Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

(Amendments to be moved by Senator Cameron, on behalf of the Opposition, in committee of the whole)

(1) Schedule 1, items 14 and 15, page 8 (lines 4 to 14), omit the items, substitute:

14 Section 12
  Insert:

  franchisee entity of a franchise: see subsection 558A(1).

14A Section 12 (definition of indirectly responsible entity)
  Repeal the definition, substitute:

  indirectly responsible entity:
  (a) in relation to TCF work performed by a TCF outworker—see subsections 789CA(3), (4) and (5); and
  (b) in Division 4A of Part 4-1—see subsection 558A(3).

14B Section 12
  Insert:

  responsible franchisor entity for a franchisee entity: see subsection 558A(2).

  supply framework: see subsection 558A(3).

14C Section 12 (before paragraph (a) of the definition of worker)
  Insert:

  (aa) in Division 4A of Part 4-1—see subsection 558A(3); and

15 Section 537 (after the paragraph relating to Division 4)
  Insert:
Division 4A imposes obligations on responsible franchisor entities, holding companies and indirectly responsible entities in relation to certain contraventions of civil remedy provisions by other entities.

(2) Schedule 1, item 16, page 8 (table item 29A), after “558B(2)”, insert “558B(2B)”.

(3) Schedule 1, item 17, page 9 (lines 1 to 3), omit the heading to Division 4A, substitute:

**Division 4A—Responsibility of responsible franchisor entities, holding companies and indirectly responsible entities for certain contraventions**

(4) Schedule 1, item 17, page 9 (line 4), omit the heading to section 558A, substitute:

**558A Meaning of franchisee entity, responsible franchisor entity and indirectly responsible entity**

(5) Schedule 1, item 17, page 9 (line 15), omit “significant”.

(6) Schedule 1, item 17, page 9 (after line 16), at the end of section 558A, add:

(3) A person is an *indirectly responsible entity* for another person (the *worker*) if:

(a) there is an arrangement, or a chain or series of 2 or more arrangements, for the production or supply of goods or services by the worker (the *supply framework*); and

(b) the person is party to an arrangement in the supply framework; and

(c) any of the following applies:

(i) the person has influence or control over the worker’s affairs or the affairs of the worker’s employer;

(ii) under the supply framework, the worker performs work for the purpose of the business of his or her employer and goods or services are provided to the person;

(iii) the worker otherwise forms part of the conduct of the undertaking of the person; and

(d) the person is not:

(i) the worker’s employer; or

(ii) a responsible franchisor entity for the worker’s employer; and

(e) if the person is a body corporate—the worker’s employer is not a subsidiary (within the meaning of the *Corporations Act 2001*) of the person.

(7) Schedule 1, item 17, page 9 (lines 17 and 18), omit the heading to section 558B, substitute:
558B Responsibility of responsible franchisor entities, holding companies and indirectly responsible entities for certain contraventions

(8) Schedule 1, item 17, page 9 (line 27), omit “entity; and”, substitute “entity.”.

(9) Schedule 1, item 17, page 9 (line 28) to page 10 (line 7), omit paragraph 558B(1)(d).

(10) Schedule 1, item 17, page 10 (after line 8), after subsection 558B(1), insert:

(1A) Subsection (1) does not apply if the responsible franchisor entity proves that it and its officers (within the meaning of the Corporations Act 2001):

(a) did not know and could not reasonably be expected to have known that the contravention by the franchisee entity would occur; and

(b) did not know and could not reasonably be expected to have known, at the time of the contravention by the franchisee entity, that a contravention by the franchisee entity of the same or a similar character was likely to occur.

(11) Schedule 1, item 17, page 10 (line 14), omit “subsection (7); and”, substitute “subsection (7).”.

(12) Schedule 1, item 17, page 10 (lines 15 to 25), omit paragraph 558B(2)(c).

(13) Schedule 1, item 17, page 10 (after line 26), after subsection 558B(2), insert:

(2A) Subsection (2) does not apply if the body corporate proves that it and its officers (within the meaning of the Corporations Act 2001):

(a) did not know and could not reasonably be expected to have known that the contravention by the subsidiary would occur; and

(b) did not know and could not reasonably be expected to have known, at the time of the contravention by the subsidiary, that a contravention by the subsidiary of the same or a similar character was likely to occur.

