

Ai GROUP SUBMISSION

Senate Education and Employment
Legislation Committee

**Fair Work Amendment (Protecting
Vulnerable Workers) Bill 2017**

10 April 2017



About Australian Industry Group

The Australian Industry Group (Ai Group) represents industries with around 440,000 businesses employing around 2.4 million people. Ai Group and its affiliates have approximately 60,000 members and employ in excess of 1.25 million employees. Ai Group has a large membership in the construction industry including both major builders and large and small subcontractors.

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Summary of Ai Group's position

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee's (**Committee**) inquiry into the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Bill)*.

Ai Group does not condone the conduct of the relatively small number of employers who deliberately underpay their employees, and we support appropriate laws to deter and punish such conduct. However, Ai Group does not support this Bill, as currently drafted. In our view, the Bill, as drafted, would most likely discourage investment and lead to various other adverse outcomes, as discussed below.

The Bill should be amended to:

- Delete Items 14-17, including the proposed Division 4A (Responsibility of responsible franchisor entities and holding companies for certain contraventions). However, to reinforce the relevance of the accessorial liability provisions in section 550 of the *Fair Work Act 2009* (FW Act) to franchisors, Ai Group would not be opposed to the inclusion of following legislative note in section 550:

“Note: For the purposes of this section, a franchisor may be involved in a contravention. See the decision of the Federal Court of Australia in *Fair Work Ombudsman v Yogurberry World Square Pty Ltd* [2016] FCA 1290.”

- In respect of “serious contraventions”, a maximum penalty of five times the current maximum would be more appropriate than a 10-fold increase. In addition, the following factor should be added to s.557A(2):

“(f) Whether the underpayment was the result of an incorrect interpretation of an industrial instrument or law, that the person genuinely believed was correct at the time that the payment was made.”

- Delete Item 38 (i.e. sections 712A, 712B, 712C and 712D) and Item 27. Ai Group is not convinced that the Fair Work Ombudsman (**FWO**) needs compulsory examination powers, similar to those necessarily held by the Australian Building and Construction Commission (**ABCC**). If despite Ai Group's concerns, Items 38 and 27 are retained in the Bill, the protections in the *Building and Construction Industry (Improving Productivity) Act 2016 (ABCC Act)* regarding the ABCC's use of similar powers, should be included in the Bill.

Liability of franchisors

We are concerned that the Bill, as drafted, could discourage investment in franchise businesses. The Bill makes franchisors liable, in many circumstances, for breaches of awards and workplace laws by franchisees (separate businesses). While this at first glance may seem like a plausible idea, it could:

- Discourage major international franchise operators from making new investments in Australia;
- Lead to franchisors restructuring their businesses and terminating their relationships with franchisees;
- Lead to franchisors believing that they need to establish extensive auditing, training, common payroll and other systems to ensure compliance by franchisees, with the substantial cost of this passed on to franchisees. In some circumstances this could lead to franchisee businesses no longer being viable.

Franchising is growing rapidly in Australia. This business model enables thousands of people to establish their own small businesses, and employ many thousands of other Australians. It is important not to put a hand-break on business and employment growth.

The Bill contains very large increases in penalties for businesses that underpay workers, and new investigation and enforcement powers for the FWO. These changes can be expected to significantly reduce the incidence of underpayments by all employers, including franchisees.

The existing accessorial liability provisions in section 550 of the FW Act have been held to apply to franchisors (see the decision of the Federal Court of Australia in *Fair Work Ombudsman v Yogurberry World Square Pty Ltd* [2016] FCA 1290). Therefore, Ai Group is not convinced that the franchisor responsibility provisions of the Bill are necessary or appropriate, particularly given the potential adverse implications on investment and employment.

Accordingly, Division 4A (Responsibility of responsible franchisor entities and holding companies for certain contraventions), should be deleted from the Bill.

However, to reinforce the relevance of the accessorial liability provisions in section 550 of the *Fair Work Act 2009* (FW Act) to franchisors, Ai Group would not be opposed to the inclusion of following legislative note in section 550:

“Note: For the purposes of this section, a franchisor may be involved in a contravention. See the decision of the Federal Court of Australia in *Fair Work Ombudsman v Yogurberry World Square Pty Ltd* [2016] FCA 1290.”

Serious contraventions

The Bill proposes a 10-fold increase in maximum penalties for a “serious contravention” of a term of an award, an enterprise agreement, the National Employment Standards (**NES**), etc.

Ai Group does not condone the conduct of the relatively small number of employers who deliberately underpay their employees, and we support appropriate laws to deter and punish such conduct.

However, underpayments sometimes occur due to a dispute over the correct interpretation of an award, an enterprise agreement or the NES. In such circumstances, an employer deliberately applies the interpretation that it believes is correct, but at a later stage may find that an alternative interpretation is the correct one. Such circumstances could fall within the definition of a “serious contravention” and, if so, this is unfair because the employer acted upon an honestly held belief.

To address this circumstance, the following factor should be added to s.557A(2):

- “(f) Whether the underpayment was the result of an incorrect interpretation of an industrial instrument or law, that the person genuinely believed was correct at the time that the payment was made.”

In addition, a maximum penalty of five times the current maximum, would be more appropriate than a 10-fold increase.

Pay record and pay slip requirements

Ai Group does not oppose the increased penalties in the Bill for breaches of pay record and pay slip requirements.

The increased penalties in the Bill would bring these penalties in line with breaches of other provisions of the FW Act.

Unreasonable requirements

Ai Group has not identified any problems with the provisions of Items 18 to 26 regarding unreasonable deductions for the benefit of an employer, unreasonable requirements to spend or pay an amount, and deductions or payments in relation to employees under 18.

Compulsory examination powers of the FWO

Item 38 (i.e. sections 712A, 712B, 712C and 712D) and Item 27 should be deleted from the Bill. Ai Group is not convinced that the FWO needs compulsory examination powers, similar to those necessarily held by the ABCC.

If despite Ai Group’s concerns, Items 38 and 27 are retained in the Bill, the protections that are in the ABCC Act regarding the use of similar powers, should be incorporated within this Bill, to ensure fairness for employers, employees and other relevant persons who may be subjected to compulsory examinations.

Section 61B of the ABCC Act requires that the ABC Commissioner apply to a nominated Presidential Member of the Administrative Appeals Tribunal (**AAT**) for an ‘examination notice’. The Presidential Member may issue a notice if satisfied:

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

- 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);
- that any other method of obtaining the information, documents or evidence:
 - has been attempted and has been unsuccessful; or
 - is not appropriate;
- that the information, documents or evidence would be likely to be of assistance in the investigation (or investigations);
- that, having regard to all the circumstances, it would be appropriate to issue the examination notice;
- of any other matter prescribed by the regulations.

In addition to the above protections, ss.64 and 65 of the ABCC Act requires that the ABC Commissioner notify the Commonwealth Ombudsman of the issuance of an examination notice and requires that the ABC Commissioner provide a report of the examination (including video and transcript) to the Commonwealth Ombudsman. The Commonwealth Ombudsman is then required to review the report.

Furthermore, the Commonwealth Ombudsman must provide a quarterly report to the Commonwealth Parliament about examinations conducted during that quarter.

Conclusion

Ai Group does not condone the conduct of the relatively small number of employers who deliberately underpay their employees, and we support appropriate laws to deter and punish such conduct. However, Ai Group does not support this Bill, as currently drafted.

In our view, the Bill, as drafted, would most likely discourage investment and lead to various other adverse outcomes, as discussed above.

The Bill should be amended, as set out in this submission.