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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FAIR WORK AMENDMENT (PROTECTING VULNERABLE WORKERS) BILL 2017**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment,  
Senator the Hon Michaelia Cash)



## **OUTLINE**

The national workplace relations system is established by the *Fair Work Act 2009* (Fair Work Act) and related laws and covers the majority of private sector employees and employers in Australia. It provides a safety net of minimum entitlements and imposes obligations on both employers and employees. The Fair Work Ombudsman is the workplace relations regulator and is responsible for ensuring compliance with national workplace relations laws.

The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the Bill) amends the Fair Work Act to implement the Government's commitment to protect vulnerable workers by:

- Introducing a higher scale of penalties for 'serious contraventions' of prescribed workplace laws.
- Increasing penalties for record-keeping failures.
- Making franchisors and holding companies responsible for underpayments by their franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them. The new responsibilities will only apply where franchisors and holding companies have a significant degree of influence or control over their business networks.
- Expressly prohibiting employers from unreasonably requiring their employees to make payments (e.g. demanding a proportion of their wages be paid back in cash).
- Strengthening the evidence-gathering powers of the Fair Work Ombudsman to ensure that the exploitation of vulnerable workers can be effectively investigated.

The Bill addresses increasing community concern about the exploitation of vulnerable workers (including migrant workers) by unscrupulous employers, and responds to a growing body of evidence that the laws need to be strengthened.

The exploitation of vulnerable workers has been examined in a range of reports, including the Senate Education and Employment References Committee's report entitled *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016; the Fair Work Ombudsman's *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven*, April 2016 and *A Report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, June 2015; and the Productivity Commission's *Productivity Commission Inquiry Report: Workplace Relations Framework*, No. 76, November 2015.

The *Inquiry into 7-Eleven* report, for example, revealed not only systematic underpayment of migrant workers, but also a practice of some franchisees paying their employees the lawful rate, but then coercing them to pay back a certain proportion of their wages to the employer in cash. In some cases, records were deliberately falsified to disguise the underpayments and leave the impression that workers were being paid their lawful entitlements. A series of cases involving the exploitation of franchise workers (both preceding and following the 7-Eleven scandal) demonstrate more can be done to protect vulnerable workers.

The Bill will introduce new provisions to hold franchisors and holding companies responsible for contraventions of the Fair Work Act, if they knew or could reasonably have been expected to

have known the contraventions would occur in their business networks and failed to take reasonable steps to manage the risk.

The Bill also addresses concerns that civil penalties under the Fair Work Act are currently too low to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business. The Bill will increase relevant civil penalties to an appropriate level so the threat of being fined acts as an effective deterrent to potential wrongdoers.

The Bill will also enhance the Fair Work Ombudsman's powers by including new formal evidence-gathering powers to facilitate investigations. New examination powers will provide the Fair Work Ombudsman with a greater suite of options to investigate potential non-compliance with workplace laws. This will help achieve positive investigation outcomes where existing powers to require the production of documents fall short because there are no employee records or other relevant documents. This will enable the most serious cases involving the exploitation of vulnerable workers to be properly investigated—even if no documents are produced.

The Bill will also give the Fair Work Ombudsman new avenues to pursue those who hinder or obstruct investigations, or provide false or misleading information to the regulator.

In summary the proposed amendments will more effectively deter unlawful practices including those that involve the deliberate and systematic exploitation of workers. It will also ensure the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations.

**FINANCIAL IMPACT STATEMENT**

Nil.

## **REGULATION IMPACT STATEMENT**

The Fair Work Ombudsman's *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network* and *The Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, the Productivity Commission's *Workplace Relations Framework Final Report*, and the Senate Standing Committee on Education and Employment's *A National Disgrace: The Exploitation of Temporary Work Visa Holders* report, together have been certified as being informed by a process and analysis equivalent to a Regulation Impact Statement (RIS) as set out in the *Australian Government Guide to Regulation* and the corresponding guidance note. The amendments included in the Bill were informed by substantial evidence from these sources. These reports can be accessed at the following websites:

- <http://www.pc.gov.au/inquiries/completed/workplace-relations/report>
- <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports>
- [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/temporary\\_work\\_visa/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report)

## **NOTES ON CLAUSES**

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

<b>Bill</b>	Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017
<b>Corporations Act</b>	<i>Corporations Act 2001</i>
<b>Criminal Code</b>	<i>Criminal Code Act 1995</i> , Schedule 1
<b>Fair Work Act</b>	<i>Fair Work Act 2009</i>
<b>Fair Work Regulations</b>	<i>Fair Work Regulations 2009</i>
<b>FWO</b>	Fair Work Ombudsman
<b>Inspector</b>	Fair Work Inspector
<b>Officer</b>	Officer within the meaning of the <i>Corporations Act 2001</i> (unless otherwise specified)
<b>Privacy Act</b>	<i>Privacy Act 1988</i>

### **Clause 1 – Short title**

1. Clause 1 provides for the short title of the Act to be the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.

### **Clause 2 – Commencement**

2. The table in this clause sets out when the provisions of the Bill commence.

### **Clause 3 – Schedules**

3. This clause gives effect to the amendments set out in the Schedule to the Act.

4. Schedule 1 of the Bill amends the Fair Work Act.

## **SCHEDULE 1 – AMENDMENTS**

### **Part 1—Increasing maximum penalties for contraventions of certain civil remedy provisions**

5. Part 1 of Schedule 1 amends the Fair Work Act to increase maximum civil penalties for certain ‘serious contraventions’ of the Act. The higher penalties will apply where a contravention was deliberate and formed part of a systematic pattern of conduct. The new regime for ‘serious contraventions’ supplements the existing penalty regime in the Fair Work Act, under which intention does not need to be proved (i.e. it is strict liability).

6. The maximum civil penalty for a ‘serious contravention’ involving deliberate conduct is 600 penalty units for individuals and 3,000 penalty units (or five times higher) for bodies corporate.

7. The reasons for higher penalties are explained in more detail in the reports referred to in the Outline and the Human Rights Compatibility Statement

#### **Item 1 – Section 12**

8. Item 1 amends section 12 to add cross-references to the new definition of the term ‘serious contravention’ in section 557A.

#### **Item 2 – Subsection 539(2) (after note 3)**

9. Item 2 adds a note at the end of subsection 539(2) about the new ‘serious contraventions’ regime.

#### **Items 3 to 12 – Subsection 539(2)**

10. Items 3 to 12 amend subsection 539(2) to insert higher penalties for ‘serious contraventions’ of the following civil penalty provisions:

- subsection 44(1) (Contravening the National Employment Standards);
- section 45 (Contravening a modern award);
- section 50 (Contravening an enterprise agreement);
- section 280 (Contravening a workplace determination);
- section 293 (Contravening a national minimum wage order);
- section 305 (Contravening an equal remuneration wage order);
- sections 323, 325 and 328 (Method and frequency of payment, Unreasonable requirements to spend amount etc, Employer obligations in relation to guarantee of annual earnings); and
- sections 535 and 536 (Employer obligations in relation to employee records and pay slips).

11. The maximum penalty for a serious contravention of a prescribed civil remedy provision is 600 penalty units for individuals, and 3,000 penalty units for bodies corporate. This is ten times higher than the penalty that would otherwise apply in a case without aggravating features.

12. The higher penalties are consistent with the relevant principles in *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Australian Law Reform Commission Report 95, Chapter 26. They have been set with a view to achieving the aim of deterrence, which is the principal purpose of the penalties.

**Item 12 – Subsection 539(2) (cell at table item 29, column 4)**

13. Item 12 increases the maximum penalty for certain record keeping obligations imposed by the Fair Work Act, and inserts a new civil penalty provision for ‘serious contraventions’.

14. The maximum penalty for ‘strict liability’ contraventions relating to employee records and pay slips in sections 535 and 536 doubles from 30 to 60 penalty units for individuals, and from 150 to 300 penalty units for bodies corporate.

15. The new maximum penalties also extend to false or misleading employee records or payslips, which the contravening employer knows to be false or misleading. The prohibition was previously provided for under regulation 3.44 of the Fair Work Regulations. The maximum penalty for these contraventions increases from 20 penalty units under the Regulations to 60 penalty units under the new provisions for individuals, and from 100 to 300 penalty units for bodies corporate.

16. The increase to these maximum penalties recognises that the current penalty levels for these contraventions are too low compared to other civil penalty provisions within the Act. This also acknowledges the important role employee records and payslips play in determining compliance under the Act; without reliable employee records, employees may be unable to prove their case and recover their minimum entitlements at law. If underpayments cannot be proved, employers may end up with a significant windfall, even if fined for contraventions relating to records under sections 535 and 536. This increase in the penalties is not designed to target those employers who genuinely overlook record-keeping requirements. Rather, it is aimed at deterring the small minority of employers who deliberately fail to keep records as part of a systematic plan to underpay workers and disguise their wrongdoing.

