

26 April 2017

Committee Secretary  
Senate Education and Employment Committees  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Committee Secretary,

## Response to questions on notice: Vulnerable Workers Bill

Thank you for the opportunity to provide further information in response to questions taken on notice at the public hearing of the Senate Inquiry into the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth) (**Vulnerable Workers Bill**).

The information below sets out our views on the current drafting of Schedule 1, Part 2, Division 4A in relation to the definition and responsibility of franchisor entities. In particular, we have provided commentary on the Franchise Council of Australia (**FCA**) submission, recommendations one to six, as requested by the Committee. For ease of reference, we have set out a comparison of drafting suggestions in Appendix One.

We would like to draw the Committee's attention to the commentary in Dr Tess Hardy and Dr Joo-Cheong Tham's submission to this Inquiry on pages 4-15, which provides additional cogent arguments for our views, including that it is justified to ascribe liability to franchisor entities in circumstances where they:

- have caused the direct employer to contravene the law
- have directly or indirectly, benefited from the contraventions
- have the power to prevent or deter workplace contraventions taking place, and/or
- have behaved in a way that increases social costs and invites moral sanction.<sup>1</sup>

## Summary of response

According to the Explanatory Memorandum, the Vulnerable Worker Bill provisions relating to franchisor entities aim:

- i. to prevent and deter franchisor entities from operating on a business model that underpays workers, and
- ii. to prompt franchisor entities do more to protect vulnerable workers employed in their business networks.<sup>2</sup>

In our view, the provisions as currently drafted are the absolute minimum required to meet these policy objectives, to enable the Fair Work Ombudsman (**FWO**), and legal services like the WEstjustice Employment Service, to attempt to hold franchisor entities to account when they are involved in the exploitation of vulnerable workers.

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<sup>1</sup> Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission to the Senate Education and Employment Legislation Committee inquiry into the Fair Work Amendment(Protecting Vulnerable Worker) Bill 2017*, 5-6.

<sup>2</sup> Explanatory Memorandum, above n7, 6.

A tougher response to this well documented problem could include creating strict liability offences that hold all franchisor entities to account for certain contraventions of workplace law, and to establish specific positive duties for all franchisor entities.

As drafted, the Vulnerable Workers Bill provisions only create liability for limited franchise arrangements, for some contraventions of the *Fair Work Act 2009* (Cth) (**FW Act**), where these franchisor entities 'knew' or 'could reasonably be expected to have known' that the contravention by the franchisee entity would occur (or one of the same or a similar character was likely to occur) and they did not take reasonable steps to prevent this occurring.

In addition, franchisor entities are able to attempt to recover losses incurred from claims made under these provisions from franchisee entities. Practically speaking, franchisor entities, even smaller ones, are better placed to attempt to recover from a franchisee entity, (or bear the concomitant loss), than a worker who has been paid less than the minimum wage.

To improve the practical utility of the franchise provisions in protecting vulnerable workers, we recommend:

- i. changes to expand the application of these provision to a broader set of franchising arrangements (as well as applying these provisions to other indirectly responsible entities such as supply chains heads and labour hire hosts), and
- ii. clarifying franchisor entity liability.

In our view, the FCA recommendations, adopted in their entirety, would make it very difficult to hold a franchisor entity that benefits from the exploitation of vulnerable workers legally accountable, rendering the franchise provisions of the Vulnerable Workers Bill essentially ineffective in achieving their purpose.

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

### **1.1. WEstjustice recommendations**

We continue to support the recommendations set out in our submission in relation to section 558A of the Vulnerable Workers Bill:

#### Recommendation Four

*Widen the definition of responsible franchisor entity: Amend the proposed definition of responsible franchisor entity to ensure that all franchises are covered by removing the requirement for a significant degree of influence or control.*

The current definition is too limited in scope. The goal should be to ensure that these provisions apply widely, and then consider what standard of liability should be imposed. As already discussed, the Vulnerable Workers Bill, as currently drafted, provides for a fair and flexible application of the standard required to avoid liability.

