

Labor Senators' Additional Comments

1.1 Labor senators welcome the provisions of the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the bill) which will reduce the exploitation of some vulnerable workers in Australia.

1.2 However, Labor senators consider that in some aspects, the bill as currently drafted falls well short of addressing the range of ways that workers are exploited. As such, Labor senators believe that a number of amendments are required in order to provide a more comprehensive solution to the deliberate and systematic exploitation of workers in Australian workplaces.

Liability of franchisors and holding companies

1.3 Labor senators agree with the conclusions contained in the main report that it is appropriate for the bill to seek to supplement the accessory liability provisions in the Fair Work Act.

However, Labor senators note the concerns raised by submitters such as WEStjustice that the bill as currently drafted does not make it clear that responsible franchisor entities and holding companies will be liable for the breaches of the franchisee entity or subsidiary. As the WEStjustice submission noted:

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-Eleven could not pursue head office for their underpayments. They could only seek that the head office pays a penalty for a breach of [proposed section] 558B [of the Fair Work Act].¹

1.4 Similarly, after citing the problems encountered in the 7-Eleven wage scandal, the ACTU submitted:

The ACTU believes this [franchise] relationship and responsibility needs to change. However, the present proposals, by requiring that franchisors cannot be held liable unless they have a 'significant degree of influence or control over the franchisee entity's affairs', may perpetuate these types [7-Eleven] of indemnification arrangements and as a consequence may not be effective in making franchisors liable.²

1.5 In this regard, Labor senators note ACCI's concern that businesses may restructure their operations to avoid responsibility under the bill:

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

1 WEStjustice, *Submission 2*, p. 20.

2 Australian Council of Trade Unions, *Submission 8*, pp. 8–9.

influence or control. Other organisations may elect to conduct their operation completely outside Australia.³

1.6 Labor senators contend that this evidence supports the need for liability to be extended so that franchisors cannot avoid responsibility by merely rearranging their affairs.

Recommendation 1

1.7 Labor senators recommend that the government amend the bill to clarify that responsible franchisor entities and holding companies will be liable for the breaches of the franchisee entity or subsidiary.

Expansion to labour hire and supply chain relationships

1.8 Labor senators consider that the bill does not go far enough in its amendments to expand accessorial liability. As the FCA argued, 'no evidence provided makes the case for singling out franchising when Fair Work compliance concerns are an economy-wide issue'.⁴ The FCA also submitted:

Any new legislation should reflect the economy-wide nature of the employee underpayment concern. An economy-wide approach may be assisted by contemplating if the definition of 'parent' company was extended beyond parent and subsidiary to a situation where one party exercised reasonable allocation of responsibilities and significant control over another party, such as in a closely controlled supply chain or a franchise, licence or product distribution arrangement.⁵

1.9 Similarly, the Asia-Pacific Centre for Franchising Excellence stated:

Franchising should not be singled out. The proposed amendments appear to have evolved as a reaction to recent media involved the underpayment of employees by franchisees in some high-profile franchise brands. However, it is disingenuous and patently unfair to target franchise organisations...⁶

1.10 Labor senators agree that the problem of the underpayment of vulnerable workers is not restricted to franchise arrangements, and that the franchising sector should not be singled out. As such, Labor senators consider it necessary that accessorial liability be extended to supply chains and labour hire hosts.

1.11 In this regard, Labor senators draw attention to the evidence in the main report received from WEstjustice, Dr Tess Hardy and Dr Joo-Cheong Tham, the ACTU and JobWatch that supports this view.⁷

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

4 Franchise Council of Australia, *Submission 9*, p. 16.

5 Franchise Council of Australia, *Submission 9*, p. 16.

6 Asia-Pacific Centre for Franchising Excellence, *Submission 11*, p. 2.

7 See WEstjustice, *Submission 2*, pp. 13, 19; Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, p. 11; Australian Council of Trade Unions, *Submission 8*, pp. 4–5; JobWatch, *Submission 27*, p. 6.

