Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

(Amendments to be moved by Senator Rhiannon, on behalf of the Australian Greens, in committee of the whole)

(1) Schedule 1, item 17, page 9 (lines 11 to 16), omit subsection 558A(2), substitute:

(2) A person is a responsible franchisor entity for a franchisee entity of a franchise if:

(a) the person is a franchisor (including a subfranchisor) in relation to the franchise; or

(b) the person:

(i) is a related body corporate of a franchisor (including a subfranchisor) in relation to the franchise; and

(ii) the person has a significant degree of influence or control over the franchisor (or subfranchisor).

[definition of responsible franchisor entity]

(2) Schedule 1, page 13 (after line 29), after Part 2, insert:

Part 2A—Recovery of unpaid amounts for franchisee employees

Fair Work Act 2009

17A After subsection 9(5B)

Insert:

(5C) Part 6-4C provides for the recovery of unpaid amounts for franchisee employees.

17B Section 12

Insert:

apparent responsible franchisor entity: see subsection 789GE(2).

franchisee employee: see subsection 789GC(1).

franchisee employer: see subsection 789GC(1).
franchise-related work: see subsection 789GC(1).

17C Section 12 (definition of unpaid amount)
Repeal the definition, substitute:

unpaid amount:
(a) in relation to TCF work performed by a TCF outworker: see subsections 789CA(1) and (4); and
(b) in relation to franchise-related work performed by a franchisee employee: see subsection 789GC(1).

17D After paragraph 789BA(1)(f)
Insert:
(fa) Part 6-4C (recovery of unpaid amounts for franchisee employees);

17E After Part 6-4B
Insert:

Part 6-4C—Recovery of unpaid amounts for franchisee employees

Division 1—Introduction

789GA Guide to this Part

This Part provides for employees employed by a franchisee entity to recover unpaid remuneration from the responsible franchisor entity for the franchisee entity.

789GB Meanings of employee and employer

In this Part, employee means a national system employee, and employer means a national system employer.

Division 2—Recovery of unpaid amounts for franchisee employees

789GC When this Division applies

Franchisee employees not paid for work in certain circumstances

(1) This Division applies if:
(a) a franchisee entity is the employer (the franchisee employer) of an employee (the franchisee employee); and
(b) the franchisee employee performs work (franchise-related work) for the franchisee employer for the purposes of business activities carried on by the employer under the franchise; and
(c) the franchisee employer does not pay an amount (the unpaid amount) that is payable, in relation to the franchise-related work, by the employer:
   (i) to the franchisee employee; or
   (ii) to another person, for the benefit of the franchisee employee; on or before the day when the amount is due for payment; and
(d) the unpaid amount is payable under:
   (i) a contract; or
   (ii) this Act, or an instrument made under or in accordance with this Act; or
   (iii) another law of the Commonwealth; or
   (iv) a transitional instrument as continued in existence by Schedule 3 to the
        Transitional Act; or
   (v) a State or Territory industrial law, or a State industrial instrument.

(2) Without limiting paragraph (1)(c), the unpaid amount may (subject to paragraph (1)(d))
be an amount of any of the following kinds that relates to (or is attributable to) the
franchise-related work:
   (a) an amount payable by way of remuneration or commission;
   (b) an amount payable in respect of leave;
   (c) an amount payable by way of contributions to a superannuation fund;
   (d) an amount payable by way of reimbursement for expenses incurred.

789GD Liability of responsible franchisor entity for unpaid amount

(1) Each responsible franchisor entity for the franchisee employer is liable to pay the unpaid
   amount.

(2) If there are 2 or more responsible franchisor entities for
   the franchisee employer, those
   entities are jointly and severally liable for the payment of the unpaid amount.

(3) Subject to subsection 789GG(2), this section does not affect the liability of the franchisee
   employer to pay the unpaid amount.

789GE Demand for payment from an apparent responsible franchisor entity

(1) The franchisee employee, or a person acting on behalf of the franchisee employee, may
give an apparent responsible franchisor entity for the franchisee employer a written
   demand for payment of the amount that the franchisee employee reasonably believes the
   entity is liable for under section 789GD in relation to the franchise-related work.

(2) An entity is an apparent responsible franchisor entity for the franchisee employer if the
   franchisee employee reasonably believes that the entity is a responsible franchisor entity
   for the franchisee employer.

