Amendments to be Moved on Behalf of the Government

(Circulated by authority of the Minister for Employment, Senator the Hon Michaelia Cash)
AMENDMENTS TO THE FAIR WORK AMENDMENT (PROTECTING VULNERABLE WORKERS) BILL 2017

OUTLINE

The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the Bill) amends the Fair Work Act 2009 (the Fair Work Act) to implement the Government’s commitment to protect vulnerable workers.

The Bill was referred to the Senate Standing Committee on Education and Employment’s Legislation Committee (the Legislation Committee) on 23 March 2017. The Legislation Committee’s report was tabled on 9 May 2017.

These amendments arose from the Legislation Committee’s report and from issues raised in stakeholder submissions to the Legislation Committee. The amendments to the Bill will:

- clarify how the proposed ‘serious contraventions’ regime applies in relation to an alleged accessory to a contravention (see section 550 of the Fair Work Act and proposed section 557A of the Bill);

- clarify what a person needs to know about a contravention for it to be considered deliberate under the proposed ‘serious contraventions’ regime (proposed section 557A);

- supplement the list of matters a court may take into account when determining whether a contravention formed part of a systematic pattern of conduct for purposes of the ‘serious contraventions’ regime (proposed section 557A); and

- make the necessary consequential amendments.
FINANCIAL IMPACT STATEMENT

Nil.
NOTES ON AMENDMENTS

In these notes on amendments, the following abbreviations are used:

<table>
<thead>
<tr>
<th>Bill</th>
<th>Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017</th>
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<tr>
<td>Committee</td>
<td>Senate Standing Committee on Education and Employment’s Legislation Committee</td>
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<tr>
<td>Fair Work Act</td>
<td>Fair Work Act 2009</td>
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<tr>
<td>Senate Committee Report</td>
<td>Report of the Senate Education and Employment Legislation Committee into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, May 2017</td>
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Item 1 – Schedule 1, page 5 (after line 6), after item 12

1. Item 1 adds a note to the end of subsection 550(1) of the Fair Work Act to clarify how an accessory’s contravention of a civil remedy provision may be a ‘serious contravention’ for purposes of proposed section 557A.

2. This amendment responds to stakeholder suggestions that the proposed new laws should be clearer on when an accessory may be subject to the proposed higher penalties in relation to serious contraventions. See also Item 4.

Item 2 – Schedule 1, item 13, page 6 (lines 2 to 9), omit subsection 557A(1)

3. Item 2 amends subsection 557A(1) of the Bill to clarify when a contravention of a civil remedy provision by a person attracts a higher penalty because it is a ‘serious contravention’.

4. This amendment responds to stakeholder suggestions that proposed subsection 557A(1) could be amended to clarify what an alleged wrongdoer needs to know, before they may be held responsible for a serious contravention under the section.

5. The proposed amendment does this by clarifying that a contravention is taken to be deliberate if the person knowingly contravened the provision. This language is used elsewhere under the Act, including in the accessorial liability provisions (section 550). There is no change to the requirement that the person’s conduct constituting the contravention must form part of a systematic pattern of conduct.

6. To be held responsible for a serious contravention under the amended provision, the alleged wrongdoer must have knowledge of what is commonly referred to as the ‘essential elements’ of the contravention. This includes knowledge of, or at least some appreciation of, the fact that their conduct was unlawful at the time it occurred. For example an alleged wrongdoer may know:
   • their employee or an identifiable class of employees is not receiving their full entitlements under the Fair Work Act (whether by act or omission); or
   • they are not complying with applicable record-keeping or pay slip requirements under the Fair Work Act or Regulations.

7. For this provision to apply however there is no need for the wrongdoer to know the section or clause number of the relevant workplace law or industrial instrument.

8. Item 2 also inserts a new example under section 557A that provides a practical example of how the serious contravention regime is intended to operate in a typical case.

Item 3 – Schedule 1, item 13, page 6 (after line 18), after paragraph 557A(2)(c)

9. Item 3 adds an additional matter to the non-exhaustive list of matters that a court may consider when determining whether a person’s conduct was part of a systematic pattern for the purposes of section 557A of the Bill.