Indirectly responsible entities

(2B) A person contravenes this subsection if:

(a) the person is an indirectly responsible entity for a worker; and

(b) the worker’s employer contravenes a civil remedy provision referred to in subsection (7) in relation to the worker; and

(c) the contravention by the worker’s employer is connected to the worker’s work under the supply framework.

Note: This subsection is a civil remedy provision (see this Part).

(2C) Subsection (2B) does not apply if the indirectly responsible entity proves that it and its officers (within the meaning of the Corporations Act 2001):

(a) did not know and could not reasonably be expected to have known that the contravention by the worker’s employer would occur; and
(b) did not know and could not reasonably be expected to have known, at the time of
the contravention by the worker’s employer, that a contravention by the worker’s
employer of the same or a similar character was likely to occur.

[Indirectly responsible entities; knowledge]

(14) Schedule 1, item 17, page 10 (lines 27 to 32), omit subsection 558B(3), substitute:

Reasonable steps to prevent a contravention of the same or a similar character

(3) A person does not contravene subsection (1), (2) or (2B) if the person proves that, as at
the time of the contravention referred to in paragraph (1)(a), (2)(b) or (2B)(b), the person
had taken reasonable steps to prevent a contravention by the franchisee entity, the
subsidiary or the worker’s employer of the same or a similar character.

[Indirectly responsible entities; knowledge]

(15) Schedule 1, item 17, page 10 (line 35), omit “franchisee entity or subsidiary”, substitute
“franchisee entity, a subsidiary or an employer of a worker”.

[Indirectly responsible entities]

(16) Schedule 1, item 17, page 11 (lines 3 and 4), omit paragraph 558B(4)(a), substitute:

(a) the size and resources of the franchise, body corporate or parties to arrangements in
the supply framework (as the case may be):

[Indirectly responsible entities]

(17) Schedule 1, item 17, page 11 (line 7), omit “or (2)(b)”, substitute “, (2)(b) or (2B)(b)”.

[Indirectly responsible entities]

(18) Schedule 1, item 17, page 11 (line 22), at the end of subparagraph 558B(4)(e)(ii), add “or”.

[Indirectly responsible entities]

(19) Schedule 1, item 17, page 11 (after line 22), after subparagraph 558B(4)(e)(ii), insert:

(iii) the supply framework;

[Indirectly responsible entities]

(20) Schedule 1, item 17, page 11 (lines 29 to 35), omit subsection 558B(6), substitute:

Civil proceedings in relation to contravention by franchisee entity, subsidiary or worker’s
employer not required

(6) To avoid doubt, a reference in paragraph (1)(a), (2)(b) or (2B)(b) to a contravention by a
franchisee entity, a subsidiary or an employer of a worker includes any contravention
whether or not an order has been sought or made against the franchisee entity, subsidiary
or employer under Division 2 for the contravention.

[Indirectly responsible entities]

(21) Schedule 1, item 17, page 12 (lines 19 and 20), omit paragraph (i), substitute:

(i) subsection 325(1) (which deals with unreasonable requirements on employees to
spend or pay amounts);

(ia) subsection 325(1A) (which deals with unreasonable requirements on prospective
employees to spend or pay amounts);

[Unreasonable requirements]

(22) Schedule 1, item 17, page 12 (lines 33 and 34), omit the heading to section 558C, substitute:
558C Right of responsible franchisor entity, holding company or indirectly responsible entity to recover

(23) Schedule 1, item 17, page 13 (lines 3 and 4), omit “of subsection 558B(1) or (2) in relation to a franchisee entity or subsidiary”, substitute “of subsection 558B(1), (2) or (2B) in relation to a franchisee entity, a subsidiary or an employer of a worker”.

(24) Schedule 1, item 22, page 15 (after line 8), after subsection 325(1), insert:

(1A) An employer (the *prospective employer*) must not directly or indirectly require another person (the *prospective employee*) to spend, or pay to the prospective employer or any other person, an amount of the prospective employee’s money if:
   (a) the requirement is in connection with employment or potential employment of the prospective employee by the prospective employer; and
   (b) the requirement is unreasonable in the circumstances; and
   (c) the payment is directly or indirectly for the benefit of the prospective employer or a party related to the prospective employer.