17. This will help ensure employees receive their legal entitlements under the Act, and also help level the playing field for those employers who do the right thing and comply with their legal obligations in relation to their employees under the Act.

18. Sections 535 and 536 will also be subject to the higher penalties scale for ‘serious contraventions’ where the contraventions are deliberate and part of a systematic pattern of conduct.

**Item 13 – After section 557**

19. Item 13 inserts new sections 557A and 557B of the Fair Work Act.

Section 557A – Civil contraventions of civil remedy provisions

20. New section 557A establishes the regime for serious contraventions under the Fair Work Act. New subsection 557A(1) provides that a contravention is only a ‘serious contravention’ if the contravening conduct was deliberate and part of a systematic pattern of conduct relating to one or more other persons.

21. The new section requires several steps to be taken. First, identify the relevant proscribed conduct in the applicable civil penalty provision (e.g. a term of a modern award has been contravened under section 45; or employee records have not been made or kept under section 535(1)). The proscribed conduct may consist of an act or omission. Second, consider whether the conduct was deliberate (e.g. a term of a modern award was deliberately contravened, or employees’ records were purposefully not made or kept). New section 557B explains how a body corporate’s conduct may be assessed to determine whether it ‘deliberately’ contravened the law for the purposes of new subsection 557A(1). Third, consider whether the conduct formed part of a systematic pattern of conduct.

22. The term ‘deliberate’ is not defined, but is intended to be read synonymously with the term ‘intentional’ that is used elsewhere in the Fair Work Act.

23. New subsection 557A(2) provides examples of the kinds of matters a court may have regard to in determining whether a person’s conduct constituting the contravention of the provisions was part of a systematic pattern.

24. The reference to a ‘systematic pattern of conduct’ is to a recurring pattern of methodical conduct or a series of coordinated acts over time. It does not encompass ad hoc or inadvertent conduct. A contravention is more likely to be considered part of a systematic pattern of conduct if:

- there are concurrent contraventions of the Fair Work Act occurring at the same time (e.g. breaches of multiple award terms and record-keeping failures);
- the contraventions have occurred over a prolonged period of time (e.g. over multiple pay periods) or after complaints were first raised;
- multiple employees are affected (e.g. all or most employees doing the same kind of work at the workplace, or a group of vulnerable employees at the workplace); and
- accurate employee records have not been kept, and pay slips have not been issued, making alleged underpayments difficult to establish.

25. These factors are intended to be indicative only, and a ‘serious contravention’ may still be established if one or more of these factors are not present. For example a pattern of systematic conduct may affect an individual or group of employees. Other factors may also be relevant, such as a failure to address complaints about alleged underpayments.

26. New subsection 557A(3) clarifies that subsection 557A(2) provides a non-exhaustive list and does not limit the matters a court may have regard to.
27. New subsection 557A(4) clarifies that, in *determining whether there is a 'systematic pattern of conduct'*, the 'grouping' of contraventions under section 557(1) should be disregarded. This allows the total number of relevant contraventions to be considered, so the entirety of the relevant conduct may be taken into account.
28. New subsection 557A(5) clarifies that, for the purpose of *determining penalties*, the 'grouping' exercise under subsection 557(1) is undertaken in relation to serious contraventions.
29. New subsection 557A(6) requires an applicant seeking the higher penalties for 'serious contraventions' to make this clear in their application for relief. This ensures procedural fairness by requiring applicants to put respondents on notice about the seriousness of the allegations being made against them from the beginning of proceedings.
30. New subsection 557A(7) applies if alleged 'serious contraventions' have not been proved (e.g. the applicant has failed to prove the contraventions were deliberate). It allows the courts to determine whether the corresponding strict liability provisions were contravened and make appropriate orders accordingly.

#### Section 557B – Liability of bodies corporate for serious contravention

31. New section 557B explains how a body corporate's conduct may be assessed, to determine whether it 'deliberately' contravened the law for the purposes of new subsection 557A(1).
32. A contravention by a body corporate is deliberate if it expressly, tacitly or impliedly authorised the contravention. The authorisation may be given by an individual within the organisation (see section 793); or via a policy, rule, course of conduct or practice that exists within the organisation. The body corporate's actions, however, must be considered as a whole. This reflects elements of Part 2.5 of the Criminal Code. The criminal framework has been adapted in the present context for use in a civil penalties framework: see *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC Report 95, paragraphs 7.138, 7.139. It recognises that it may sometimes be simplistic to merely correlate the culpability of an agent with the culpability of the corporation without investigating the actions of the corporation as a whole.
33. There may be some instances where the misconduct of a 'rogue' senior manager does not represent the corporation's policy. In these cases, the actions of the corporation as a whole may be taken into account. There is no liability if the body corporate proves that it exercised due diligence to prevent the 'rogue' conduct or authorisation.
34. New subsection 557B(2) clarifies that the new provision does not limit section 793 (Liability of bodies corporate).

## **Part 2—Liability of responsible franchisor entities and holding companies**

35. Part 2 of Schedule 1 amends the Fair Work Act to insert new provisions to hold ‘responsible franchisor entities’ (referred to as franchisors) and ‘holding companies’ responsible for certain contraventions of the Act by businesses in their networks. The new provisions supplement and do not override the existing accessorial liability provisions (section 550).

36. Some franchisors and holding companies have established franchise agreements and subsidiaries in their corporate structure that operate on a business model based on underpaying workers. Some have either been blind to the problem or not taken sufficient action to deal with it once it was brought to their attention.

37. Recent highly publicised cases of exploitation of vulnerable workers, including by 7-Eleven franchisees, demonstrate more needs to be done by franchisors and holding companies to protect vulnerable workers employed in their business networks. A number of case studies are provided in the Senate Education and Employment References Committee’s report entitled *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016 and reports of the Fair Work Ombudsman.

38. Under the existing laws a person may be held responsible for being ‘involved in’ a contravention, even if they are not the direct employer (section 550). This is known as accessorial liability. There is no accessorial liability if a person genuinely ‘did not know’.

39. The provisions only apply to responsible franchisor entities which have a significant degree of influence or control over the relevant franchisee’s affairs. By definition, holding companies have control over the affairs of their subsidiaries. Control relates to the affairs of the franchisee or subsidiary broadly, not only as to minor matters that would not have any impact on the management and operational decisions of the business.

40. For franchisors and holding companies with significant influence of control over their networks, turning a blind eye to contraventions is not an option under the new provisions. Franchisors and holding companies are held responsible for certain contraventions of the Act by businesses in their networks if they knew or could reasonably be expected to have known that the contraventions would occur, or that contraventions of the same or a similar character were likely to occur and they had significant influence or control over the companies in their network. There is no liability if the franchisor or holding company has taken reasonable steps to deal with the problem.

41. The Fair Work Act does not extend to impose franchisor obligations on corporations operating completely outside Australia. That is, companies that do not have any operations in Australia and have simply entered into a master franchisor relationship with an Australian company (even if the Australian company is a subsidiary of the foreign company).

42. The new provisions do not displace the obligations of employers to continue to comply with Australian workplace laws or introduce joint employment arrangements.

### **Item 14 – Section 12**

43. Item 14 inserts cross-references to new definitions of the terms ‘franchisee entity’ and ‘responsible franchisor entity’ in new section 558A.

### **Item 15 – Section 537 (after the paragraph relating to Division 4)**

44. Item 15 inserts a new plain-English guide into the new Division 4A.

### **Item 16 – Subsection 539(2) (after table item 29)**

45. Item 16 amends subsection 539(2) to add new item 29A in relation to the new requirements for franchisors and holding companies. It provides that proceedings may be brought before the Federal Court or the Federal Circuit Court by an employee, an employee organisation or an Inspector (including the FWO).

46. The maximum penalty is 60 penalty units for an individual or 300 penalty units for bodies corporate.

47. The new provisions hold franchisors and holding companies responsible for contraventions of the prescribed provisions by the businesses in their networks, in certain circumstances. Section 557 (Course of conduct) groups together contraventions of the same provision or term. Section 557 applies to the contraventions of franchise entities or subsidiaries referred to in new paragraphs 558B(1)(a) and 558B(2)(b). Section 557 does not, however, apply to the contraventions of the franchisor or holding company, as new section 558B is not a civil remedy provision to which section 557 applies (see subsection 557(2)). In practice, this means that a franchisor or holding company that contravenes the new requirement could be fined on the same basis as the contravening employer.

### **Item 17 – After Division 4 of Part 4-1**

48. Item 17 inserts new Division 4A into Chapter 4 of the Fair Work Act.

#### Section 558A – Meaning of *franchisee entity* and *responsible franchisor entity*

49. New paragraph 558A(1)(a) defines the term ‘franchisee entity’. The definition relies on the ordinary meaning of the term ‘franchisee’, but clarifies that the term includes a subfranchisee (however described).

