Chapter 3

Liability of franchisors and holding companies

3.1 This chapter focuses on matters relating to the liability of responsible franchise entities and holding companies as proposed in Part 2 of Schedule 1 of the bill.

Current framework

3.2 Workplace rights and obligations provided under the Fair Work Act and the Fair Work instruments are confined to the direct relationship between an employer and employee. In the franchising context, the franchisee is the direct employer of labour. As such, it is the franchisee who has obligations to its employees and who is responsible for compliance with workplace laws.[1]

3.3 However, under certain circumstances the Fair Work Act extends legal responsibility to persons beyond the direct employer, where persons are 'involved in' a contravention. This is referred to as accessorial liability.[2]

3.4 The relevant section of the Fair Work Act is as follows:

> **550 Involvement in contravention treated in same way as actual contravention**
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> (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
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> 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.[3]

3.5 Under the Fair Work Act's current accessorial liability provisions, franchisors and holding companies with no knowledge of contraventions within their networks cannot be found to have been 'involved in' the contraventions.[4]

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1 Fair Work Ombudsman, *Submission 4*, p. 10.

2 Department of Employment, *Submission 1*, p. 6.

3 *Fair Work Act 2009*, s. 550.

4 Department of Employment, *Submission 1*, p. 6.

Proposed amendments

3.6 The bill amends the Fair Work Act to insert new provisions to hold 'responsible franchisor entities' (i.e. franchisors) and holding companies responsible for payment-related contraventions of the Fair Work Act by businesses in their networks if they knew, or could reasonably be expected to have known, that the contraventions would occur, or that contraventions of the same or similar character were likely to occur. The new provisions supplement, not override, the existing accessorial liability provisions contained in section 550.[5]

3.7 The EM summarised the aim of the amendments as such:

> Some franchisors and holding companies have established franchise agreements and subsidiaries in their corporate structure that operate on a business model based on underpaying workers. Some have either been blind to the problem or not taken sufficient action to deal with it once it was brought to their attention.
>
> Recent highly publicised cases of exploitation of vulnerable workers, including by 7-Eleven franchisees, demonstrate more needs to be done by franchisors and holding companies to protect vulnerable workers employed in their business networks. [6]

3.8 The expanded accessorial liability provisions in the bill only apply to responsible franchisor entities which have 'a significant degree of influence or control' over the relevant franchisee's affairs.[7] In this context, 'control relates to the affairs of the franchisee or subsidiary broadly, not only as to minor matters that would not have any impact on the management and operational decisions of the business'.[8]

3.9 A franchisor or holding company will not be held liable if it has taken 'reasonable steps' to prevent contraventions from occurring.[9]

3.10 Importantly, the new provisions do not displace the obligations of employers to continue to comply with Australian workplace laws, nor do they introduce joint employment arrangements.[10]Joint employment arrangements occur when an entity

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5 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 6.

6 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 6.

7 Proposed subsection 558A(2), Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

8 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 6.

9 Proposed section 558B, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017. See also Department of Employment, *Submission 1*, p. 7.

10 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 6.

that does not employ a particular employee is deemed to have the same liability as the employing entity.[11] As the Department of Employment submission clarified:

> 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.[12]

3.11 This point was reinforced by Professor Andrew Stewart, a specialist in employment law and workplace relations at the University of Adelaide:

> In my view it [the bill] does not impose joint liability at all, for two reasons. Firstly, it does not purport to make a franchisor or a parent company responsible right from the time someone is hired for the provision of employment entitlements. It is not, for example, saying, where a person is hired to work for a franchisee, that the franchisor and the franchisee—where the franchisee is actually the employer—are jointly liable to ensure that that worker is paid correctly. That is what joint liability is. The bill does not even come close to proposing that…
>
> There will never be double recovery there, so you cannot have a situation where an employee gets paid twice; that could never happen. There might be a situation where penalties are imposed both on the franchisee and on the franchisor, but that conceptually is no different from the current act, which allows for the imposition of penalties simultaneously on both an employer and a person knowingly involved in an employer's breach, such as a director, a manager or an external adviser. So to me the argument about joint liability being imposed is misconceived.[13]

3.12 The new provisions do not extend to impose franchisor obligations on corporations operating completely outside of Australia. For example, a company that does not have any operations in Australia and which has 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) will not be affected by the amendments.[14]

3.13 The FWO outlined its support for the amendments:

> The proposal to include specific provisions to impose liability on the key class of franchisors and holding companies, who have knowledge of issues in their network or subsidiary companies and fail to take reasonable steps to address them, will facilitate compliance in franchise networks by those who

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11 Department of Employment, *Submission 1*, p. 7.