Recommendation 2

1.12 Labor senators recommend that the government expand the scope of the bill to address worker exploitation in labour hire arrangements and supply chain networks.

Preventing cash-back practices

1.13 Labor senators support the provisions in the bill to address the problem of unscrupulous employers requiring their employees to pay back part of their wages.

1.14 However, Labor senators are of the opinion that the cash-back prohibitions should be extended to offer protection to prospective employees as well.

1.15 Labor senators highlight the evidence submitted by WEstjustice, and Dr Hardy and Dr Tham and the ACTU on this matter.⁸

Recommendation 3

1.16 Labor senators recommend that the government amend the bill to expand the cash-back prohibitions to include prospective employees.

Definitional issues

1.17 Labor senators recognise the concerns raised by submitters regarding the definitions of several terms used in the bill.

1.18 For example, as set out in chapter 5 of the main report, Professor Andrew Stewart, ACCI and the LCA argued that the term 'deliberate' used in the bill was ambiguous and required further clarification.⁹

Recommendation 4

1.19 Labor senators recommend that the government amend the bill to clarify the meaning of the term 'deliberate' in proposed section 557A.

1.20 Additionally, Labor senators draw attention to the evidence from Professor Stewart, outlined in chapter 5 of the main report, that indicated there was ambiguity around the interaction of the 'serious contravention' provisions in the bill with the accessorial liability provisions of the Fair Work Act contained in section 550. As Professor Stewart noted:

As the bill stands, it is unclear whether s 550 would apply to a serious contravention (as opposed to the underlying 'ordinary' contravention). The EM does not appear to address the matter. Whatever the intent here, it could usefully be clarified.¹⁰

8 See WEstjustice, *Submission 2*, pp. 12, 25; Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, pp. 15–17; Australian Council of Trade Unions, *Submission 8*, p. 5.

9 See Professor Andrew Stewart, *Submission 3*, p. 3; Australian Chamber of Commerce and Industry, *Submission 5*, p. 6; Law Council of Australia, *Submission 36*, p. 10.

10 Professor Andrew Stewart, *Submission 3*, p. 4.

Recommendation 5

1.21 Labor senators recommend that the government amend the bill to clarify whether section 550 of the Fair Work Act would apply to serious contraventions.

1.22 Labor senators also consider that further detail is required in the bill to clarify the factors which may be considered in determining whether a contravention was part of a systematic pattern (and therefore likely to be a 'serious contravention'). In this regard, Labor senators highlight evidence received from ACCI:

While noting the list of criteria for establishing whether a contravention is a 'serious contravention, the explanatory memorandum also suggests that beyond those expressly stated 'other factors may also be relevant, such as a failure to address complaints about alleged underpayments'. In the Australian Chamber's submission, this is an important consideration and the express inclusion of this behaviour in the list of criteria for establishing a serious contravention may assist in driving enhanced compliance outcomes and supporting a facilitative approach on the part of the FWO.¹¹

Recommendation 6

1.23 Labor senators recommend that the government amend the bill to include a failure to address complaints about alleged underpayments to the list of conduct in proposed subsection 557A(2) to be considered when assessing whether conduct constitutes a serious contravention.

Increased penalties for record-keeping failures

1.24 Labor senators support the increased penalties for record-keeping failures proposed in the bill.

1.25 However, in addition to increased penalties, Labor senators consider that a reverse onus of proof in wage disputes where an employer fails to keep or provide employee records is also necessary to encourage compliance with record-keeping obligations.

1.26 As the WEStjustice submission detailed:

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 CCTA 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 had not kept and/or provided employee records as required by sections 535, 536 of the Fair Work Act or regulation 3.42 of the Fair Work Regulations.¹²

11 Australian Chamber of Commerce and Industry, *Submission 5*, p. 8.

12 WEStjustice, *Submission 2*, p. 12.

Recommendation 7

1.27 Labor senators recommend that the government amend the bill to create a reverse onus of proof for wage claims where employers fail to keep or provide employee records.

**Senator Gavin Marshall
Deputy Chair**