50. New paragraph 558A(1)(b) qualifies the definition by providing the term only applies to franchisees whose business is substantially or materially associated with ‘intellectual property relating to the franchise’. This may be evidenced by use of trademarks, advertising or commercial symbols that are owned, used, licensed or specified by the franchisor or their associate. The effect of this qualification is that the definition only covers businesses that are widely considered to be ‘franchise businesses’. This is consistent with the approach taken under the Franchising Code of Conduct contained in Schedule 1 of the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014*. This approach effectively limits the scope of the new provisions to franchisor/franchisee businesses which are appropriately associated by branding—and distinguishes it from other forms of arrangements – for example, distribution agreements or joint venture marketing.

51. New paragraph 558A(2)(a) defines the term ‘responsible franchisor entity’. The definition relies on the ordinary meaning of the term ‘franchisor’, but clarifies that the term includes a subfranchisor (however described).

52. New paragraph 558A(2)(b) narrows the scope of the new provisions to those franchisors which exercise a significant degree of influence or control over the franchisee entity’s affairs. This recognises that there are a wide range of franchise models, and the extended responsibilities in Division 4A should only apply to those who have a significant degree of involvement in their franchisees’ affairs. The new provisions can only work in practice where the franchisor has a certain degree of influence and control over the franchisee.

53. The term ‘affairs’ is not defined but is intended to be read broadly, and is not limited to particular aspects of a franchisee’s operations. It is intended to include involvement in the franchisee’s financial, operational and corporate affairs.

Section 558B – Responsibility of *responsible franchisor entities and holding companies* for certain contraventions

54. New subsection 558B(1) makes ‘responsible franchisor entities’ liable for certain contraventions of the Fair Work Act by their franchisee entities in situations where they should reasonably have been aware of the contraventions and could reasonably have taken action to prevent such contraventions from occurring. Responsible franchisor entities that have taken reasonable steps to prevent the contraventions will not contravene these new provisions (subsection 558B(3)).

55. New paragraphs 558B(1)(a) and (b) trigger the new provisions if:

- a franchisee entity contravenes one or more of the civil penalty provisions prescribed in subsection 558B(7); and
- there is a responsible franchisor entity for the franchisee entity (see section 558A).

56. New paragraph 558B(1)(c) clarifies that only contraventions occurring in the course of the franchised business or businesses count for this purpose. Contraventions of the Fair Work Act by a franchisee entity occurring as part of the conduct of another external business, for example, are not relevant.

57. New paragraph 558B(1)(d) enables the responsible franchisor entity (including a subfranchisor) to be held liable for prescribed contraventions if either:

- it or one of its ‘officers’ knew, or could reasonably be expected to have known, the contravention by the franchisee entity would occur; or
- at the time of the contravention, it or one of its ‘officers’ knew, or could reasonably be expected to have known, that a contravention by the franchisee entity of the same or a similar character was likely to occur.

58. These provisions mean that the responsible franchisor entity does not need to have actual knowledge that the franchisee entity’s contravention would occur. It is enough that the responsible franchisor entity could reasonably be expected to have known the

contravention would occur, or that a contravention of the same or a similar character was likely to occur. Mere suspicion is not enough – there must objectively be reasonable grounds to hold the belief.

59. For example, a responsible franchisor entity may be aware of a series of complaints about alleged underpayments, or may be aware of a system of non-compliance that is likely to result in the franchisee entity’s employees being underpaid or otherwise deprived of their entitlements under the Fair Work Act. There is no need to prove the responsible franchisor entity knew exactly who was being underpaid, and on what basis.

60. Determining whether a responsible franchisor entity could reasonably be expected to have known of a contravention (or contraventions of the same or a similar character) is an objective test. It also takes into account the responsible franchisor entity’s knowledge, experience and acumen.

61. The test looks to what the responsible franchisor entity knew, or could reasonably be expected to have known, about the general likelihood of contraventions affecting employee entitlements within its franchise network at the time the actual contravention occurred. There is no need to prove that the head office of a potentially large franchise network knew the exact details of contraventions being committed by their franchisees. It requires a general assessment of what was known, or could reasonably be expected to have been known, about levels of compliance with the relevant requirements within the franchise network.

#### *Contraventions of the same or a similar character*

62. The phrase ‘contraventions of the same or a similar character’ is not defined, so has its ordinary meaning. A contravention is generally ‘of the same or a similar character’ if it is legally the same or similar in character (e.g. breaches of the terms of an award or enterprise agreement). Additionally there must be some factual or temporal nexus or connection between the contraventions in order to establish a series (e.g. award contraventions form part of a series of contraventions relating to the underpayment of employees at a workplace).

#### Subsection 558B(2) – Responsibility of *holding companies* for certain contraventions

63. New subsection 558B(2) mirrors the provisions in subsection 558B(1), but applies them in relation to holding companies and their subsidiaries. The term ‘subsidiary’ takes its meaning from the *Corporations Act 2001*.

#### 558B(3)-(5) – Reasonable steps to prevent a contravention of the same or a similar character

64. New subsection 558B(3) provides that a franchisor or holding company does not contravene new section 558B if it had taken reasonable steps to prevent the kind of contraventions which occurred (i.e. contraventions of the same or a similar character).

65. The requirement to take reasonable steps is a requirement to take such steps as ought reasonably to be taken in the circumstances. This avoids a ‘one size fits all’ approach by allowing franchisors and holding companies flexibility in deciding which steps to take to support compliance within their business networks. The diverse range of business models

and range of industries in the market means that what constitutes ‘reasonable steps’ for a multi-national business will be different for a small franchisor with only several franchisees.

66. The FWO website identifies a number of practical steps franchisors and holding companies can take to help franchisees and subsidiaries understand and meet their obligations. These may be scaled up or down depending on the nature of the business involved and what might be reasonable in the circumstances.

67. Many franchises and holding companies will already be undertaking steps to ensure such compliance, and will not need to change their arrangements as a result of these provisions. For those that do need to take additional steps, the following activities may constitute reasonable steps to avoid a contravention of the Act, depending on the size and influence or control of the relevant companies:

- ensuring that the franchise agreement or other business arrangements require franchisees to comply with workplace laws;
- providing franchisees or subsidiaries with a copy of the FWO’s free Fair Work Handbook;
- encouraging franchisees or subsidiaries to cooperate with any audits by the FWO;
- establishing a contact or phone number for employees to report any potential underpayment to the business;
- auditing of companies in the network.

68. New subsection 558B(4) sets out a non-exhaustive list of matters which a court may take into account in determining whether a person took reasonable steps to prevent a contravention under the provision including the size and resources of the franchise or body corporate and ability to influence and control the matter. This means that the changes will not require steps to be taken that are unreasonable or impractical.

69. New subsection 558B(5) clarifies that other relevant factors may be taken into account, in addition to those listed in new subsection 558B(4).

70. Similar to standard practice for statutory exemptions, a franchisor or holding company wishing to claim the statutory exemption bears the evidential onus (but not legal onus) and must provide evidence showing that, at the time of the contraventions:

- it had taken reasonable steps to prevent a contravention of the same or similar character; or
- there were no reasonable steps it could have taken to prevent a contravention of the same or similar character.

71. This approach is appropriate as the facts giving rise to the statutory exemption are within the particular knowledge of the franchisor or holding company. Only the franchisor or holding company will know what steps (if any) it has taken to prevent the

contraventions by the franchisee or subsidiary, and the reasonableness of its approach in the circumstances.

Subsection 558B(6) – Civil proceedings in relation to contravention by franchisee entity or subsidiary not required

72. New subsection 558B(6) clarifies that liability may be established against a franchisor or holding company whether or not the franchisee entity or subsidiary responsible for the contraventions has had orders made or sought against it in relation to the contraventions.

Subsection 558B(7) – Relevant civil remedy provisions

73. New subsection 558B(7) prescribes the civil remedy provisions that trigger the operation of new section 558B if contravened by a franchisee entity or subsidiary.

Section 558C – Right of franchisor entity or holding company to recover

74. New section 558C sets out a statutory recovery mechanism. It applies if a franchisor or holding company has rectified an underpayment by its franchisee or subsidiary as a result of new section 558B.

75. New subsection 558C(1) enables the franchisor or holding company to recover the amount from the franchisee entity or subsidiary responsible for the underpayment. This does not include any amount it has already recovered (e.g. under the terms of a franchise arrangement). No provision is made for the recovery of any pecuniary penalties imposed by a court.

76. New subsection 558C(2) sets out the purpose for which proceedings may be brought.

77. New subsection 558C(3) confers jurisdiction on the prescribed courts to deal with applications under the section.

78. New subsection 558C(4) sets out the orders a court may make under the section.

79. New subsection 558C(5) requires the court, upon application, to make provision for an amount of interest in the sum ordered, unless good cause is shown to the contrary. This reflects the policy in section 547 (Interest up to judgment) of the Fair Work Act.

80. New subsection 558(6) prescribes the period for which interest may be charged.

81. New subsection 558(7) prescribes the time for bringing proceedings under the section as six years.

### **Part 3—Unreasonable requirements to make payments**

82. Part 3 of Schedule 1 amends the Fair Work Act to clarify the operation of section 325 (Unreasonable requirements to spend amount).