12 Department of Employment, *Submission 1*, p. 7.

13 Professor Andrew Stewart, private capacity, *Proof Committee Hansard*, 12 April 2017, p. 17.

14 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 6. See also Department of Employment, *Submission 1*, p. 7.

> have a real capacity to influence or control. It reinforces the 'moral and ethical responsibility' that the FWO has been emphasising established brands should be taking. The provisions would provide the FWO with an additional lever to pursue non-compliance and recover underpayments.[15]

3.14 The FWO also emphasised that it would take steps to educate franchisors, franchisees and their employees about any new obligations introduced by the bill:

> The Explanatory Memorandum notes that the proposed requirement in the bill provides flexibility to franchisors and holding companies in deciding what steps to take to support compliance. This is consistent with the tailored advice that the FWO already provides for franchisors, which can be scaled up or down depending on the type and sophistication of the franchise network. The FWO recognises that a one-size-fits-all approach to compliance is not appropriate and is contrary to the intention of the bill.[16]

Adequacy of current framework—the Yogurberry case

3.15 Some submitters claimed that the existing accessorial liability provisions contained in the Fair Work Act were more than adequate to address any compliance problems arising within franchises. These submitters pointed to the FWO's successful civil remedy litigation against the franchisor of the Yogurberry chain[17] as evidence for this argument.[18]

3.16 However, the committee received evidence from several inquiry participants rebutting this argument and emphasising that the decision in the Yogurberry case had to be viewed in context.[19]

3.17 The Yogurberry case involved the exploitation of four Korean backpackers (working on subclass 417 Working Holiday visas) employed by a Yogurberry franchise in Sydney. A FWO investigation uncovered underpayments, unlawful deductions from wages, and various pay slip and record-keeping failures.[20]

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15 Fair Work Ombudsman, *Submission 4*, p. 14.

16 Fair Work Ombudsman, *Submission 4*, p. 15.

17 See *Fair Work Ombudsman v Yogurberry World Square Pty Ltd [2016] FC 1290*.

18 See Franchise Council of Australia, *Submission 9*, pp. 19–21; Australian Industry Group, *Submission 5*, p. 4; Mr Bruce Billson, Executive Chair, Franchise Council of Australia, *Proof Committee Hansard*, 12 April 2017, p. 36; Ms Dominique Lamb, Chief Executive Officer, National Retail Association, *Proof Committee Hansard*, 12 April 2017, p. 48.

19 See Fair Work Ombudsman, *Submission 4*; Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26;* Mr Trevor Clarke, Director, Legal and Industrial, Australian Council of Trade Unions, *Proof Committee Hansard*, 12 April 2017, p. 19; Professor Andrew Stewart, private capacity, *Proof Committee Hansard*, 12 April 2017, pp. 18–19; Ms Natalie James, Fair Work Ombudsman, Proof Committee Hansard, 12 April 2017, pp. 73–74.

20 Fair Work Ombudsman, *Submission 4*, p. 11.

3.18 Dr Tess Hardy and Dr Joo-Cheong Tham, academics at the Melbourne Law School specialising in employment and labour law, pointed out that the circumstances of the Yogurberry case were unique and did not necessarily reflect the typical business format of franchise arrangements. In the Yogurberry litigation, the putative employer (the franchisee which operated the relevant store) and the head franchisor were part of a group of complex companies controlled by various members of the same family. Dr Hardy and Dr Tham emphasised that this 'corporate nexus, overlaid with close family connections' was not generally present in the majority of franchise networks, and as such the decision of the Federal Court of Australia was confined to its facts.[21]

3.19 Finally on the Yogurberry case, the committee notes comments from the ACTU's representative about limited nature of the precedent it may set:

> I simply observe that those who click on the link and read the case will see it was actually a judgement by consent, where liability was admitted, including the liability of the accessories. Not to take any credit away from the Fair Work Ombudsman for resolving the matter, but to suggest that it is some outstanding legal precedent that every court will follow is a bit rich.[22]

Submitter views

3.20 The committee received submissions from a number of inquiry participants voicing opinions on the expanded accessorial liability provisions.