Note: This subsection is a civil remedy provision (see Part 4-1).

(25) Schedule 1, page 15 (after line 8), after item 22, insert:

22A Subsection 325(2)

After “subsection (1)”, insert “or (1A)”.

(26) Schedule 1, page 16 (after line 21), after item 25, insert:

25A Subsection 539(2) (after table item 10)

Insert:

<table>
<thead>
<tr>
<th>10A</th>
<th>325(1A)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td>a prospective employee;</td>
</tr>
<tr>
<td>(b)</td>
<td>an employee;</td>
</tr>
<tr>
<td>(c)</td>
<td>an employee organisation;</td>
</tr>
<tr>
<td>(d)</td>
<td>an inspector</td>
</tr>
</tbody>
</table>

(a) the Federal Court;  
(b) the Federal Circuit Court;  
(c) an eligible State or Territory court

for a serious contravention—600 penalty units; or  
otherwise—60 penalty units

25B After paragraph 540(1)(a)

Insert:

(aa) a prospective employee;

(27) Schedule 1, item 26, page 16 (lines 24 to 25), omit paragraph (i), substitute:

(i) subsection 325(1) (which deals with unreasonable requirements on employees to spend or pay amounts);  
(ia) subsection 325(1A) (which deals with unreasonable requirements on prospective employees to spend or pay amounts);

[unreasonable requirements]
(28) Schedule 1, item 27, page 17 (before line 5), before the definition of FWO notice, insert:

AAT presidential member means a person who is a presidential member of the Administrative Appeals Tribunal under the Administrative Appeals Tribunal Act 1975.

Commonwealth Ombudsman means the person for the time being holding office as Ombudsman under the Ombudsman Act 1976.

(29) Schedule 1, item 30, page 17 (lines 19 to 22), omit paragraphs 683(1B)(a) and (b), substitute:

(a) the power under subsection 712AA(1) to apply for the issue of an FWO notice; and
(b) the power under subsection 712AD(1) to give an FWO notice; and
(c) the power under subsections 712AD(3) and (4) to give notice of a later time.

(30) Schedule 1, item 35, page 18 (lines 17 and 18), omit subsection 703(2), substitute:

(2) To avoid doubt, the power to apply for the issue of an FWO notice under section 712AA and the power to give an FWO notice under section 712AD are not compliance powers.

(31) Schedule 1, item 38, page 19 (line 1) to page 20 (line 13), omit section 712A, substitute:

712A Minister may nominate AAT presidential members to issue FWO notices

(1) The Minister may, by writing, nominate an AAT presidential member to issue written notices (FWO notices) under section 712AB.

(2) The Minister may nominate an AAT presidential member who is a Judge to issue FWO notices under section 712AB only if the Judge has consented, by writing, to the nomination.

(3) A nomination ceases to have effect if:

(a) the nominated AAT presidential member ceases to be an AAT presidential member; or
(b) the Minister, by writing, withdraws the nomination.

(4) A nominated AAT presidential member has, in performing a function of or connected with issuing an FWO notice under this Subdivision, the same protection and immunity as a Justice of the High Court has in relation to proceedings in the High Court.

712AA Fair Work Ombudsman may apply to nominated AAT presidential member for FWO notice

General requirements

(1) The Fair Work Ombudsman may apply, in writing, to a nominated AAT presidential member for the issue of an FWO notice referred to in subsection (2) if the Fair Work Ombudsman believes on reasonable grounds that a person:

(a) has information or documents relevant to an investigation by an inspector into a suspected contravention of a provision of this Act, a fair work instrument or a safety net contractual entitlement that relates, directly or indirectly, to:

(i) the underpayment of wages, or other monetary entitlements, of employees; or
(ii) the unreasonable deduction of amounts from amounts owed to employees; or
(iii) the placing of unreasonable requirements on employees to spend or pay
amounts paid, or payable, to employees; or

(b) is capable of giving evidence that is relevant to such an investigation.