#### **Item 18 – Section 151**

83. Item 18 repeals and replaces section 151. The amendment is consequential upon the changes to sections 325 and 326 made by this Part.

#### **Item 19 – Subsection 253(1) (note 2)**

84. Item 19 substitutes the wording in a note, and is consequential upon the changes to sections 325 and 326 made by this Part.

#### **Item 20 – Division 2 of Part 2-9 (heading)**

85. Item 20 replaces the heading for Division 2 of Part 2-9, which is consequential upon the changes to sections 325 and 326 made by this Part.

#### **Item 21 – Section 325 (heading)**

86. Item 21 replaces the heading for section 325, which is consequential upon the amendments to subsection 325(1) made by this Part.

#### **Item 22 – Subsection 325(1)**

87. Item 22 amends subsection 325(1) to clarify the section prohibits employers from directly or indirectly requiring an employee to give ‘cashback’ or pay any other amount of the employee’s money or the whole or any part of an amount payable to the employee in relation to the performance of work (whether to the employer or another person) if:

- the requirement is unreasonable in the circumstances; and
- the payment is directly or indirectly for the benefit of the employer or a party related to the employer (e.g. an owner or director of an employer, or a relative of the owner or director of an employer).

88. The prohibition applies whether the requirement is made directly or indirectly by the employer, or an officer, employee or agent of the employer (see section 793). It applies even if the employee refuses or fails to make the payment that was required of them.

89. Asking an employee for ‘cashback’ so the person can keep their job, or with the sole purpose of undercutting their minimum entitlements under the Fair Work Act, will always be unreasonable and prohibited under section 325(1).

90. Asking an employee for any amount to be spent, or money to be paid, out of the employee’s pocket in a way which involves undue influence, duress or coercion, will always be unreasonable and prohibited under section 325(1).

91. The maximum civil penalty is 60 penalty units for individuals or 300 penalty units for bodies corporate. Higher maximum penalties of 600 penalty units for individuals and

3,000 penalty units for bodies corporate may apply where there are aggravating circumstances (see amendment made by item 11, Part 1).

92. Any employee who has paid ‘cashback’ or made other payments which are unreasonable in the circumstances is entitled to have the amounts reimbursed by their employer (see section 327).

#### Requests for overpayments to be returned

93. The provision has no operation in relation to legitimate, mutual negotiations for overpayments to be paid back by an employee to their employer in lieu of legal proceedings. These kinds of requests are reasonable, so are not caught by the prohibition.

#### Alignment with section 326 (Certain terms to have no effect)

94. The amendments to subsection 325(1) have aligned the provision more closely with the approach taken in existing paragraph 326(1)(b) (Certain terms have no effect) to improve the consistency between the two sections.

95. This was achieved by replacing the reference in subsection 325(1) to an amount being spent from the employee’s wages (i.e. ‘*an amount payable to the employee in relation to the performance of work*’) with ‘*an amount of the employee’s money*’.

#### **Item 23 – Section 326**

96. Item 23 amends section 326 to make technical changes, consequential upon amendments to subsection 325(1). The provisions have also been re-ordered to improve the readability of the section. While the entire section has been repealed and replaced there are no substantive changes to this section.

#### **Item 24 – Section 327 (heading)**

97. Item 24 amends the heading to section 327 to reflect amendments made to the section, which are consequential upon the amendments to subsection 325(1).

#### **Item 25 – Paragraph 327(b)**

98. Item 25 repeals and replaces paragraph 327(b) to reflect changes to subsection 325(1), which refers to amounts being spent from or paid out of an employee’s money rather than the employee’s wages, which was previously the case.

99. The provision makes it clear that any amounts an employee was unlawfully required to spend or pay (out of the employee’s money) by their employer may be recovered by the employee from their employer.

#### **Item 26 – Paragraph 557(2)(i)**

100. Item 26 amends the description about the effect of subsection 325(1) in subparagraph 557(2)(i) to reflect its new content.

## **Part 4—Powers of the Fair Work Ombudsman**

101. Part 4 of Schedule 1 amends the Fair Work Act to grant the FWO new evidence-gathering powers similar to those already available to corporate regulators like the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission.

102. The FWO will have the power to issue an ‘FWO notice’ if the FWO reasonably believes that a person has information or documents relevant to an investigation, or is capable of giving evidence that is relevant to such an investigation. The FWO notice may require the person to give the information, produce the documents or attend before the FWO to answer questions.

103. The FWO’s new evidence-gathering powers supplement the existing powers of Inspectors to require the production of documents under section 712. For example if a person refuses or fails to comply with a notice issued under section 712, or no documents (e.g. employee records) exist.

104. The new evidence-gathering powers will give the FWO enforceable powers of questioning for the first time, which will be particularly important in cases where no relevant documents appear to be available and the investigation has stalled. While Inspectors may interview people under paragraph 709(e), there is no penalty for a person who refuses or fails to answer questions.

105. The stronger evidence-gathering powers are subject to important safeguards to ensure the powers are exercised appropriately and consistently, and that people who are asked to respond to an FWO notice are dealt with fairly. They have been framed consistent with *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 and the Administrative Review Council Report 48, *The Coercive Information-gathering Powers of Government Agencies*. Safeguards include:

- before exercising the new powers, the FWO must have reasonable grounds to believe a person can help with an investigation—suspicion is not enough;
- the power to issue an FWO notice may only be exercised by the FWO personally, or a delegate who is an SES or acting SES member of staff;
- an interview conducted under the new powers may only be conducted by the FWO personally or by an SES or acting SES member of staff;
- an FWO notice must be in writing and in the form prescribed by the regulations (if any);
- a recipient of an FWO notice has a guaranteed minimum of 14 days to comply with the notice;
- a person attending a place to answer questions may be legally represented, and is entitled to be reimbursed for certain reasonable expenses, up to a prescribed amount;
- there is protection from liability relating to FWO notices; and

- self-incriminating information, documents or answers given in response to an FWO notice cannot be used against the person who gave the evidence in any proceedings.

106. The exercise of the new powers is subject to the general jurisdiction of the Commonwealth Ombudsman and judicial review under the *Judiciary Act 1903*. The powers are not exercisable by Inspectors generally (unless they are also members of the SES).

107. The maximum penalty for failure to comply with an FWO notice is 600 penalty units for individuals and 3,000 penalty units for bodies corporate.

108. The rationale for stronger evidence-gathering powers is explained in more detail in the reports referred to in the Outline.

### **Item 27 – Section 12**

109. Item 27 amends section 12 to add a cross-reference to the new definition of ‘FWO notice’ in new subsection 712A(1).

### **Item 28 – Subsection 539(2) (after table item 32)**

110. Item 28 amends subsection 539(2) to add new item 32A for failing to comply with an FWO notice. The FWO, or any other Inspector may bring proceedings for a contravention of the new penalty provision before a prescribed court.

111. The maximum penalty for failing to comply with an FWO notice is 600 penalty units for individuals and 3,000 penalty units for bodies corporate.

### **Items 29 and 30 – Subsection 683(1) and after subsection 683(1)**

112. These items amend the delegation powers of the FWO to deal with the new powers to issue and vary FWO notices. The amendments provide the FWO may only delegate these powers to a member of staff who is an SES employee or an acting SES employee.

113. Tight restrictions on who may exercise these powers recognises their serious nature, including the significant penalties that apply to a person who fails or refuses to comply with an FWO notice. This ensures that only the most senior personnel in the organisation are able to exercise these powers. Restricted delegations also promotes consistency in decision making, as only a small number of people are able to exercise these powers.

114. A note to the section highlights that the terms ‘SES employee’ and ‘acting SES employee’ are defined in the *Acts Interpretation Act 1901*.

### **Items 31 and 32 – At the end of subsection 685(1) and section 686**

115. These items add notes at the end of relevant sections highlighting that new section 714A restricts the type of personal information that can be included in reports and annual reports (see item 45 of Part 4).

**Item 33 – Subdivision D of Division 3 of Part 5-2 (heading)**

116. This item amends the heading of Subdivision D to reflect its re-structuring to accommodate the new powers of the FWO.

**Items 34 and 35 – Section 703 and at the end of section 703**

117. These items insert new subsection 703(2) to clarify the power to issue an FWO notice under new section 712A is not a ‘compliance power’. This delineates the Inspectors’ ‘compliance powers’ and the FWO’s new evidence-gathering powers. Special conditions and restrictions on the exercise of the latter are included in new section 712A.

**Items 36 and 37 – Before section 708 and before subsection 711**

118. These items insert new subdivision headings. This reflects the re-structuring of Subdivision D to accommodate the FWO’s new powers.