3.21 The Franchise Council of Australia (FCA) was among the most vocal opponents of the expanded accessorial liability provisions proposed in the bill. The FCA argued that the bill unfairly targets franchising as a business model, and that if enacted without significant amendments, would result in a reduction in franchising activity, growth and investment in Australia.[23]

3.22 The FCA submission summarised its opposition to the bill as follows:

> It is unsafe to presume that there is a single model of franchising and that high profile cases are typical of the commercial arrangements between two separate businesses that characterises the franchisor-franchisee relationship.
>
> A minority of franchise systems have control, exercise direction, impose workplaces relations policies and practices or have a line-of-sight over Fair Work Act compliance matters. To mandate this change would be to force business models to be varied for regulatory convenience against the commercial judgement of the contracting parties.[24]

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21 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, pp. 7–8.

22 Mr Trevor Clarke, Director, Legal and Industrial, Australian Council of Trade Unions, *Proof Committee Hansard*, 12 April 2017, p. 19.

23 Franchise Council of Australia, *Submission 9*, p. 6.

24 Franchise Council of Australia, *Submission 9*, p. 6.

3.23 Groups representing employers and franchisors either indicated support for the content of the FCA submission, or raised similar or related concerns. These groups included:

- the Australian Industry Group (Ai Group);
- Australia Post;
- the Asia-Pacific Centre for Franchising Excellence;
- the Federal Chamber of Automotive Industries (FCAI);
- the Australian Lottery and Newsagents Association (ALNA);
- the Housing Industry Association (HIA);
- the Australasian Convenience and Petroleum Marketers Association (ACAPMA);
- the Franchise Advisory Centre;
- BlueRock Partners;
- the Australian Fleet Lessors Association (AFLA);
- the International Franchise Association (IFA);
- the Australian Chamber of Commerce and Industry (ACCI);
- Queensland Law Society (QLS); and
- the National Retail Association (NRA).

3.24 The Ai Group stated that the bill as drafted would discourage investment in franchise businesses, and recommended that the proposed Division 4A (responsibility of responsible franchisor entities and holding companies for certain contraventions) be deleted from the bill entirely. The Ai Group also stated that the expanded accessorial liability provisions would lead to franchises restructuring their business and terminating their relationships with franchisees.[25]

3.25 Similarly, the ACPAMA argued that the bill would fundamentally change the framework within which franchisee agreements were made in Australia:

> 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 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.[26]

25 Australian Industry Group, *Submission 5*, pp. 1–2.

26 Australasian Convenience and Petroleum Marketers Association, *Submission 16*, p. 4.

3.26 Submitters also raised concerns with the costs of any new compliance obligations. For example, Australia Post argued that the cost of compliance with the bill would impact the financial performance of the company and its licensees, which would be reflected in general cost increases.[27] The Ai Group stated that the bill may lead franchisors into believing that they needed to establish extensive auditing, training and other systems to ensure compliance by franchisees, with these substantial costs then being passed on to franchisees.[28] Additionally, the NRA argued that many retailers and fast food entities captured by the bill would simply not have the financial or personnel resources available to ensure compliance.[29]

3.27 Submitters also emphasised that the broad reach of the expanded accessorial liability provisions may have negative, unintended consequences. For example, ACCI stated:

> The significant scope for liability pursuant to the bill's terms does create some risk that businesses will restructure their affairs in such a way that they are not captured by the provisions. For franchisors this may see a withdrawal of support of the nature that could give rise to a finding of influence and control. Other organisations may elect to conduct their operations completely outside Australia. The extent and likelihood of such risk is difficult to gauge however it would likely be mitigated if the extent of liability for franchisors and holding companies was contained to better reflect the types of practices that gave rise to the bill.[30]

3.28 7-Eleven stated that although it supported a degree of increased franchisor responsibility, it noted it still had some concerns about the provision. For example, its submission noted that an assessment of what a franchisor ought to be reasonably expected to have been known (about a contravention committed by a franchisee) would inevitably occur with the benefit of hindsight.[31]

3.29 Other submitters indicated support for the expanded accessorial liability provisions (or at the very least, the broad aims of the provisions), and some also recommended amendments designed to improve the effectiveness or increase the scope of the provisions. These submitters included:

- Dr Hardy and Dr Tham;
- Maurice Blackburn Lawyers (Maurice Blackburn);
- Independent Contractors Australia (ICA);
- the Australian Council of Trade Unions (ACTU);

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27 Australia Post, *Submission 34*, p. 4.