(3) The demand must:
   (a) specify the amount, and identify the franchisee employer; and
   (b) include particulars of the franchise-related work to which the amount relates, and
        why the amount is payable by the entity to which the demand is given; and
   (c) state that if the specified amount is not paid by a specified time, proceedings may
        be commenced against the entity under section 789GF.

(4) The time specified for the purpose of paragraph (3)(c) must not be less than 14 days after
   the demand is given to the entity.

789GF Court order for entity to pay amount demanded

(1) If:
(a) in accordance with section 789GE, an apparent responsible franchisor entity for the franchisee employer has been given a demand for payment of a specified amount; and
(b) the amount has not been paid in full by the time specified in the demand;
a person or organisation specified in subsection (2) (the applicant) may commence proceedings for an order requiring the apparent responsible franchisor entity or the responsible franchisor entity for the franchisee employer to pay the specified amount.

(2) The proceedings may be commenced:
(a) by the franchisee employee; or
(b) on the franchisee employee’s behalf, by:
   (i) an organisation that is entitled to represent the industrial interests of the franchisee employee; or
   (ii) an inspector.

(3) The proceedings may be commenced in:
(a) the Federal Court; or
(b) the Federal Circuit Court; or
(c) an eligible State or Territory court.

(4) Subject only to subsections (5) and (6), the court may make an order requiring a responsible franchisor entity for the franchisee employer to pay, to the franchisee employee or to another person on the employee’s behalf, the specified amount (or so much of that amount as the applicant alleges is still owing).

(5) The court must not make an order under subsection (4) in relation to a responsible franchisor entity for the franchisee employer if the entity satisfies the court that the entity is not liable under section 789GD to pay any of the specified amount.

(6) If a responsible franchisor entity for the franchisee employer satisfies the court that the amount of the entity’s liability under section 789GD is less than the specified amount (or is less than so much of that amount as the applicant alleges is still owing), the court must not make an order under subsection (4) requiring the entity to pay more than that lesser amount.

(7) In making the order, the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.

(8) Without limiting subsection (7), in determining the amount of interest, the court must take into account the period between the day when the unpaid amount was due for payment by the franchisee employer and the day when the order is made.

(9) Proceedings cannot be commenced under this section more than 6 years after the time when the unpaid amount became due for payment by the franchisee employer.

789GG Effect of payment by entity (including entity’s right to recover from franchisee employer)

(1) This section applies if an entity pays an amount in discharge of a liability of the entity under section 789GD, or pursuant to an order under section 789GF.

(2) The payment discharges the liability of the franchisee employer for the unpaid amount, to the extent of the payment. This does not affect any right that the entity has to recover an
equivalent amount from the franchisee employer (under this section or otherwise) or from another person, or to be otherwise indemnified in relation to the making of the payment.

(3) The entity may, in accordance with this section, recover from the franchisee employer an amount (the recoverable amount) equal to the sum of:

(a) the amount paid by the entity as mentioned in subsection (1); and

(b) any interest paid by the entity in relation to that amount pursuant to an order under section 789GF.

(4) The entity may recover the recoverable amount:

(a) by offsetting it against any amount that the entity owes to the franchisee employer; or

(b) by action against the franchisee employer under subsection (5).

(5) The entity may commence proceedings against the franchisee employer for payment to the entity of the recoverable amount. The proceedings may be commenced in:

(a) the Federal Court; or

(b) the Federal Circuit Court; or

(c) an eligible State or Territory court.

(6) The court may make an order requiring the franchisee employer to pay the entity the recoverable amount (or so much of it as is still owing) if the court is satisfied that:

(a) this section applies as mentioned in subsection (1); and

(b) the entity has not otherwise recovered the recoverable amount in full from the franchisee employer.

(7) In making the order the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.

(8) Without limiting subsection (7), in determining the amount of interest, the court must take into account the period between the day when the recoverable amount was paid by the entity and the day when the order is made.

(9) Proceedings cannot be commenced under this section more than 6 years after the time when the entity paid the recoverable amount.

789GH Division does not limit other liabilities or rights

Nothing in this Division limits any other liability or right in respect of the entitlement of the franchisee employee to the unpaid amount (or to have the unpaid amount paid to another person for the employee’s benefit).

[recovery of unpaid amounts for franchisee employees]

(3) Schedule 1, page 31 (after line 25), after item 19, insert:

19A Application of the amendments—recovery of unpaid amounts for franchisee employees

Part 6-4C of the amended Act applies in relation to an amount that is payable by a franchisee employer if the franchise is entered into on or after the commencement of this Part.

[recovery of unpaid amounts for franchisee employees]