**Item 38 – After section 712**

119. Item 38 inserts new sections 712A, 712B, 712C and 712D.

Section 712A – Fair Work Ombudsman may give FWO notice

120. New section 712A sets out when the FWO can give an FWO notice to a person.

121. New subsection 712A(1) provides that the FWO may give an FWO notice in writing to a person, in the form prescribed by the regulations (if any), if he or she reasonably believes that the person:

- has information or documents relevant to an investigation by an inspector into a suspected contravention of the Fair Work Act; or
- is capable of giving evidence that is relevant to such an investigation.

122. Subsection 712A(2) states that the notice may require a person to do one or more of the following:

- give information to the FWO, or a specified member of the staff of the Office of the FWO, by the time, and in the manner and form, specified in the notice; or
- produce the documents to the FWO, or a specified member of the staff of the Office of the Fair Work Ombudsman, by the time, and in the manner, specified in the notice; or
- to attend before the FWO, 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, at the time and place specified in the notice, and answer questions relevant to the investigation.

123. An FWO notice must specify the time for compliance, which must be at least 14 full calendar days after the notice is given. The day on which notice is served is not counted. This gives the recipient of the notice a guaranteed minimum period to comply with the

notice, consistent with *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011.

124. New subsection 712A(3) empowers the FWO to extend the time given to a person to comply with an FWO notice. The variation must be in writing, and the new compliance date must be at least 14 days after the notice is first given to the person.

125. New subsection 712A(4) clarifies that a person attending a place to answer questions in response to an FWO notice may be represented by a lawyer if the person chooses. This is an important safeguard that makes it clear that a person is permitted to be represented by a lawyer during questioning.

126. New subsection 712A(5) empowers a person asking questions under an FWO notice to require information or answers to be verified by, or given on, oath or affirmation, and either orally or in writing. Any member of staff authorised by the person conducting the examination may administer the oath or affirmation.

127. New subsection 712A(6) provides that the oath or affirmation is an oath or affirmation that the information or answers are or will be true.

128. New section 718A includes new civil sanctions in relation to the provision of false or misleading information or documents under the Fair Work Act (see item 56 of Part 6).

#### Section 712B – Requirement to comply with FWO notice

129. New subsection 712B(1) is a civil penalty provision that requires a person who has been given an FWO notice to comply with the terms of the notice (including taking an oath or affirmation when required to do so).

130. A court may fine a person who fails or refuses to comply a maximum penalty of 600 penalty units for individuals and 3,000 penalty units for bodies corporate (see item 28 of Part 4).

131. New subsection 712B(2) excuses a person from having to comply with a requirement under the section if they are not capable of doing so (e.g. a requested document does not exist or it is otherwise not possible to comply with the requirement). A person who seeks to rely on this exception bears the evidential onus, which requires them to provide evidence as to why they were not capable of complying with the FWO notice. The legal onus of proof, which rests with the applicant, does not change.

132. The recipient of a notice may be required to give information or produce documents which lie, in the case of information, within its knowledge or control or, in the case of documents, within its possession or control.

133. The recipient of a notice cannot be required to undertake a general investigation of matters beyond their control. However, a degree of inquiry may be required to determine matters which are properly to be seen as being within their knowledge or control. This is particularly the case where the recipient is a body corporate.

### Requirements for bodies corporate

134. A body corporate may be required by a notice to give information, which is held on its behalf by its officers, employees or agents. The people responsible for preparing the body corporate's response will commonly find it necessary to make inquiries within the organisation as to relevant information. The process is similar to the one required to provide particulars, answer interrogatories or discover and produce documents in compliance with court orders in litigation, or to provide information in compliance with statutory requirements.

135. An individual may be required to attend a specified place under new paragraph 712A(2)(c) in relation to a body corporate's affairs. If required to do so, the individual must attend and may be questioned as to their own knowledge of the body corporate's affairs. If it turns out that they do not possess the relevant knowledge they may be required to identify those who do have that knowledge and those others may then, in turn, be required to appear and give evidence.

### Section 712C – Payment for expenses incurred in attending as required by an FWO notice

136. New section 712C allows an individual to be reimbursed for certain reasonable expenses (including legal expenses) incurred by the individual in attending an examination in accordance with an FWO notice. The regulations prescribe the amounts which may be recovered. It would not be reasonable for example to recover expenses already directly met by the attendee's employer.

137. To recover expenses, a person must apply in writing to the FWO within three months after their attendance and provide sufficient evidence to establish they incurred the expenses being claimed. An application must be in the form prescribed by regulations (if a form has been prescribed), and must include any information prescribed by the regulations.

### Section 712D – Protection from liability relating to FWO notices

138. New section 712D protects persons who have, in good faith, given information, produced records or documents, or answered questions when required to do so in response to an FWO notice. In these situations, the person who gives the information, record or documents or answers the questions is not liable to any proceedings for contravening any other law because of that conduct, or for civil proceedings for loss, damage or injury of any kind suffered by another person because of that conduct.

### **Item 39 – Section 713**

139. Item 39 repeals and replaces section 713 of the Fair Work Act to accommodate new processes and protections around FWO notices.

140. The rules around self-incrimination etc. for existing Inspector-issued notices do not change (see section 712), except for a minor correction (see new paragraphs 713 (2)(d) and (e)). The provisions continue the existing law except:

- it covers the new power of the FWO to issue an FWO notice; and

- the amendments correct an inadvertent omission in the existing law by aligning it with Commonwealth criminal policy to provide that material may be admissible in criminal proceedings against the individual in relation to perjury type offences.

#### Section 713 – Self-incrimination etc.

141. New section 713 abrogates the privilege against self-incrimination for individuals in relation to any information, record or document, or answer given under paragraph 709(d), subsection 712(1) or new section 712A, subject to certain immunities and safeguards. The provision has no application to any of these things if given voluntarily. Bodies corporate are not entitled to the privilege so the provision does not apply.

142. New subsection 713(1) does not change the policy in relation to anything required to be given under paragraph 709(d) or subsection 712(1). Its scope has increased to cover things or answers given under an FWO notice.

143. New subsection 713(1) removes the privilege against self-incrimination. It provides a person is not excused from giving information, producing a record or document, or answering a question under the prescribed provisions on the ground that to do so might tend to incriminate the person or otherwise expose the person to a penalty or other liability.

144. Abrogating the privilege against self-incrimination is necessary to ensure the FWO has all the available, relevant information to properly carry out its statutory functions. It is particularly important to address non-compliance by those determined to disregard workplace laws.

145. In these cases, those who may be best placed to give information about possible contraventions of workplace laws may have had some level of involvement in those contraventions or may have contravened another law. If the privilege is not abrogated, there may be no reason for such individuals to provide information to the FWO.

146. In cases involving the exploitation of workers, a stalled investigation could mean significant delays in workers recovering unpaid entitlements or that there is insufficient evidence to commence proceedings. Migrant workers, in particular, may not be able to recover their unpaid wages if an investigation is stalled and they are required to leave the country. Failure to detect and address non-compliance can lead to a culture of non-compliance becoming entrenched across a business, a business network or even more broadly and perpetuates the exploitation of workers (particularly migrant workers entering Australia): see the Baiada Inquiry Report.

#### Immunities: Inspector-issued notices etc. (paragraph 709(d), 712(1))

147. Paragraphs 713(2)(a)-(c) do not change the policy in relation to immunities for an individual who is required to give something under paragraph 709(d) or subsection 712(1). Under the provision, none of the evidence—or any information, document or thing obtained as a direct or indirect result of producing the evidence—is admissible in evidence against the individual in criminal proceedings (subject to several exceptions).

148. New paragraphs 713(2)(d) and (e) amend the existing scheme by inserting exceptions to the immunities to enable perjury-type offences to be prosecuted. Consistent

with Commonwealth criminal policy, the immunities do not apply to the following offences that relate to the Fair Work Act:

- sections 137.1 and 137.2 of the Criminal Code (false or misleading information or documents); and
- section 149.1 of the Criminal Code (obstruction of Commonwealth officials).

149. This change corrects an oversight in the current provisions.

150. It also brings the Fair Work Act into line with other Commonwealth legislation that abrogates the privilege against self-incrimination, and ensures that an individual who provides false or misleading information or documents, or obstructs Commonwealth officials, is not protected from the consequences of that behaviour.

#### Immunities: new FWO notices (new section 712A)

151. New subsection 713(3) applies in relation to the new FWO notice process, and extends use immunity to individuals who give information, records or documents, or answers to questions in response to an FWO notice. Under the provision, none of that evidence given by an individual is admissible against the individual in proceedings, other than:

- proceedings for contraventions of section 712B or 718A (requirement to comply with FWO notice and false or misleading information or documents);
- proceedings for an offence against section 137.1 or 137.2 of the Criminal Code (false or misleading information or documents); and
- proceedings for an offence against section 149.1 of the Criminal Code (obstruction of Commonwealth officials).

152. These exceptions have been framed consistently with the *Guide to Framing Commonwealth Offences Infringement Notices and Enforcement Powers*, September 2011.

