SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

SUBMISSIONS REGARDING

FAIR WORK AMENDMENT (PROTECTING VULNERABLE WORKERS) BILL 2017

Prepared by the National Retail Association

6 April 2017

Executive Summary

1. The National Retail Association Limited (**NRA**) is a not-for-profit industry association that provides professional services and critical information and advice to the retail, fast food and broader service industries throughout Australia.

2. This submission of the NRA is made in response to the Senate Education and Employment Legislation Committee's inquiry in relation to the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (**Bill**) introduced to the House of Representatives on 23 March 2017.

3. The NRA acknowledges and supports the need to protect vulnerable workers and to hold account those persons who seek to exploit vulnerable workers, however, the NRA is opposed to numerous amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) as proposed by the Bill. Our submissions in that respect are outlined below.

Submissions

<u>Current scope of liability under 'accessorial liability' provisions</u>

4. The NRA submits that the current provisions relating to 'accessorial liability' under section 550 of the FW Act, sufficiently cover franchisor entities and holding companies that are the objects of the Bill's proposed amendments.

5. Section 550 of the FW Act states:

"(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."

6. The NRA submits that the current scope of liability within section 550 of the FW Act is sufficient and adequately addresses concerns relating to the investigation of entities such as 7-Eleven.

7. The NRA submits that the real concern coming out of the 7-Eleven inquiry report[1] is the Fair Work Ombudsman's (**FWO**) powers, or lack thereof, to obtain direct evidence in relation to an accessory's role in or knowledge of the business and the facts comprising a contravention. The 7-Eleven inquiry noted:

"Investigations in this Inquiry have been characterised by widespread lack of cooperation and creation of records that concealed rather than established contravening conduct. In this context evidence obtained can limit our capacity to investigate and establish accessorial liability beyond the direct employer/franchisee level."[2]

8. The 7-Eleven inquiry stated that it had been:

"…characterised by a large number of relevant witnesses being unwilling to talk to us on the record or provide evidence of the conduct of others. Anecdotal material and hearsay about what 'people' within 7-Eleven may have known at particular points in time may support a broad inference that 7-Eleven, or some of its people, knew or suspected that underpayments were occurring. However, an inference based on hearsay or speculation is not evidence. It does not demonstrate knowledge of specific contraventions by a specific franchisee, as required by section 550 of the FW Act."[3]

9. Unlike some regulators, the FWO does not currently have the capacity to require or compel a person to answer questions on the record in relation to alleged contraventions of workplace laws.[4]

10. The NRA is not opposed to the proposed amendments giving the FWO further and better powers to obtain information to allow the FWO to obtain direct evidence in relation to an accessory's role in or knowledge of the business and the facts comprising a contravention, with the accompanying immunity that generally flows to a witness.

11. The NRA, however, does not support any amendment or increase to the scope of persons

[1] A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven April 2016
[2] Ibid, paragraph 7.1.2, pages 72-73
[3] Ibid, paragraph 7.1.2, page 72
[4] Ibid

that would be held liable for the contravention/s by others, or to the increase of penalties where a contravention is found to have occurred.

12. The NRA submits that any amendment or increase to the scope of liability is unnecessary and broadens the objects of the legislation, and as such the NRA submits that the proposed Division 4A of Chapter 4 of the Bill be removed.

Effectiveness of a three limb test under the Bill

13. Alternatively, if the proposed amendments within Division 4A of Chapter 4 are not removed, the NRA submits the following:

    a. The 'responsible franchisor entity' definition under section 558A(2)(b) of the Bill should be limited or narrowed to include reference to the civil remedy provisions referred to in subsection 7 of the Bill (i.e. the person has a significant degree of influence or control over the franchisee entity's affairs in relation to the civil remedy provisions referred to in subsection 7). This narrows the scope of the legislation to those that have a significant degree of influence or control over the employment related practices of a franchisee.

    b. On this note, the NRA also submits that a first limb to the liability test be inserted for holding companies in a similar form to the franchisor test mentioned above at paragraph 13.a. The NRA submits that this inclusion be in the form of an additional requirement to section 558B(2), whereby a holding company is required to have a significant degree of influence or control over a subsidiary company's affairs in relation to the civil remedy provisions referred to in subsection 7 of the Bill.

    c. The NRA further submits that section 558B(4)(b) of the Bill relating to how 'reasonable steps' should be interpreted under the legislation be amended. The NRA submits that the word 'significant' be included in relation to a person's ability to influence or control a contravening employer's conduct (i.e. the extent to which the person had significant ability to influence or control the contravention referred to in subsections 558B(1)(a) or (2)(b) or a contravention of the same or similar character). This will again limit the scope of liability to those that have a real and enforceable ability to influence or control franchisees or subsidiary companies in relation to these issues.

d. Section 558B(6) of the Bill has the effect of imposing a primary liability on a responsible franchisor or holding company for a contravention by a franchisee or subsidiary entity irrespective of whether an order has been sought or made against the franchisee or subsidiary. The franchisor or holding company is not the primary employing entity and in the vast majority of cases, the NRA submits, are removed from the employment practices of franchisees and subsidiaries. The NRA submits that section 558B(6) of the Bill should be amended to define, and limit, a contravention by a franchisee entity or subsidiary, as referenced in subsections 558B(1)(a) and (2)(b), to mean where an order has been made against the franchisee entity or subsidiary under Division 2 for the contravention. In other words, a reference to a contravention in this context requires a successful prosecution and subsequent order being issued against the franchisee or subsidiary by the FWC.

