Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

(Amendments to be moved by Senator Xenophon, on behalf of the Nick Xenophon Team, in committee of the whole)

(1) Schedule 1, item 27, page 17 (lines 3 to 5), omit the item, substitute:

27 Section 12

Insert:

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

FWO notice: see subsection 712B(1).

nominated AAT presidential member means an AAT presidential member in respect of whom a nomination is in force under section 712A to issue FWO notices.

(powers of the Fair Work Ombudsman)

(2) Schedule 1, item 28, page 17 (table item 32A), omit “712B(1)”, substitute “712G(1)”.

(powers of the Fair Work Ombudsman)

(3) Schedule 1, item 30, page 17 (lines 12 to 24), omit the item, substitute:

30 After subsection 683(1)

Insert:

(1A) The Fair Work Ombudsman must not delegate his or her functions or powers as an inspector.

(1B) The Fair Work Ombudsman may delegate to a member of the staff of the Office of the Fair Work Ombudsman who is an SES employee or an acting SES employee:

(a) the power under subsection 712B(1) to apply for the issue of an FWO notice; and

(b) the power under subsection 712E(1) to give an FWO notice; and

(c) the power under subsection 712E(3) or (4) to vary the time for compliance with an FWO notice.
Note: *SES employee* and *acting SES employee* are defined in the *Acts Interpretation Act 1901*.

(4) Schedule 1, item 35, page 18 (lines 15 to 18), omit the item, substitute:

**35 At the end of section 703**

Add:

(2) To avoid doubt, the following are not compliance powers:

(a) the power under subsection 712B(1) to apply for the issue of an FWO notice;

(b) the power under subsection 712E(1) to give an FWO notice.

(5) Schedule 1, item 38, page 18 (line 26) to page 21 (line 21), omit the item, substitute:

**38 After section 712**

Insert:

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

(1) The Minister may, by writing, nominate an AAT presidential member to issue FWO notices.

(2) The Minister may nominate an AAT presidential member who is a Judge to issue FWO notices 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, the same protection and immunity as a Justice of the High Court has in relation to proceedings in the High Court.

**712B 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 a notice (an *FWO notice*) referred to in subsection (2) if the Fair Work Ombudsman reasonably believes that the person:

(a) has information or documents relevant to an investigation by an inspector into a suspected contravention of this Act; or

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

(2) The notice may require the person:

(a) to give information to the Fair Work Ombudsman or a member of the staff of the Office of the Fair Work Ombudsman; or

(b) to produce documents to the Fair Work Ombudsman or a member of the staff of the Office of the Fair Work Ombudsman; or
(c) to attend before the Fair Work Ombudsman, or a 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.

Note: **SES employee** and **acting SES employee** are defined in the **Acts Interpretation Act 1901**.

**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 applicant 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 have been made in relation to the person in respect of the investigation (or investigations) referred to in paragraph (b);
   (f) information about whether any other applications for an FWO notice have been made or are expected to be made in relation to the investigation (or investigations) referred to in paragraph (b) and, if so, the persons to whom those applications relate.

Note: The applicant for an FWO notice may be the Fair Work Ombudsman or a delegate of the Fair Work Ombudsman (see subsection 683(1B)).

**Further information**

(6) A nominated AAT presidential member to whom an application for an FWO notice is made may request the applicant 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 applicant must give the further information in writing as soon as practicable after receiving the request.

**712C 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).

712D 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—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—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) if the notice requires a person to give information or produce documents to, or attend to answer questions before, a member of the staff of the Office of the Fair Work Ombudsman—specify the name or position of the member of staff; and

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

(g) include any other information prescribed by the regulations.

Note: See also sections 712G (which deals with the requirement to comply with an FWO notice), 712J (which deals with protection from liability), 713 (which deals with self-incrimination etc.), 713AA (which deals with legal professional privilege) and 714 (which deals with the power to keep records or documents).
712E 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.

Fair Work Ombudsman may vary 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 712D(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 712D(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.

712F Attendances required by an FWO notice

Application of section

(1) This section applies if a person (the attendee) is required by an FWO notice to attend before a person (the official) to answer questions relevant to an investigation.

Note: The official may be the Fair Work Ombudsman or a member of the staff of the Office of the Fair Work Ombudsman who is an SES employee or an acting SES employee (see paragraph 712B(2)(c)).

Representation by lawyer

(2) The attendee may, if the attendee chooses, be represented at the attendance by a lawyer.

Oath or affirmation

(3) The official may require the information or answers given by the attendee 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.
(4) The oath or affirmation is an oath or affirmation that the information or answers are, or will be, true.

712G Requirement to comply with FWO notice

(1) A person who has been given an FWO notice must do the following (as applicable):
   (a) give information or produce a document in accordance with the notice;
   (b) attend to answer questions in accordance with the notice;
   (c) take an oath or make an affirmation when required to do so under subsection 712F(3);
   (d) answer questions relevant to the investigation while attending as required by the FWO notice.

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

(2) Subsection (1) does not apply to the extent that the person is not capable of complying with the requirement.

712H Payment for expenses incurred in attending as required by an FWO notice

(1) A person who attends as required by an FWO notice is (subject to subsection (2)) entitled to be paid fees and allowances, fixed by or calculated in accordance with the regulations, for reasonable expenses (including legal expenses) incurred by the person in so attending.

(2) The person is not entitled to be paid for expenses under this section unless the person:
   (a) applies, in writing, to the Fair Work Ombudsman for payment of the expenses within 3 months after the attendance; and
   (b) provides to the Fair Work Ombudsman sufficient evidence to establish that the person incurred the expenses.

(3) An application under paragraph (2)(a) must:
   (a) if a form is prescribed by the regulations—be in that form; and
   (b) include any information prescribed by the regulations.

712J Protection from liability relating to FWO notices

A person who, in good faith, gives information, produces a record or document, or answers a question, when required to do so under an FWO notice is not liable to:
   (a) any proceedings for contravening any other law because of that conduct; or
   (b) civil proceedings for loss, damage or injury of any kind suffered by another person because of that conduct.

712K 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 712E(3) or (4) is given to a person, the Fair Work Ombudsman must notify the Commonwealth Ombudsman as soon as practicable after giving notice.

712L Review and report by Commonwealth Ombudsman

Fair Work Ombudsman to give report etc. to Commonwealth Ombudsman

(1) As soon as practicable after an attendance by a person as required by an FWO notice, the Fair Work Ombudsman must give the Commonwealth Ombudsman:
   (a) a report about the attendance; and
   (b) a video recording of the attendance; and
   (c) a transcript of the attendance.

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

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 or 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 attendances, during that quarter, by persons as required by FWO notices. 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.

Subdivision DC—Other rules relating to answers, records and documents

[powers of the Fair Work Ombudsman]

(6) Schedule 1, item 39, page 22 (line 24), omit “712B”, substitute “712G”.

[powers of the Fair Work Ombudsman]
(7) Schedule 1, item 56, page 28 (line 11), omit “712A(2)”, substitute “712B(2)”.

[powers of the Fair Work Ombudsman]

(8) Schedule 1, item 57, page 31 (line 31), omit “to 712D”, substitute “to 712L”.

[powers of the Fair Work Ombudsman]