 penalty units ($54,000) for bodies corporate.

18. The current penalties in the Fair Work Act are, in many cases, too low to deter businesses which have manipulated records in order to disguise underpayments. This kind of conduct is unfair, unlawful and difficult to prove. The need to address this issue was noted in the 7-Eleven Report, which found that:

    "Maximum penalties for failure to keep or provide accurate records are often significantly less than the value of relevant underpayments, particularly if the conduct is longstanding. One may consider the financial incentive to breach the law to be greater than the deterrent effect of possible action by the Fair Work Ombudsman."[9]

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

20. The higher penalties are not intended to apply to genuine mistakes or errors. The Fair Work Ombudsman is required to act as a model litigant and must only bring proceedings in cases where penalties are appropriate. Courts also have discretion in determining penalties, and will reserve the highest penalties for the most serious cases.

Liability of franchisors and holding companies for underpayments

21. The Fair Work Act mostly regulates employment relationships, but there are other kinds of businesses which are in a position to influence or control employees' wages. Section 550 of the Fair Work Act currently extends responsibility to others 'involved in' a contravention (this is referred to as 'accessorial liability'). Under the accessorial liability provisions currently in the Act franchisors and holding companies with no knowledge of contraventions within their networks cannot be found to have been involved in the contraventions.

[8] If the Crimes Amendment (Penalty Unit) Bill 2017 passes both houses of Parliament, Commonwealth penalty units will increase from $180 to $210 on 1 July 2017.
[9] *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (April 2016) (the 7-Eleven Report), p 32. Available at: https://www.fairwork.gov.au/ArticleDocuments/763/7-eleven-inquiry-report.pdf.aspx

22. The Bill builds upon existing accessorial liability provisions in the Fair Work Act so that franchisors and holding companies can be held responsible for payment-related contraventions of the Fair Work Act, if they should have known about them and were in a position to prevent them. Accessorial liability should not be confused with the notion of "joint employment", in which an entity that does not employ a particular employee is deemed to have the same liability as the employing entity.

23. The new responsibilities will only apply to franchisors and holding companies that have a significant degree of influence or control over the franchisee's affairs and if the franchisee is substantially or materially associated with the franchise brand. A franchisor or holding company will not be held liable if it has taken 'reasonable steps' to prevent contraventions from occurring.

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

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

26. These provisions do not extend to or impose obligations on corporations operating completely outside of Australia. Companies that do not have any operations in Australia and have simply entered into a master franchisor or holding company relationship with an Australian company (even if the Australian company is a subsidiary of the foreign company) are not affected by these amendments.

27. A key intention of introducing specific franchisor and holding company liability provisions is to drive a culture of compliance from the top of the business network, regardless of the business structure that has been adopted. Appropriate workplace compliance controls can act as an investment in a corporate brand with the potential to create positive recognition of the brand in the community (a number of companies enter voluntary compliance partnership with the Fair Work Ombudsman for this very reason).

Expressly prohibiting 'cashback' scams

28. The Bill makes it clear that it is unlawful for employers to directly or indirectly require employees to give 'cashback' or pay any other amount of the employee's money if the requirement is unreasonable in the circumstances. In the 7-Eleven investigation, the Fair Work Ombudsman uncovered cases of employers (franchisees) paying their employees correctly through a payroll system, but later requiring them to hand back a portion of their wages in cash.[10] This is known as a 'cashback' arrangement.

29. While the Fair Work Ombudsman's investigation into 7-Eleven highlighted the 'cashback' practice, it is important to emphasise that this behaviour is not contained to the franchising sector. In recent years, there have been reports of this practice occurring across a range of business models.[11]

Stronger evidence-gathering powers of the Fair Work Ombudsman

30. The Fair Work Ombudsman is the workplace relations regulator and is responsible for ensuring compliance with national workplace relations laws. Fair Work Inspectors currently have a range of powers, including the power to enter premises in certain circumstances; inspect and make copies of documents; and require a person to produce a record or document and provide their name and address.[12] Unlike other Government agencies, such as the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission, the Fair Work Ombudsman does not have an enforceable power to require a person to answer questions.

31. This Bill strengthens the Fair Work Ombudsman's evidence gathering powers. These new provisions will:
    - enhance the Fair Work Ombudsman's ability to gather evidence where proper records do not exist or are being withheld; and
    - deter employers, employees and other witnesses from hindering or obstructing the Fair Work Ombudsman and Fair Work Inspectors in the exercise of their duties under the Fair Work Act.

[10] *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (April 2016) (the 7-Eleven Report), p 59. Available at: https://www.fairwork.gov.au/ArticleDocuments/763/7-eleven-inquiry-report.pdf.aspx

[11] For example, in February 2017 the Federal Circuit Court ordered a former Albury café owner and his company to pay penalties for, among other things, coercing two workers into paying back a portion of their wages. *Fair Work Ombudsman v Rubee Enterprises Pty Ltd & Anor* [2016] FCCA 3456. In the same month, the Fair Work Ombudsman commenced court proceedings against another café owner for allegedly requiring a worker to engage in a cash back scheme, Fair Work Ombudsman media release (15 February 2017). Available at: http://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/february-2017/20170215-robit-nominees-litigation-mr

[12] The principle powers of Fair Work inspectors are set out in ss 708-711 and 714-716 of the *Fair Work Act 2009*.