10. New paragraph 557A(2)(ca) provides that a court may have regard to the person’s response, or failure to respond, to any complaints made about the relevant contraventions. This
Notes on Amendments

may include consideration of the nature and timing of any response, and whether the response achieved a reasonable and durable solution to the problem for all affected employees (if required). Where complaints about workplace entitlements are voluntarily and properly addressed as they arise, this indicates that any contravening conduct is less likely to be either deliberate or systematic. Adverse inferences may be available however if there are multiple instances of the employer failing to properly address complaints of alleged underpayment.

**Item 4 – Schedule 1, item 13, page 6 (after line 36), after subsection 557A(5)**

11. Item 4 adds a new subsection the end of proposed section 557A to clarify how a person ‘involved in’ the contravention of a civil remedy provision (accessory) by the principal wrongdoer (principal) may be penalised for a ‘serious contravention’. See section 550 for the accessorial liability provisions under the Fair Work Act.

12. This amendment responds to stakeholder suggestions that the proposed new laws should be clearer about when an accessory may be subject to the proposed higher penalties in relation to serious contraventions. See also Item 1.

13. New subsection 557(5A) provides that an accessory involved in the contravention of a civil penalty provision commits a ‘serious contravention’ of the provision only if:

- the principal’s contravention was a serious contravention under the section; and
- the accessory knew that the principal’s contravention was a serious contravention.

14. The accessory is subject to the higher penalties for serious contraventions in these circumstances because their conduct (that is, their involvement in the underlying contraventions) is more serious: they were knowingly involved in contraventions by the principal, which they knew to be both deliberate and systematic at the time they occurred.

15. This approach is broadly consistent with the current approach to accessorial liability under section 550 of the Fair Work Act. In general this requires the alleged accessory to have participated in the contravention to some degree (see section 550), and also have had knowledge of the ‘essential elements’ of the contravention.

16. For accessorial liability, there is a two-step process. First the accessory must be found to have been ‘involved in’ the contravention in the usual way (see section 550). Second it must be established on the balance of probabilities that the accessory additionally knew they were involved in a serious contravention by the principal at the relevant time (see proposed subsection 557A(5A)).

17. Higher penalties for a ‘serious contravention’ may only be sought against a person (including an alleged accessory) if the procedure in proposed subsection 557A(6) is followed. To avoid doubt, a reference to a contravention by the principal includes any contravention whether or not an order has been sought or made against the principal for the contravention.

18. If the claim is not made out, then subsection 557A(7) may also apply. This would allow the court to consider whether an ordinary accessorial liability claim had been established under section 550.
Item 5 – Schedule 1, item 13, page 7 (lines 14 to 17), omit subsection 557B(1)

19. Item 5 makes a consequential amendment to subsection 557B(1) of the Bill to reflect the amendment made by Item 2.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Amendments to the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

The amendments to the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the Bill) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of amendments to the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the Bill) amends the Fair Work Act 2009 (the Fair Work Act) to implement the Government’s commitment to protect vulnerable workers.

The development of these amendments arose out of the Legislation Committee’s report and from issues raised in stakeholder submissions to the Legislation Committee. The amendments to the Bill will:

- clarify how the proposed ‘serious contraventions’ regime applies in relation to an alleged accessory to a contravention (see section 550 of the Fair Work Act and proposed section 557A);
- clarify what a person needs to know about a contravention for it to be considered deliberate under the proposed ‘serious contraventions’ regime (proposed section 557A);
- supplement the list of matters a court may take into account when determining whether a contravention formed part of a systematic pattern of conduct for purposes of the ‘serious contraventions’ regime (proposed section 557A); and
- make the necessary consequential amendments.

Human Rights Implications

The amendments do not alter the human rights implications of the Bill as expressed in the Statement of Compatibility with Human Rights that accompanies the Explanatory Memorandum for the Bill.

Conclusion

The amendments are compatible with human rights.

Minister for Employment, Senator the Hon Michaelia Cash