(2) The FWO notice may require the person:
(a) to give information to the Fair Work Ombudsman, or a specified member of the
staff of the Office of the Fair Work Ombudsman; or
(b) to produce documents to the Fair Work Ombudsman, or a specified member of the
staff of the Office of the Fair Work Ombudsman; or
(c) to attend before the Fair Work Ombudsman, or a specified member of the staff of
the Office of the Fair Work Ombudsman who is an SES employee or an acting SES
employee, and answer questions relevant to the investigation.

Form and content of application

(3) An application for an FWO notice must:
(a) if a form is prescribed by the regulations—be in that form; and
(b) include any information prescribed by the regulations.

(4) An application for an FWO notice must not relate to more than one person, but may relate
to more than one investigation.

Application must be accompanied by affidavit

(5) An application for an FWO notice must be accompanied by an affidavit by the Fair Work
Ombudsman including the following:
(a) the name of the person to whom the application relates;
(b) details of the investigation (or investigations) to which the application relates;
(c) the grounds on which the Fair Work Ombudsman believes the person has
information or documents, or is capable of giving evidence, relevant to the
investigation (or investigations) referred to in paragraph (b);
(d) details of other methods used to attempt to obtain the information, documents or
evidence;
(e) the number (if any) of previous applications for an FWO notice that the Fair Work
Ombudsman has made in relation to the person in respect of the investigation (or
investigations) referred to in paragraph (b);
(f) information about whether the Fair Work Ombudsman has made, or expects to
make, any other applications for an FWO notice in relation to the investigation (or
investigations) referred to in paragraph (b) and, if so, the persons to whom those
applications relate.

Further information

(6) A nominated AAT presidential member to whom an application for an FWO notice is
made may request the Fair Work Ombudsman to give the presidential member further
information in relation to the application.

(7) If a request for further information is made under subsection (6), the Fair Work
Ombudsman must give the further information in writing as soon as practicable after
receiving the request.
712AB  Issue of FWO notice

(1) A nominated AAT presidential member to whom an application for an FWO notice has been made must issue the FWO notice if the presidential member is satisfied of the following:

(a) that an inspector has commenced the investigation (or investigations) to which the application relates;

(b) that there are reasonable grounds to believe that the person to whom the application relates has information or documents, or is capable of giving evidence, relevant to the investigation (or investigations);

(c) that any other method of obtaining the information, documents or evidence:
   (i) has been attempted and has been unsuccessful; or
   (ii) is not appropriate;

(d) that the information, documents or evidence would be likely to be of assistance in the investigation (or investigations);

(e) that, having regard to all the circumstances, it would be appropriate to issue the FWO notice;

(f) any other matter prescribed by the regulations.

(2) A nominated AAT presidential member must not issue an FWO notice except in the circumstances referred to in subsection (1).

(3) An FWO notice must not be issued in relation to more than one person, but may be issued in relation to more than one investigation.

(4) If:

(a) an application for an FWO notice is made in relation to more than one investigation; and

(b) the nominated AAT presidential member to whom the application is made is not satisfied of the matters referred to in subsection (1) in relation to each of those investigations;

the nominated AAT presidential member must issue the FWO notice in relation to the investigation (or investigations) in relation to which the nominated AAT presidential member is satisfied of the matters referred to in subsection (1).

712AC  Form and content of FWO notice

An FWO notice must:

(a) if a form is prescribed by the regulations—be in that form; and

(b) if the notice requires a person to give information under paragraph 712AA(2)(a)—specify the time by which, and the manner and form in which, the information is to be given; and

(c) if the notice requires a person to produce documents under paragraph 712AA(2)(b)—specify the time by which, and the manner in which, the documents are to be produced; and

(d) if the notice requires a person to attend to answer questions relevant to an investigation—specify the time and place for the attendance; and

(e) be signed by the nominated AAT presidential member who issued it; and

(f) include any other information prescribed by the regulations.
712AD  Fair Work Ombudsman may give FWO notice to person in relation to whom it is issued and vary time for compliance

Fair Work Ombudsman may give FWO notice to person in relation to whom it is issued

(1) If a nominated AAT presidential member issues an FWO notice, the Fair Work Ombudsman may give the notice to the person in relation to whom it is issued.