28 Australian Industry Group, *Submission 5*, p. 2.

29 National Retail Association, *Submission 7*, p. 6.

30 Australian Chamber of Commerce and Industry, *Submission 5*, p. 14.

31 7-Eleven, *Submission 28*, p. 3.

- JobWatch;
- Uniting Church in Australia (Synod of Victoria and Tasmania); and
- WEstjustice.

3.30 In particular, submitters raised concerns with proposed section 558A (relating to the meaning of 'franchisee entity' and 'responsible franchisor entity') and proposed section 558B (relating to the responsibilities of 'responsible franchisor entities' and 'holding companies' for certain contraventions).[32]The chapter will now examine matters surrounding each of these proposed sections in turn.

The meaning of 'franchisee entity' and 'responsible franchisor entity'[33]

3.31 The FCA raised concerns with the definitions used in the bill of key terms relating to franchises. The FCA argued that using an 'obscure' and 'inappropriate' definition of franchising taken from the *Corporations Act 2001* would lead to ambiguity and regulatory overreach, and instead advocated for the definitions to be based on those in the Franchising Code of Conduct (Franchising Code).[34]

3.32 The FCA outlined the impacts of the definitions as currently proposed in the bill:

> The consequence is that there will be many business caught by the legislation that do not currently see themselves as a franchise. It would seem that there will also be franchise agreements caught by the current Franchising Code of Conduct definition that will not be covered. This creates substantial additional compliance costs, as a business needs to consider afresh whether it is or is not a franchise for the purposes of the Fair Work Act.[35]

3.33 Submissions from BlueRock Partners, AFLA, Australia Post, HIA, QLS, and FCAI raised similar concerns about the inappropriate definitions in the bill and made recommendations to align the definitions with those in the Franchising Code.[36]

3.34 WEstjustice submitted that the definition of 'responsible franchisor entity' should be widened as the current definition was too limited in scope. It suggested that a new definition could be drafted modelled on the Franchising Code.[37]

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32 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, pp. 7–8.

33 Proposed section 558A, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

34 Franchise Council of Australia, *Submission 9*, pp. 22–23.

35 Franchise Council of Australia, *Submission 9*, p. 22.

36 See BlueRock Partners, *Submission 21*, pp. 2–3; Australian Fleet Lessor Association, *Submission 23*, p. 3; Australia Post, *Submission 34*, pp. 3, 5; Housing Industry Association, Submission 10, pp. 5–6; Queensland Law Society, *Submission 30*, p. 3; Federated Chamber of Automotive Industries, *Submission 13*, p. 2

3.35 The committee also received evidence raising concerns with the proposed wording in section 558A(2)(b). The FCA argued that the use of the word 'affairs' was unnecessarily broad and that it created a connection that went beyond the stated intent of the bill:

> The connection between a franchisee and a franchisor is made by a new definition of 'responsible franchisor entity' in section 558A(2), with the requisite connection being 'the person has a **significant degree of influence** or control over the franchisee entity's **affairs**'.
>
> This connection goes beyond the stated intent of the law, and will catch many franchise systems where the franchisor has no capacity to control or direct workplace relations matters.[38]

3.36 The FCA recommended that the phrase 'workplace terms and conditions' be used instead of 'affairs'.[39]

3.37 Similarly, BlueRock Partners, who act for and on behalf of numerous franchisors and franchisees, stated that that requisite connection between a franchisee and a franchisor for the purposes of the amendments 'cast a wider net than is necessary':

> In particular, we consider that control should not be made with reference to the 'affairs' of the franchisee, rather, it should reflect the subject matter that the bill seeks to regulate – employment.[40]

3.38 BlueRock Partners emphasised that the effect of the provision as currently drafted would be to penalise franchisors that did not exercise control over the employment affairs of their franchisees, but did exercise control in other areas. BlueRock Partners underlined that this situation was quite common amongst smaller franchises, and highlighted that according to the FCA, 95 per cent of franchisors were small businesses.[41]

3.39 To combat this, BlueRock Partners recommended that the term 'affairs' be replaced with the phrase 'employment matters' or similar.[42]

3.40 The QLS also raised concerns about the breadth of the term 'affairs', and proposed 'workplace terms and conditions' as an alternative to ensure that the policy intent of the bill was not misinterpreated. It cautioned :

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37 WEstjustice, answers to questions on notice, 12 April 2017, p. 3 (received 26 April 2017).

