



6 April 2017

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

eec.sen@aph.gov.au

Dear Sir/Madam,

Senate Inquiry into Fair Work Amendment - Protecting Vulnerable Workers Bill (2017)

Reference is made to the Inquiry being conducted by the Senate Standing Committee on Education and Employment Legislation relating to the draft *Protecting Vulnerable Workers Bill (2017)*.

Below please find ACAPMA's submission to the Inquiry

Our feedback comprises some information about ACAPMA (Section 1), some general comments on the proposal (Section 2) and specific concerns relating to the draft legislation (Section 3).

1. About ACAPMA

The Australasian Convenience and Petroleum Marketers Association (ACAPMA) is the national peak body representing the interests of the petroleum distribution and petrol convenience retail industry. The Association is first and foremost an employer organisation that is formally recognised under Australian law as the industrial advocate for fuel marketing and fuel distribution businesses.

First established in 1976, the Association started operations as the Australian Petroleum Agents and Distributors Association (APADA) and subsequently changed its name to ACAPMA in 2007. The name change was accompanied by a change in the Association's Constitution to incorporate national representation of fuel retailers.

Today, the Association directly represents 95% of fuel distributors in the country and directly and indirectly (via franchisees and distributor-owned retailers) around 4800 of the 6400 service stations operating in Australia.

The scope of ACAPMA's membership extends from 'refinery gate' through to the forecourt of Australia's national network of service stations and petrol convenience outlets – including fuel wholesale, fuel distributors, fuel retailers, petroleum equipment suppliers and petroleum service providers.

ACAPMA's member businesses range from Australian-owned subsidiaries of international companies, to Australian-owned businesses, to independently owned mid-cap Australian companies, and small single retail site family-owned businesses.

As such, our membership comprises both *franchisors* and *franchisees*.

2. General comments

ACAPMA has an unequivocal commitment to ensuring that workplaces in the Australian Industry and both fair and compliant.

As a peak employer body, our Association seeks to work proactively with workplace regulators to ensure that all reasonable measures are taken to ensure that wages within the industry are paid in strict accordance with the law.

That said, we are extremely concerned about the measures being proposed under the Fair Work Amendment (*Protecting Vulnerable Workers Bill 2017*) that was tabled in the Australian House of Representatives on 1 March 2017.

This concern is premised in two principal observations, namely:

1. Breaches of employment law in Australia are not systemic in the small business sector, but there is nonetheless a need to ensure better compliance, given that wage non-compliance brings broader problems in Australian society, including:
 - a) A failure in our national responsibility to protect vulnerable workers, including: migrant workers. Woman and youth.
 - b) Distorting competition where businesses paying legal wages are at a disadvantage to those businesses who are not
 - c) Under-employment of youth leading to the creation of broader social problems in our communities
2. The key to resolving this issue requires a comprehensive approach that makes it easier for small business to comply by:
 - a) Reducing the compliance burden by simplifying the laws that apply to small business, possibly via the development of a Small Business Employment Award
 - b) Helping small businesses to understand what is expected of them – from start up to maturity

- c) Improving the level of trust between small business and regulators via improved education and engagement, possibly via the use of third parties such as Industry Bodies
- d) Reducing the pressures on business cashflow by reducing the substantial culture of late payment in Australia
- e) Advancing new regulation as a 'last resort', targeting only those businesses that are deliberately flouting the law.
- f) Addressing issues associated with the operation of the Black Economy in Australia

ACAPMA believes that the proposed legislation constitutes a gross overreach by the Australian Government given recent legislative and regulatory developments since the 7 Eleven issue was identified in March 2016.

Further, we believe that the proposed legislation will have serious and unintended commercial and financial consequences for the large number of franchise and agency agreements that are used within the national fuels retail industry.