153. The use immunity arising from information provided in response to an FWO notice applies to both criminal and civil proceedings. The greater protection is conferred in recognition of the stronger examination powers being exercised in this context, which also attract commensurately higher maximum penalties in relation to contraventions.

154. The term ‘proceedings’ is not defined but is intended to be given broad scope to cover any proceedings of a legal nature between parties. It is not limited to judicial proceedings.

155. The provision does not include a ‘derivative use’ immunity—that is, a prohibition on the indirect use of information etc. provided by a natural person to gather other, admissible evidence against him or her. Evidence obtained from other sources by Fair Work Inspectors following an examination will not be subject to the limitations applying to examination powers in subsection 713(3).

156. Other Commonwealth laws arising in a similar regulatory context, like the *Australian Securities and Investments Commission Act 2001* and the *Competition and Consumer Act 2010*, also only provide for use immunity. The FWO's new examination powers have been modelled on powers currently conferred by these Acts.

157. This approach addresses several difficulties associated with derivative use immunity.

158. Provision of a derivative use immunity means that further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings, even if the additional evidence would have been uncovered by the regulator through independent investigation processes. A related issue is that it can be very difficult and time-consuming in a complex investigation to prove whether evidence was obtained as a consequence of the protected evidence or obtained independently.

159. The burden placed on investigating authorities in conducting a prosecution before the courts is the main reason why the powers of the Australian Securities Commission (now the Australian Securities and Investment Commission) were amended to remove derivative use immunity. The explanatory memorandum to the *Corporations Legislation (Evidence) Amendment Bill 1992* [at p. 1] provides that derivative use immunity placed:

*...an excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that any item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity...*

#### **Item 40 – After section 713A**

160. Item 40 inserts new section 713AA, which clarifies that legal professional privilege is preserved for purposes of Part 5-2.

#### **Items 41, 42, 43 and 44 – Section 714**

161. These items make consequential amendments to section 714 (Power to keep records or documents) so the existing powers to inspect, copy and keep records or documents, and corresponding safeguards, extend to records and documents given or produced in response to an FWO notice.

#### **Item 45 – After section 714**

162. Item 45 inserts new section 714A which prohibits information relating to the affairs of an individual from being included in a report under section 685 (which allows the Minister to require reports) or in a report referred to in section 686 (which deals with annual reports) if the individual is named (or otherwise identified), or their identity may be reasonably worked out from the context.

163. This provision ensures that personal information that a person is required to disclose in response to an FWO notice is treated confidentially and that the person who disclosed the information is not identified in connection with that information.

**Item 46 – Before section 715**

164. Item 46 inserts a new heading, consequential upon the new structure of the Subdivision. This has been logically divided using new Subdivision headings to make the provisions easier to find.

## **Part 5—Hindering and obstructing the Fair Work Ombudsman and inspectors**

165. Part 5 of Schedule 1 amends the Fair Work Act to prohibit a person from hindering or obstructing a prescribed official. The new provision is subject to appropriate safeguards, and does not apply if a person has a ‘reasonable excuse’.

166. The maximum penalty is 60 penalty units for an individual or 300 penalty units for bodies corporate.

167. This new civil remedy supplements the existing criminal remedies available under the Criminal Code, which provide for a maximum penalty of up to 2 years’ imprisonment.

### **Item 47 – Subsection 539(2) (before table item 31, after the subheading “Part 5-2—Office of the Fair Work Ombudsman”)**

168. Item 47 amends subsection 539(2) to add a new item 30A to prohibit persons from hindering or obstructing the Fair Work Ombudsman or other prescribed officials.

169. The FWO or any other Inspector may bring proceedings before a prescribed court in relation to alleged contraventions of the new provision.

170. The maximum penalty is 60 penalty units for an individual or 300 penalty units for bodies corporate.

### **Item 48 – After section 707**

171. Item 48 inserts new section 707A, which prohibits a person from intentionally hindering or obstructing a prescribed official acting in the course of their duties (e.g. workplace visit). This includes the FWO or any other Inspector, an Inspector’s assistant (as provided for in section 710) or any member of staff exercising powers or performing functions in relation to an FWO notice.

172. The phrase ‘intentionally hinder or obstruct’ is not defined, but is intended to take its ordinary meaning in the industrial context. The phrase generally refers to any act or conduct that actually makes it more difficult for the person who is being hindered or obstructed to discharge their functions. This does not include an act or conduct that is accidental.

173. The act must be of such a nature that it is an ‘appreciable’ obstruction or interference. A trivial act, or even an act which could not reasonably be regarded as an obstruction or interference, would not fall within the new provision. A subjective intention to hinder or obstruct must also be established.

174. The new provision is not intended to cover conduct already covered by a more specific civil penalty provision, like failing to comply with a notice to produce or compliance notice (sections 712, 716). In any event the rules against civil double jeopardy would apply to prevent any ‘double punishment’ in relation to that conduct (section 556).

175. New section 707A does not apply if:

- the person has a reasonable excuse; or

- the person was not shown the Inspector’s identity card (if applicable) and given an appropriate warning about the effect of the section. This would typically be information about the consequences of hindering or obstructing the relevant official. The warning may be given orally or in writing, and there is no requirement to use any particular words.

176. The term ‘reasonable excuse’ is not defined so its ordinary meaning applies. In this context, a person may have a reasonable excuse if they are not reasonably able to comply with an Inspector’s request for co-operation. For example, a person may temporarily delay entry to a premises by an Inspector because they are required to undertake certain checks or procedures to comply with work health and safety laws.

177. The person wishing to make a ‘reasonable excuse’ bears the evidential onus (not a legal onus). It is appropriate to reverse the evidential burden because the facts giving rise to a reasonable excuse would be within the particular knowledge of the alleged contravener. In contrast, it would be impracticable and unduly expensive for the applicant to lead evidence on this point.

178. The ‘reasonable excuse’ exception is justified because it appropriately anticipates a wide range of reasonable excuses that could be provided and may not comfortably fall within an exception of general application. This provides adequate protection to any individual who may be required to interact with one of the prescribed officials (e.g. at a workplace).

179. The legal burden of proof does not change under these arrangements.

180. New subsection 707A(3) clarifies that the protection conferred by the new provision extends to a delegate of the FWO.

## **Part 6—False or misleading information or documents**

181. Part 6 of Schedule 1 amends the Fair Work Act to prohibit a person from giving false or misleading information or documents—which they know to be false or misleading—to the FWO, any other Inspector, or person who accepts information or documents under new subsection 712A(2). The provisions include appropriate safeguards.

182. The maximum penalty is 60 penalty units for an individual or 300 penalty units for bodies corporate.

183. This new civil remedy supplements the existing criminal law remedies that are available in relation to the provision of false or misleading information or documents under sections 137.1 and 137.2 of the Criminal Code.

184. This Part also amends existing employee record requirements and obligations in relation to payslips to prohibit:

- the making or keeping of employee records that the employer knows are false or misleading (section 535); and
- the giving of a pay slip that the employer knows is false or misleading (section 536).

185. The maximum penalty for contravention of section 535 or 536 is 60 penalty units for an individual or 300 penalty units for bodies corporate. Higher penalties may apply in the case of ‘serious contraventions’.

### **Item 49 – At the end of section 535**

186. Item 49 amends section 535 to prohibit employers from making or keeping a record for the purposes of the section that the employer knows is false or misleading.

### **Item 50 – At the end of section 536**

187. Item 50 amends section 536 to prohibit employers from giving a pay slip for the purposes of the section that the employer knows is false or misleading.

### **Items 51 and 52 – Subsection 539(2) (table item 29, column 1)**

188. Items 51 and 52 amend table item 29 of subsection 539(2) by inserting two new civil penalty provisions to the list in that item. The FWO, any other Inspector or an employee may bring proceedings for a contravention of the new penalty provisions before a prescribed court.

189. The maximum penalty is 60 penalty units for individuals or 300 penalty units for bodies corporate. Higher penalties apply for ‘serious contraventions’ (see item 12 of Part 1).

### **Item 53 – Subsection 539(2) (after table item 33)**

190. Item 53 amends subsection 539(2) to add a new item 33A in relation to the provision for false or misleading information to a prescribed official (new section 718A).

191. Under the new provision, an Inspector (including the FWO) may bring proceedings before a prescribed court in relation to the provision of false or misleading information or documents.

192. The maximum penalty is 60 penalty units for individuals or 300 penalty units for bodies corporate.

**Items 54 and 55 – Paragraph 557(2)(n) and 557(2)(o)**

193. These items amend subsection 557(2) to add references to the new civil penalty provisions inserted by items 49 and 50 of Part 6.

**Item 56 – At the end of Division 3 of Part 5-2**

194. Item 56 inserts new section 718A, which prohibits a person from giving a prescribed official:

- information or documents they know to be false or misleading in a material particular (including if they are reckless as to whether the information is false or misleading); or
- information which is misleading in a material particular because it is knowingly or recklessly incomplete.