32. While the existing evidence-gathering powers are adequate in most cases, investigations can stall if there are no documents, and no-one wishes to speak to the Fair Work Ombudsman or Fair Work Inspectors. In its investigation of 7-Eleven, the Fair Work Ombudsman experienced a widespread lack of cooperation that hindered its ability to gather evidence about suspected breaches of workplace laws. Further, Fair Work Inspectors could not progress investigations into serious allegations when employment records didn't exist, were falsified or weren't forthcoming.[13]

33. Under the proposed new powers, the Fair Work Ombudsman will be able to give a person a 'Fair Work Ombudsman notice' if he or she reasonably believes that the person has information relevant to an investigation or is capable of giving evidence relevant to an investigation. This new power will enable the Fair Work Ombudsman to secure positive investigation outcomes where there is no paper trail, and no co-operation.

34. There will be appropriate safeguards on the exercise of these stronger powers, for example:
    - a notice can only be issued by the Fair Work Ombudsman personally or a delegate who is a Senior Executive Service member of staff;
    - a person must be given at least 14 days' notice before they can be required to give records, information or evidence;
    - evidence that is produced in response to an Fair Work Ombudsman notice cannot be used against the person who provided it in most criminal proceedings other than prosecutions of perjury-type offences; and
    - a person who is called to provide evidence has a right to legal representation and reimbursement for a range of expenses, including legal expenses.

35. These safeguards are standard for corporate regulators with similar powers, such as the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission.

36. The Bill also creates a new civil penalty for providing false or misleading information to the Fair Work Ombudsman or a Fair Work Inspector. Providing false or misleading information to Government officials is already a criminal offence under the *Criminal Code Act 1995 (Cth)*. The new provision will let the Fair Work Ombudsman directly enforce the law through civil rather than criminal proceedings.

Approach to implementation

37. The Department understands that business may be concerned about how the proposed laws will affect their operations and that vulnerable workers may still be worried about coming forward.

[13] *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (April 2016) (the 7-Eleven Report). Available at: https://www.fairwork.gov.au/ArticleDocuments/763/7-eleven-inquiry-report.pdf.aspx

38. For those businesses that set out to do the right thing there is nothing to fear. Business can expect the Fair Work Ombudsman to take a graduated approach to compliance and enforcement. Section 682 of the Fair Work Act requires the Fair Work Ombudsman to promote harmonious, productive and cooperative workplace relations by providing education, assistance and advice. One way this is implemented is through the Fair Work Ombudsman's Compliance and Enforcement Policy (the Policy).[14] The Fair Work Ombudsman encourages parties to self-resolve issues in the workplace where possible. A formal investigation is often not the best approach.

39. The Policy provides clear examples of the type of cases that might result in the Fair Work Ombudsman taking court action. This includes deliberate and/or repeated non-compliance, failure to cooperate and parties with a prior history of breaches who have not then taken adequate steps to ensure compliance in the future.

40. The Fair Work Ombudsman will also be an important source of education and advice on the new laws, and will ensure that all parties understand their obligations and are ready to comply. The Department encourages employers and franchisors and holding companies to seek out the services of the Fair Work Ombudsman by accessing its website at www.fairwork.gov.au or contacting its Small Business Helpline on 13 13 94.

41. The Government has also responded to concerns from employees and migrant worker advocates that assurance is needed in order to protect those who come forward to expose unscrupulous employers. The Department of Immigration and Border Protection and the Fair Work Ombudsman have agreed on a protocol for workers who may come forward to the Fair Work Ombudsman.[15] For temporary visa holders with a work entitlement attached to their visa who have reported their circumstances to the Fair Work Ombudsman, the Department of Immigration and Border Protection 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).

42. For any temporary visa holder who has no work entitlement, the Department of Immigration and Border Protection will make no commitment other than to consider the case on its merits. This measured approach balances risks to the integrity of Australia's migration programs with protecting migrant workers.

[14] *Fair Work Ombudsman: Compliance and Enforcement Policy. Available at:* http://www.fairwork.gov.au/about-us/our-vision/compliance-and-enforcement-policy
[15] Chair's Public Statement from the Migrant Workers' Taskforce (25 January 2017). Available at: https://www.employment.gov.au/chairs-public-statement-february-2017

Conclusion

43. In preparing this submission, the Department acknowledges that the majority of employers are doing the right thing and are compliant with Australia's workplace laws. For this majority, this Bill will have little effect on their existing practices. The unfortunate rise in cases of exploitation of often vulnerable workers has made it necessary for the Australian Government to propose amendments to the Fair Work Act. The Department considers that these proposed amendments, underpinned by evidence, strike the right balance between deterrence, penalties, increased liability for franchisors and holding companies, and increased investigative powers for the Fair Work Ombudsman to prevent exploitation in Australia's workplaces in the future.

44. The Department appreciates the opportunity to provide a submission to this inquiry and is available to discuss the submission at a hearing of the Committee.