38 Franchise Council of Australia, *Submission 9*, p. 24. Emphasis in original.

39 Franchise Council of Australia, *Submission 9*, p. 24.

40 BlueRock Partners, *Submission 21*, p. 3.

41 BlueRock Partners, *Submission 21*, pp. 3–4.

42 BlueRock Partners, *Submission 21*, p. 4.

> We are advised that the Fair Work Ombudsman suggested at a National Franchise Conference in Canberra in October 2016 that a franchisor that controls the use of its trademarks or how to make products or services would, in her view, have the ability to influence a franchisee's compliance with workplace legislation. Again, we urge caution against creating liability for those who are not in any way responsible for workplace terms and conditions.[43]

The responsibilities of 'responsible franchisor entities' and 'holding companies' for certain contraventions[44]

3.41 Although acknowledging that section 558B of the bill constituted an improvement on the existing accessorial liability provisions, Maurice Blackburn noted that the section had several shortcomings which undermined the effectiveness of the bill as a mechanism for extending liability to franchisors and holding companies.[45]

3.42 For example, the liability imposed by section 558B is attached only to a franchisor categorised as a 'responsible franchisor entity', defined in the bill as a franchisor that has a significant degree of influence or control over the franchisee entity's affairs. Maurice Blackburn raised concerns that this may encourage the construction of 'arms-length' franchise arrangements which work to create the appearance that the franchisor does not have the requisite influence or control.[46]

3.43 Maurice Blackburn also observed that proposed subsection 558B(3) entitles a responsible franchisor to escape liability if they took 'reasonable steps' to 'prevent' a contravention:

> The factors set out in s 558B (4) are productive of template 'tick-a-box' or 'checklist' compliance, whereby a franchisor:
>
> - designs its arrangements (e.g. the contract between the franchisor and franchisee) to minimize the perception of its ability to influence or control a franchisee; or
> - simply provides pro-forma information on the obligations imposed on the franchisee by civil remedy provisions but in reality takes no substantial measures to ensure compliance.[47]

3.44 Additionally, Maurice Blackburn identified that in a temporal sense, the 'reasonable steps' test may render irrelevant the issue of whether or not a franchisor has taken action to address a contravention, once it becomes aware of the contravention:

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43 Queensland Law Society, *Submission 30*, p. 4.

44 Proposed section 558B, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

45 Maurice Blackburn Lawyers, *Submission 24*, pp. 3–4.

46 Maurice Blackburn Lawyers, *Submission 24*, p. 4.

47 Maurice Blackburn Lawyers, *Submission 24*, p. 4.

> The word 'prevent' suggests that the franchisor need only take pre-emptive action in advance of the contravention, and will not be in breach of the provision if they fail to address a contravention once it has occurred or is occurring. This is an obvious flaw, because a franchisor could in essence do nothing after becoming aware of a contravention, and escape liability if it otherwise meets the 'prevention' test in s 558B.[48]

3.45 Maurice Blackburn also observed that proposed subsection 558B(4) should require a court to examine the underlying business model of the franchise to ascertain whether that model substantially contributed to the occurrence of the breach of the Fair Work Act. The submission gave the example of the 7-Eleven underpayments case, where the profit-splitting arrangement (in which the franchisor took 57 per cent of profits made by franchisees and imposed a significant number of business expenses on the franchisee) worked to incentivise franchisees' non-compliance with workplace laws in attempts to recover profits they had surrendered to the franchisor.[49]

3.46 Dr Hardy and Dr Tham emphasised that the proposal to include franchisor entities and holding companies in the expanded accessorial liability provisions was 'an essential and appropriate extension of the existing regulatory framework'.[50] Their submission argued that the proposed provisions rightfully recognised that it is no longer acceptable for lead firms, such as franchisors and holding companies, to 'have it both ways'—that is, exercise high levels of influence and control over the performance of work, yet remain legally insulated from the negative impacts that may be created.[51]