195. The prescribed officials are the FWO or any other Inspector, or a person referred to in new subsection 712A(2).

196. The prohibition does not apply to a person who gives information which includes unintentional or inadvertent errors. Further, the prohibition does not apply in situations where the information or document given is not false or misleading in a material particular; or the information that was omitted did not otherwise make the information that was provided false or misleading in a material particular.

197. New subsection 718A(4) clarifies the process by which documents containing potentially false or misleading information may be notified to the person receiving the information.

198. New subsection 718A(5) provides the prohibition does not apply unless reasonable steps have been taken to inform the person who is giving the information or document about the consequences of giving false or misleading information or documents.

199. New subsection 718A(6) gives an example of the kind of warning which can be given as an appropriate warning. The warning may be given orally or in writing. The words are given by way of example only, and do not limit other ways that the communication may be made.

## **Part 7—Application and transitional provisions**

200. Part 7 amends the Fair Work Act to make application and transitional provisions arising from the amendments made to the Fair Work Act by the Bill.

### **Item 57 – In the appropriate position in Schedule 1**

201. Item 1 inserts new Part 4 into Schedule 1 (Application, saving and transitional provisions relating to amendments to this Act) of the Fair Work Act.

#### Clause 15 – Definitions

202. This clause defines the term ‘amended Act’ to mean the Fair Work Act as amended by the Bill.

#### Clause 16 – Application of amendments—unreasonable requirements to pay amounts

203. This clause provides that the amendments to section 325(1) start after the commencement of the clause.

#### Clause 17 – Saving of regulations—unreasonable requirements to pay amounts

204. This clause preserves regulations that were made for the purposes of subsection 362(2) of the Fair Work Act prior to the commencement of the Bill. This is necessary because section 326 is repealed and replaced under the Bill. These regulations are deemed to have effect as if they had been made for the purposes of new subsection 326(2).

#### Clause 18 – Application of amendments—increasing maximum penalties for contraventions of certain civil remedy provisions

205. This clause inserts transitional arrangements for the new ‘serious contravention’ regime (new sections 557A and 557B). Only conduct which occurs after commencement of the Part is covered by the ‘serious contraventions’ regime and higher penalties.

206. Under the transitional provisions, contravening conduct spanning commencement may be split into two parts, and each part considered separately. That is, the part of the conduct occurring before commencement, and the part afterwards. This is achieved by turning off the ‘grouping’ rules in section 557, under which continuing contraventions may be treated as a single course of conduct in certain circumstances. The higher penalties regime for ‘serious contraventions’ may only be applied to conduct occurring on or after commencement.

207. While both courses of conduct may be penalised separately, the courts are able to look at the total amount of the penalty to determine whether it is an appropriate response to the conduct which lead to the contraventions. This is generally known as applying the ‘totality principle’.

208. Any conduct that occurred before commencement may still be taken into account when determining whether the contraventions form part of a systematic course of conduct for purposes of new section 557A.

Clause 19 – Application of amendments—responsibility of franchisor entities and holding companies

209. This clause provides that new section 558B (Responsibility of franchisor entities and holding companies for certain contraventions) will apply to contraventions that occur after the end of the period of six weeks beginning on the day this Part commences.

Clause 20 – Application of amendments—hindering or obstructing the Fair Work Ombudsman and inspectors

210. This clause clarifies new section 707A (Hindering or obstructing the Fair Work Ombudsman and inspectors) only applies prospectively (i.e. to conduct engaged in at or after the commencement of Part 4 of the Bill).

211. This conduct may also fall within section 149.1 of the *Criminal Code*, whether occurring before or after commencement.

Clause 21 – Application of power to give FWO notices

212. This clause clarifies the FWO’s evidence-gathering powers under new section 712A to 712D may only be used prospectively. However, they may be used for an investigation which is begun either before or after the commencement of the relevant provisions. The provisions are not retrospective, as they do not create retrospective or civil liability.

Clause 22 – Application of amendments relating to self-incrimination etc.

213. This clause provides that the amendments to the rules around self-incrimination in section 713 (Self-incrimination etc.) only start after the commencement of the Part, i.e. in relation to information given, records or documents produced or questions answered after the commencement.

214. The old provisions (including immunities) continue to apply in relation to any records or documents etc. produced in accordance with paragraph 709(d) or subsection 712(1) prior to commencement.

Clause 23 – Application of requirement for reports not to include information relating to an individual’s affairs

215. This clause provides that the requirement in section 714A that reports not include information relating to an individuals’ affairs will only apply in relation to reports that are prepared after the commencement of Part 4 of the Bill.

Clause 24 – Application of amendments—false or misleading information or documents

216. This clause provides that the new and amended obligations in relation to false or misleading information or documents (subsections 535(4), 536(3) and section 718A) only apply in relation to conduct that is engaged in after the commencement of Part 4 of the Bill.

217. Earlier contravening conduct may fall within regulation 3.44 of the Fair Work Regulations. The conduct may also fall within sections 137.1 or 137.2 of the *Criminal Code*, whether occurring before or after commencement.

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

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

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

The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the Bill) is 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 the Bill**

The national workplace relations system is established by the *Fair Work Act 2009* (Fair Work Act) and related laws and covers the majority of private sector employees and employers in Australia. It provides a safety net of minimum entitlements and imposes obligations on both employers and employees. The Fair Work Ombudsman is the workplace relations regulator and is responsible for ensuring compliance with national workplace relations laws.

The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the Bill) amends the Fair Work Act to implement the Government's commitment to protect vulnerable workers by:

- Introducing a higher scale of penalties for 'serious contraventions' of prescribed workplace laws.
- Increasing penalties for record-keeping failures.
- Making franchisors and holding companies responsible for underpayments by their franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them. The new responsibilities will only apply where franchisors and holding companies have a significant degree of influence or control over their business networks.
- Expressly prohibiting employers from unreasonably requiring their employees to make payments (e.g. demanding a proportion of their wages be paid back in cash).
- Strengthening the evidence-gathering powers of the Fair Work Ombudsman to ensure that the exploitation of vulnerable workers can be effectively investigated.

The Bill addresses increasing community concern about the exploitation of vulnerable workers (including migrant workers) by unscrupulous employers, and responds to a growing body of evidence that the laws need to be strengthened.

The exploitation of vulnerable workers has been examined in a range of reports, including the Senate Education and Employment References Committee's report entitled *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016; the Fair Work Ombudsman's *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven*, April 2016 and *A Report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, June 2015; and the Productivity

Commission's *Productivity Commission Inquiry Report: Workplace Relations Framework*, No. 76, November 2015.

The *Inquiry into 7-Eleven* report, for example, revealed not only systematic underpayment of migrant workers, but also a practice of some franchisees paying their employees the lawful rate, but then coercing them to pay back a certain proportion of their wages to the employer in cash. In some cases, records were deliberately falsified to disguise the underpayments, and leave the impression that workers were being paid their lawful entitlements. A series of cases involving the exploitation of franchise workers (both preceding and following the 7-Eleven scandal) demonstrate more can be done to protect vulnerable workers.

The Bill will introduce new provisions to hold franchisors and holding companies responsible for contraventions of the Fair Work Act, if they knew or could reasonably have been expected to have known the contraventions would occur in their business networks and failed to take reasonable steps to manage the risk.

The Bill also addresses concerns that civil penalties under the Fair Work Act are currently too low to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business. The Bill will increase relevant civil penalties to an appropriate level so the threat of being fined acts as an effective deterrent to potential wrongdoers.

The Bill will also enhance the Fair Work Ombudsman's powers by including new formal evidence-gathering powers to facilitate investigations. New examination powers will provide the Fair Work Ombudsman with a greater suite of options to investigate potential non-compliance with workplace laws. This will help achieve positive investigation outcomes where existing powers to require the production of documents fall short because there are no employee records or other relevant documents. This will enable the most serious cases involving the exploitation of vulnerable workers to be properly investigated—even if no documents are produced.

The Bill will also give the Fair Work Ombudsman new avenues to pursue those who hinder or obstruct investigations, or provide false or misleading information to the regulator.

In summary the proposed amendments will more effectively deter unlawful practices, including those that involve the deliberate and systematic exploitation of workers. It will also ensure the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations.

### **Human rights implications**

The Bill has potential relevance to the following rights:

- Article 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) – Right to just and favourable conditions of work;
- Articles 14 and 15 of the *International Covenant on Civil and Political Rights* (ICCPR) – Criminal process rights; and
- Article 17 of ICCPR – Right to privacy and reputation.

## **Right to just and favourable conditions of work (Article 7 of ICESCR)**

### **Overview of the right to just and favourable conditions of work**

Article 7 of ICESCR requires that States Parties recognise the right to just and favourable conditions of work. This encompasses a number of elements including:

- remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value, and a decent living for themselves and their families, and
- rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

### **Relevance of this right**

The provisions of the Bill are relevant to this right as they enhance protections for worker conditions, including helping to ensure lawful payment of wages.