(2) If an FWO notice is not given to the person in relation to whom it is issued within 3 months after the day on which it was issued, the notice ceases to have effect at the end of that period.

Variation of time for compliance with FWO notice

(3) If:
   (a) the Fair Work Ombudsman gives an FWO notice to a person under subsection (1); and
   (b) the time specified in the notice under paragraph 712AC(b), (c) or (d) is not at least 14 days after the notice is given to the person;
the Fair Work Ombudsman must, at the same time as the FWO notice is given to the person, also give notice to the person of a time later than the time specified in the notice.

(4) The Fair Work Ombudsman may, at any time after giving an FWO notice to the person in relation to whom it is issued, give notice to the person of a time later than the time:
   (a) specified in the notice under paragraph 712AC(b), (c) or (d); or
   (b) notified under subsection (3).

(5) A later time notified under subsection (3) or (4) must be at least 14 days after the FWO notice is given to the person.

(6) If the person is notified of a later time under subsection (3) or (4), the FWO notice has effect as if the later time (or the latest of those times) were the time specified in the FWO notice.

712AE  Conduct of examination

Legal representation

(1) A person attending before the Fair Work Ombudsman, or a member of the staff mentioned in paragraph 712AA(2)(c), may be represented by a lawyer if the person chooses.

Oath or affirmation

(2) The Fair Work Ombudsman, or a member of the staff mentioned in paragraph 712AA(2)(c), may require the information or answers to be verified by, or given on, oath or affirmation, and either orally or in writing. For that purpose, the Fair Work Ombudsman, or any member of the staff of the Office of the Fair Work Ombudsman, may administer the oath or affirmation.

(3) The oath or affirmation is an oath or affirmation that the information or answers are or will be true.

[FWO notices]

(32) Schedule 1, item 38, page 20 (line 21), omit “712A(5)”, substitute “712AE(2)”. 

9
(33) Schedule 1, item 38, page 21 (after line 19), after section 712D, insert:

712E Fair Work Ombudsman must notify Commonwealth Ombudsman of issue of FWO notice

(1) As soon as practicable after an FWO notice has been issued, the Fair Work Ombudsman must:
   (a) notify the Commonwealth Ombudsman that the FWO notice has been issued; and
   (b) give the Commonwealth Ombudsman a copy of:
      (i) the FWO notice; and
      (ii) the affidavit that accompanied the application for the FWO notice; and
      (iii) any other information in relation to the FWO notice that was given to the nominated AAT presidential member who issued the notice.

(2) If notice under subsection 712AD(3) or (4) is given to a person, the Fair Work Ombudsman must notify the Commonwealth Ombudsman as soon as practicable after giving notice.

712F Review and report by Commonwealth Ombudsman

Fair Work Ombudsman to give report etc. to Commonwealth Ombudsman

(1) As soon as practicable after an examination of a person under paragraph 712AA(2)(c) is completed, the Fair Work Ombudsman must give the Commonwealth Ombudsman:
   (a) a report about the examination; and
   (b) a video recording of the examination; and
   (c) a transcript of the examination.

(2) The report under paragraph (1)(a) must include:
   (a) a copy of the FWO notice under which the examination was conducted; and
   (b) the following information:
      (i) the time and place at which the examination was conducted;
      (ii) the name of each person who was present at the examination;
      (iii) any other information prescribed by the rules.

Review of exercise of powers under this Subdivision

(3) The Commonwealth Ombudsman:
   (a) must review the exercise of powers under this Subdivision by the Fair Work Ombudsman and any member of the staff of the Office of the Fair Work Ombudsman; and
   (b) may do anything incidental or conducive to the performance of that function.

(4) The Commonwealth Ombudsman’s powers under the Ombudsman Act 1976 extend to a review by the Ombudsman under this section as if the review were an investigation by the Ombudsman under that Act.