Explanatory memorandum to the Bill

14. The NRA is particularly concerned that the Explanatory Memorandum to the Bill (**EM**) makes it clear that the Bill extends liability to the extent that a prosecution would not need to prove the responsible franchisor (or holding company as the case may be) knew exactly who was being underpaid and on what basis.[5] The EM states that the franchisor or holding company does not need to have actual knowledge that the franchisee or subsidiary has contravened the FW Act, it is enough that the franchisor could reasonably be expected to have known the contravention could occur or that a contravention of the same or a similar character was likely to occur.[6]

15. The EM, the NRA submits, seems at odds with the first limb of liability test outlined in section 558A(2)(b) of the Bill in regards to the requirement that a responsible franchisor entity have a significant degree of influence or control over the franchisee entity's affairs. The EM indicates that merely having some knowledge of contraventions within the industry or a contravention within the business would invoke the requirement to take 'reasonable steps' to avoid a contravention under the Bill.

16. The NRA submits that the 'reasonable steps' as explained within the EM, are unreasonably onerous on franchisors and holding companies, both in terms of costs and business confidence (eroding complex business relationships between franchisees and franchisors) as outlined below.

[5] Explanatory Memorandum to *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*, paragraphs 58-59
[6] Ibid, paragraphs 58-59

17. To this end, the NRA submits that the reference to *"auditing of companies in the network"* in the EM at paragraph 67 be removed completely, as it indicates that this would be a necessary reasonable step for franchisors and holding companies to take to ensure compliance with the FW Act.

18. In practical terms, this proposed onerous auditing requirement will have the effect of significantly adding to a franchisor and holding company's administration costs and would be a major burden on their resources.

Significant costs to NRA members

19. Many retailers and fast food entities that would be captured by the Bill in its current form simply do not have the financial or personnel resources for a finance or audit division.

20. The NRA submits that imposing an expectation of this kind is not sustainable or affordable for many businesses. In some cases members have informed the NRA that they would be required to reroute funding from core services focused on keeping businesses open or reduce staff levels to provide an auditing and other 'watchdog' type services (i.e. taking reasonable steps to prevent a contravention by a separate legal entity within their franchise or company framework). All of these activities, the NRA submits, will not grow business, innovate or support market competitiveness.

21. This increased regulatory burden and added compliance costs come at a time when the franchising industry has not shown a net increase in business units over the past two years.[7] A report by Griffith University and the Franchising Council of Australia (**Report**)[8] indicates that sales turnover for the entire franchising sector was estimated at $146 billion in 2016 compared with $144 billion in 2014.[9] Added to this is the ever increasing costs of business. The Report indicates that the total start-up cost for a new retail franchise unit was $287,500 compared to $59,750 in a non-retail franchise.[10] This included an initial franchise fee of $31,500 in retailing compared to $28,000 in non-retail franchises.[11] The costs associated with auditing of franchisees, and subsidiaries, will only add to those costs and reduce the every shrinking bottom line.

[7] Franchising Australia 2016, Griffith University and Franchise Council of Australia Report 2016, page 6
[8] Franchising Australia 2016, Griffith University and Franchise Council of Australia Report 2016
[9] Ibid, page 6
[10] Ibid, page 7
[11] Ibid, page 7

22. The burden of taking reasonable steps to prevent a contravention by a franchisee or subsidiary imposed on a franchisor and holding company will:

    a. Potentially be passed through to franchisees through increased franchise license fees, product pricing or royalty fees being payable by the franchisee. This will inevitably place further pressure on the financial viability of franchisees, creating the potential for even more pressure on franchisees to reduce labour costs; and

    b. Create a disincentive to franchisors operating under a franchise model in the longer term, thus reducing the opportunity for small business to gain access to this operating model, and in turn to employ their own workforce.

Taking reasonable steps to prevent contravention - risks

23. NRA members have expressed concern that the requirement under the Bill to avoid liability by taking reasonable steps to prevent a contravention by a franchisee or subsidiary, as the case may be, opens the door to an argument that by taking such action the franchisor or holding company is in fact exercising a significant degree of influence or control over the franchisee's or subsidiary's affairs thereby exposing the franchisor or holding company to liability and risk for any franchisee or subsidiary contraventions.

Conclusion

24. The Bill is effectively seeking to hold franchisors and holding companies as guarantors over the employment and payroll practices of separate legal entities and, in the case of franchisees, unrelated third parties.

25. That said, the NRA whole heartedly supports the holding to account of those persons who exploit vulnerable workers. However, the Bill, whilst with the best intentions, is unnecessarily holding to account the entire franchising industry (and holding companies) for the unscrupulous acts of an overwhelming minority of rogue entitles in circumstances where the FW Act already has adequate protections in place – albeit acknowledging that modifications are required in respect of the FWO's powers to investigate suspected contraventions.