The Bill addresses concerns that civil penalties under the Fair Work Act are currently too low to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business. The Bill will increase relevant civil penalties to an appropriate level so the threat of being fined acts as an effective deterrent to potential wrongdoers. Support for higher penalties is found in the reports listed in the Overview.

The Fair Work Ombudsman's (FWO) new evidence gathering powers also promote this right by ensuring the most serious cases involving exploitation of vulnerable workers and non compliance with workplace laws can be properly investigated.

By improving compliance rates, this policy promotes the objectives under Article 7 of ICESCR, which requires workers to be provided with 'fair wages and equal remuneration for work of equal value without distinction of any kind...'.

## **Criminal process rights (Articles 14 and 15 of the ICCPR)**

The Parliamentary Joint Committee on Human Rights Practice Note 2 notes that civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR, regardless of the distinction between criminal and civil penalties in domestic law. When a provision imposes a civil penalty, an assessment is required as to whether it amounts to a criminal penalty for the purposes of ICCPR.

### **Relevance of this right**

The Bill amends or creates the following civil penalty provisions, which need to be assessed for this purpose:

New penalties for ‘serious contraventions’ of existing civil penalty provisions	New civil penalty provisions
<p>Subsection 44(1) (Contravening the National Employment Standards)</p> <p>Section 45 (Contravening a modern award)</p> <p>Section 293 (Contravening a national minimum wage order)</p> <p>Section 305 (Contravening an equal remuneration wage order)</p> <p>Sections 323, 325 and 328 (Method and frequency of payment etc.)</p> <p>Sections 535, 536 (Employer obligations in relation to employee records and pay slips)</p>	<p>535(4), 536(3) (False or misleading employee records or pay slips)</p> <p>558B(1), 558B(2) (Liability of franchisor entities and holding companies)</p> <p>712B(1) (Requirement to comply with FWO notice)</p> <p>717A(1) (Hindering or obstructing FWO and inspectors)</p> <p>718A(1) (False or misleading information or documents)</p>
<p>Maximum civil penalty for a ‘serious contravention’: 600 penalty units for individuals</p>	<p>Maximum civil penalty, other than contraventions relating to an FWO notice—60 penalty units for individuals</p> <p>Maximum civil penalty for contraventions relating to an FWO notice—600 penalty units for individuals</p>

The relevant factors for assessing whether a penalty is a criminal penalty for the purposes of human rights law include the classification of the penalty in domestic law, the nature of the penalty and the severity of the penalty.

*Classification of the penalty in domestic law and the nature of the penalty*

The penalty provisions of the Fair Work Act are expressly classified as civil penalties (section 549). These provisions create pecuniary penalties in the form of a debt payable to the Commonwealth or other person. The civil penalty provisions do not impose criminal liability, and do not lead to the creation of a criminal record. There is no possibility of imprisonment for failing to pay a penalty (section 571).

The purpose of these penalties is to encourage compliance with the Fair Work Act, which supports the implementation of a number of Australia's obligations under international law. This has been recognised in a number of cases including: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 at [55]; *Fair Work Ombudsman v Shaik* [2016] FCCA 2345 at [168]; *Fair Work Ombudsman v Global Express Consultancy Pty Ltd & Anor* [2016] FCCA 2446 at [82].

The penalties only apply to the regulatory regime of the Fair Work Act (e.g. employers), rather than to the public in general. While the FWO has enforcement powers, in many cases

enforcement does not rest solely with the FWO. Proceedings in relation to the underpayment of wages or record keeping failures for example may also be brought by an affected employee or union. Further, the imposition of the civil penalties is not dependent on a finding of guilt.

These factors all suggest that the civil penalties imposed by the Fair Work Act are civil rather than criminal in nature.

#### *Severity of the penalty*

The severity of the relevant civil penalties should be considered low. They are pecuniary penalties (rather than a more severe punishment like imprisonment) and there is no sanction of imprisonment for non-payment of penalties. Only courts may apply a pecuniary penalty.

The pecuniary penalties are set at levels which are considered to be consistent with the nature and severity of the corresponding contraventions.

#### **Conclusion**

Based on the above factors, the cumulative effect of the nature and severity of the civil penalties in the Bill should not be considered criminal for the purposes of human rights law.

#### **Right to privacy and reputation (Article 17 of ICCPR)**

##### **Overview of the right to privacy and reputation**

The right to privacy in Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation.

In order for an interference with the right to privacy not to be arbitrary, the interference must be for a reason consistent with the ICCPR and reasonable in the particular circumstances. Reasonableness, in this context, involves notions of proportionality, appropriateness and necessity.<sup>1</sup>

In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the circumstances. The United Nations Human Rights Committee has interpreted the requirement of 'reasonableness' as implying that any interference with privacy must be proportionate to a legitimate end and be necessary in the circumstances.

##### **Relevance of this right**

The FWO's new evidence-gathering powers will be inserted into the Fair Work Act by Part 4 of Schedule 1 of the Bill. An individual may be given an FWO notice and information obtained under a FWO notice may include personal information.

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<sup>1</sup> *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) at 8.3

*Powers of questioning etc.*

The new powers of the FWO are very similar to those exercised by other corporate regulators, including the ACCC and ASIC and include appropriate safeguards, for example to ensure a person:

- has enough time so they are not disadvantaged and are able to be properly represented;
- has an adequate opportunity to seek advice and arrange for legal representation (if desired); and
- is not financially disadvantaged by attending to answer questions; and
- will not have their person information included in prescribed reports (see new section 714A.)

The FWO's graduated approach to compliance and enforcement means that these powers will only be used where other co-operative approaches have failed or are inappropriate. The new powers support a legitimate end by helping to achieve positive investigative outcomes where existing powers have been demonstrated to fall short (as evidenced by the reports listed in the Outline). New powers will enable the most serious cases involving the exploitation of vulnerable workers to be properly investigated and help ensure the lawful payment of wages (in promotion of Article 7 of ICESCR – see above).

*Disclosure of information*

Subsection 718 of the Fair Work Act provides the FWO may only disclose, or authorise the disclosure of, the information it has officially acquired if the FWO reasonably believes:

- that it is necessary or appropriate to do so in the course of performing functions, or exercising powers, under the Act; or
- that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

The Act also makes provision for disclosure to the Minister and disclosure to the Department (subsections 718(3)–(4)).

Section 718 is not a civil penalty provision, so no penalties apply under the Fair Work Act in relation to a breach of the provision. It is intended to operate in conjunction with relevant provisions in the *Privacy Act 1988* (the Privacy Act), the *Public Service Act 1999* and *Public Service Regulations 1999* (including the APS Code of Conduct).

It is noted that persons can make complaints about the handling of their personal information by Australian government agencies and private sector organisations covered by the Privacy Act and that the Information Commissioner has investigative and enforcement powers to redress non-compliance with the Australian Privacy Principles.

### Information sharing

Paragraph 718(2)(b) provides the FWO may disclose, or authorise the disclosure of, the information if the FWO reasonably believes ‘that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory’.

Disclosure is not limited to a prescribed list of government bodies, but in each case the disclosure must be to assist in the administration or enforcement of an Australian law. This has the practical effect of limiting the scope of the provision.

This approach is necessary to manage complex, cross-jurisdiction and cross-border issues, like the exploitation of vulnerable workers. The FWO relies on cooperation with various federal, state and territory government agencies including State work health and safety regulators, the Australian Tax Office, ASIC and the Department of Immigration and Border Protection (DIBP) to manage its compliance function (e.g. Taskforce Cadena). The sharing of information and intelligence across agencies enables them to effectively respond to complex compliance issues.

Under Taskforce Cadena the FWO, DIBP and Australian Border Force share intelligence and data to identify strategic targets with regard to contraventions of the Fair Work Act and the *Migration Act 1958*. This enhances the ability of both agencies to target and disrupt criminal syndicates that seek to commit visa fraud and exploit foreign workers in Australia.

In 2015—during the course of the FWO Inquiry into the 7-Eleven network—the FWO and DIBP agreed on a protocol whereby DIBP would not take action against individuals while they were assisting the FWO with a 7-Eleven investigation or legal action. The protocol assisted the FWO in reassuring workers to engage with the FWO about contraventions of workplace laws by 7-Eleven franchisees. In January 2017 the DIBP and FWO agreed to extend a similar approach to all temporary visa holders with a work entitlement.

The information sharing powers in section 718 of the Fair Work Act recognise that there may be imperatives requiring the disclosure of information for other purposes, for example if the FWO uncovers information about possible human rights violations (including human trafficking and slavery), which are beyond the FWO’s jurisdiction.

In light of the extensive safeguards around the exercise of the new FWO notice power, and the limited range of circumstances in which information may be recorded or disclosed, it is considered that any abrogation of the rights contained in Article 17 of the ICCPR are reasonable and proportionate.

### Conclusion

The Bill is compatible with human rights.

**Minister for Employment, Senator the Hon Michaelia Cash**