3.47 In response to concerns raised by the FCA that the expanded accessorial liability provisions would threaten the viability of the franchise model in Australia, Dr Hardy and Dr Tham argued:

> While it is true that the allocation of risk within the franchise arrangement may be recalibrated by the proposed reforms, it is doubtful whether the consequences will be nearly as dire a predicted.[52]

Further expansion of the provisions

3.48 The committee received evidence from several submitters recommending that accessorial liability be extended to supply chains and labour hire hosts, in addition to the franchisor entities and holding companies as proposed in the bill.

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48 Maurice Blackburn Lawyers, *Submission 24*, p. 4.

49 Maurice Blackburn Lawyers, *Submission 24*, p. 4.

50 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, pp. 4–5

51 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, pp. 4–5.

52 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, p. 9.

3.49 Dr Hardy and Dr Tham recommended that the expanded accessorial liability provisions outlined in the bill should be further extended to capture other types of organisational forms, including supply chains and labour hire arrangements:

> We would tend to agree that there are good reasons, and strong evidence, for capturing other types of fragmented organisational structures and business networks, including complex supply chains and labour hire arrangements. The failure to extend liability to these other lead firms represents a significant gap.[53]

3.50 Similarly, WEstjustice recommended that liability be extended to all relevant parties, so that in addition to protecting workers in franchises and subsidiary companies, supply chains and labour hire hosts would also be responsible for the protection of workers' rights.[54]

3.51 WEstjustice reasoned that as ways of workings have changed, Australian workplace laws have not kept up, with the existing Fair Work Act still largely focused on traditional employer/employee relationships as defined by common law. As a result, the legal framework fails to adequately regulate non-traditional working arrangements, where it is common for employment relationships to be fragmented. The submission noted:

> 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.[55]

3.52 WEstjustice outlined how the recommendation to expand accessorial liability to include supply chains and labour hire hosts could be achieved:

> …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) and in Part 7 – application and transitional provisions.[56]

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53 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, p. 11.

54 WEstjustice, *Submission 2*, p. 19.

55 WEstjustice, *Submission 2*, p. 13.

56 WEstjustice, *Submission 2*, p. 19.

3.53 JobWatch also agreed that liability for workplace breaches should extend up organisational hierarchy where appropriate, and supported WEstjustice's suggestion of extending liability to labour hire arrangements.[57]

Committee view

3.54 The committee considers it appropriate that the bill seek to supplement the existing accessorial liability provisions in the Fair Work Act. The committee considers that the Yogurberry case, although a signal that, in certain limited circumstances, franchisors can be held accountable for exploitation in their networks, is not a precedent that demonstrates that the existing provisions are adequate.

3.55 The committee recognises stakeholder concerns with the wording of proposed section 558A(2)(b) around the use of the term 'affairs'. The committee considers that the current wording is too broad and requires clarification to ensure that it is able to properly target non-compliance with workplace laws.

3.56 In light of recent commentary from the FWO which appears to indicate a lack of understanding around the diversity of business models across the franchising spectrum, the committee strongly believes such a clarification is necessary to ensure that the regulator does not misinterpret the intent of the bill and engage in regulatory overreach. This issue is discussed further in chapter 4.

Recommendation 1

3.57 The committee recommends that the government consider amending proposed paragraph 558A(2)(b) of the bill to clarify that the term 'affairs' be specifically associated with workplace relations matters.

3.58 The committee recognises that this bill seeks to address specific behaviour in a specific sector (i.e. franchising). However, the committee is also aware of evidence that indicates that other business models and employment structures, such as labour hire and supply chains, harbour a high risk of worker exploitation due to the complex and fragmented nature of the organisational structures and business networks involved. In this context, the committee notes that the government's Migrant Workers Taskforce is currently examining further the issues relating to worker exploitation, including in the context of labour hire.

Recommendation 2

3.59 The committee recommends that as part of the Migrant Worker Taskforce, the government consider whether any further reforms are necessary to address issues of exploitation and liability in the context of labour hire.

57 JobWatch, *Submission 27*, p. 6.