(5) The exercise of those powers in relation to a review by the Ombudsman under this section is taken, for all purposes, to be an exercise of powers under the Ombudsman Act 1976.
Commonwealth Ombudsman to report to Parliament

(6) As soon as practicable after the end of each quarter of each financial year, the Commonwealth Ombudsman must prepare and present to the Parliament a report about examinations conducted during that quarter. The report must include the results of reviews conducted under this section during that quarter.

(7) The Commonwealth Ombudsman may prepare and present to the Parliament any other reports about the results of reviews conducted under this section the Commonwealth Ombudsman considers appropriate.

[FWO notices]

(34) Schedule 1, item 56, page 28 (line 11), omit “712A(2)”, substitute “712AA(2)”.

[FWO notices]

(35) Schedule 1, item 57, page 30 (line 15), omit “Subsection 325(1) of the amended Act applies”, substitute “Subsections 325(1) and (1A) of the amended Act apply”.

[unreasonable requirements]

(36) Schedule 1, item 57, page 31 (lines 14 and 15), omit the heading to clause 19 of Schedule 1, substitute:

19 Application of amendments—responsibility of responsible franchisor entities, holding companies and indirectly responsible entities

[indirectly responsible entities]

(37) Schedule 1, item 57, page 31 (lines 17 and 18), omit “or subsidiaries”, substitute “, subsidiaries or employers of workers”.

[indirectly responsible entities]

(38) Schedule 1, item 57, page 31 (lines 20 to 25), omit subclause 19(2) of Schedule 1, substitute:

(2) To avoid doubt, in determining for the purposes of subsections 558B(1A), (2A) or (2C) of the amended Act whether a person could not reasonably be expected to have had knowledge as referred to in that subsection, a court may have regard to conduct that occurred, or circumstances existing, before the end of the period referred to in subclause (1).

[indirectly responsible entities; knowledge]

(39) Schedule 1, item 57, page 31 (line 31), omit “712D”, substitute “712F”.

[FWO notices]

(40) Schedule 1, item 57, page 32 (after line 13), at the end of Part 4, add:

24A Application of amendments—presumption where records not provided

Section 557C of the amended Act applies in relation to contraventions of civil remedy provisions that occur after the commencement of this Part.

[records]

(41) Schedule 1, page 32 (after line 13), at the end of the Schedule, add:
Part 8—Records

Fair Work Act 2009

1 At the end of subsection 535(3)
   Add:

   Note: If an employer fails to comply with subsection (1), (2) or (3), the employer may bear the burden of disproving allegations in proceedings relating to a contravention of certain civil remedy provisions: see section 557C.

2 Subsection 536(2) (note)
   Omit “Note”, substitute “Note 1”.

3 At the end of subsection 536(2)
   Add:

   Note 2: If an employer fails to comply with subsection (1) or (2), the employer may bear the burden of disproving allegations in proceedings relating to a contravention of certain civil remedy provisions: see section 557C.

4 Before section 558
   Insert:

557C Presumption where records not provided

(1) If:
   (a) in proceedings relating to a contravention by an employer of a civil remedy provision referred to in subsection (3), an applicant makes an allegation in relation to a matter; and
   (b) the employer was required:
      (i) by subsection 535(1) or (2) to make and keep a record; or
      (ii) by regulations made for the purposes of subsection 535(3) to make available for inspection a record; or
      (iii) by subsection 536(1) or (2) to give a pay slip;
      in relation to the matter; and
   (c) the employer failed to comply with the requirement;
   the employer has the burden of disproving the allegation.

(2) Subsection (1) does not apply if the failure to comply was due to exceptional circumstances beyond the employer’s control.

(3) The civil remedy provisions are the following:
   (a) subsection 44(1) (which deals with contraventions of the National Employment Standards);
   (b) section 45 (which deals with contraventions of modern awards);
   (c) section 50 (which deals with contraventions of enterprise agreements);
   (d) section 280 (which deals with contraventions of workplace determinations);
   (e) section 293 (which deals with contraventions of national minimum wage orders);
   (f) section 305 (which deals with contraventions of equal remuneration orders);
   (g) subsection 323(1) (which deals with methods and frequency of payment);
(h) subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);

(i) subsection 325(1) (which deals with unreasonable requirements to spend or pay amounts);

(j) any other civil remedy provisions prescribed by the regulations.