3. Specific comments

3.1 Any decision to make Franchisors directly responsible for the illegal actions of franchisees in unjust and apparently contravenes the core principals of common law by making an 'unrelated third-party business' (i.e. the Franchisor) liable for the actions of a separate and discrete legal entity (i.e. the Franchisee

ACAPMA believes that the proposed laws set a new and dangerous precedent by making a Franchisor business legally responsible for the employment actions of a separate Franchisee business.

Our understanding is that Australian Corporations Law considers *Franchisor* and *Franchisee* businesses to be distinct legal entities. Accordingly, ACAPMA considers a franchisor to be an 'unrelated third party' that cannot reasonably be held accountable for the regulatory behaviour of a franchisee.

3.2 The proposed legislation threatens the future viability of the longstanding commercial operation of franchisee agreements around Australia, potentially resulting in destruction of many small, family-owned businesses.

Franchisee arrangements are typically used where a franchisor is seeking to grow value by creating business opportunities for unrelated businesses- many of them being small, independently owned small businesses.

Making franchisors liable for breaches of employment law challenges the longstanding commercial paradigm under which Franchisee agreements are offered in the Australian economy, potentially setting a precedent for franchisors to be held accountable for breaches of other laws by franchisees in areas such as safety and environmental compliance. If passed, the net effect of these laws will be to force a redesign of the commercial arrangements that exist between franchisors and franchisees.

The potential consequences of such action could result in small business destruction (because of franchisors electing not to use the franchise model for fuel retail in the future) and/or a significant cost being placed on franchisees by the franchisor as a means of managing what would effectively be an outsourced liability.

Within the fuel industry, where franchisees largely set fuel prices independent of the franchisor, it is also possible that this action could result in a significant lessening of fuel price competition for Australian motorists.

3.3 The proposed legislation is not considered necessary in the face of recent developments in employment enforcement and new Unfair Contract Laws

ACAPMA believes that the proposed legislation is unnecessary or, at the very least, premature.

Since the emergence of the highly publicised 7 Eleven issue in March of last year, the Australian Government has established both Task Force Cadena and the Migrant Workers Taskforce that comprise a multi-agency approach to the future detection of wage underpayment and exploitation of migrant workers.

These two monitoring and enforcement mechanisms are less than 12 months old and their effectiveness in addressing wage fraud in the future – particularly in relation to the employment of migrant workers – remain unknown.

Within this context, the passing of the Vulnerable Workers Bill (2017) appears premature.

It is also suggested that, where a franchisee may feel compelled to pay below award wages because of a franchise agreement that is economically unsound, the new Fair Contracts Laws provide a legally valid mechanism for the potential transmission of liability to the franchisor.

Accordingly, making the franchisor explicitly liable for employment breaches by the franchisor is considered to unnecessary now.

3.4 The proposed laws are not considered proportionate to the nature of the current problems.

While ACAPMA acknowledges that wage underpayment is a significant social and competitive issue within our industry, we believe that the clear majority of businesses are doing the right thing.

Given the fact that the proposed laws will potentially adversely impact the future of many businesses operating within the Australian retail fuels industry, to address the small number of businesses that are doing the wrong thing, the proposed laws are considered wholly disproportionate to the scale of the problems observed.

ACAPMA believes that a more prudent approach would be to increase the resources available to key enforcement bodies (i.e. Fair Work Commission and Fair Work Ombudsman) to support the increased enforcement of existing laws.

4. Summary

ACAPMA wholly supports the Government in its desire to address incidences of wage underpayment within Australian Industry, including the retail fuels industry.

ACAPMA believes, however, that such actions should be proportionate to the scale of the issue and should not result in increased commercial and financial risk for the large number of franchisees that are obeying Australian employment law.

Accordingly, we propose that the draft Protecting Vulnerable Workers Bill (2017) be deferred until the efficacy of recent enforcement initiatives (i.e. Task Force Cadena and the Migrant Workers Task Force) and the new Unfair Contracts Laws in driving increased workplace compliance are properly assessed.

Should you require clarification of any of the matter raised in this submission, please contact me directly.

Yours sincerely,

Mark McKenzie
Chief Executive Officer