As per our submission, WEstjustice proposes that section 558A(2)(b) of the Vulnerable Workers Bill be deleted to broaden the definition of responsible franchisor entity by removing the requirement for significant influence or control completely. The degree of control able to be exercised by a franchisor entity is already a relevant consideration when determining liability under section 558B(4)(b) Vulnerable Workers Bill, which states that in determining whether a person took reasonable steps to prevent a contravention the extent of control held by the franchisor is relevant (see WEstjustice Recommendation Six below for a more detailed discussion of the reasonable steps defence).

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An alternative approach to widening the scope of the application of these provisions would be to draft a new definition which is modelled on the [Franchising Code of Conduct](#).<sup>3</sup> The Franchising Code of Conduct sets out a comprehensive and inclusive definition of franchises, including ‘franchisor’, ‘franchisee’ and ‘franchise’ (see Appendix One for the wording of these definitions). Utilising these definitions would have the benefit of facilitating uniformity in the application of these laws, with the applicability of the existing Franchising Code of Conduct, and therefore making it easy and simple for franchisor and franchisee entities to know if these provisions apply to them.

## Recommendation Three

*Extend liability to all relevant third parties: In addition to protecting workers in franchises and subsidiary companies, make supply chains and labour hire hosts responsible for the protection of workers’ rights.*

We have comprehensively set out the reasoning behind this recommendation in our submission (along with specific drafting suggestions and options). To achieve this WEstjustice suggests inserting a new section 558A(3) into the Vulnerable Workers Bill to define ‘indirectly responsible entity’ or inserting a new clause into Vulnerable Workers Bill to amend section 550 of the FW Act. If the former approach is adopted, a new section 558B(2A) will also need to be inserted into Division 4A of the Vulnerable Workers Bill to extend responsibility to indirectly responsible entities, along with some other minor amendments to the Bill.

## **1.2. Franchise Council of Australia recommendations**

### Recommendation 2

*Amend the definition of a ‘responsible franchisor entity’ in 558A (2) (b) by: a. replacing “significant” with “substantial”; b. deleting “of influence”; and c. inserting “workplace terms and conditions” instead of “affairs”.*

To assess the impact of replacing the word ‘significant’ with substantial, we firstly note that according to the Oxford dictionary online, ‘significant’ means ‘sufficiently great or important to be worthy of attention; noteworthy,’ whereas ‘substantial’ means ‘of considerable importance, size, or worth.’ These definitions need to be considered in the context of the particular provision, and in addition a court is required to prefer an interpretation which would achieve the purpose or object of the Act, to an interpretation that would not promote that purpose or object.<sup>4</sup> While the FW Act does use the terminology ‘substantial’ and ‘significant’ within various provisions, we are not aware of any relevant and noteworthy commentary in employment law cases. In the context of evidence law, however, ‘significant’ has been defined as more than trivial but less than substantial.<sup>5</sup>

Overall, it is reasonable to presume a court may interpret the provision slightly differently with the word ‘substantial’ instead of ‘significant’, with the term ‘substantial’ suggesting a higher threshold. Although, it is possible that FCA suggestion to use ‘substantial’ over ‘significant’ may prove to be a relatively minor change, when combined with the other changes they have suggested, it would greatly narrow the scope of the application of these provisions.

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<sup>3</sup> [Competition and Consumer \(Industry Codes—Franchising\) Regulation 2014](#), Schedule 1 Franchising Code of Conduct, Part 1, Division 2, Sections 4 and 5.

<sup>4</sup> *Acts Interpretation Act 1901* (Cth) section 15AA

<sup>5</sup> *R v Lockyer* (1996) 89 A Crim R 457

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The FW Act contains a definition of ‘workplace law’ and ‘workplace rights’.<sup>6</sup> It does not specifically define ‘workplace affairs’ or ‘workplace terms and conditions.’ However, it does define ‘terms and conditions of employment’ as provided for under the FW Act, which include the National Employment Standards, a modern award, enterprise agreement or workplace determination that applies to an employees, along with remuneration, wage orders and miscellaneous provisions.<sup>7</sup>

It is reasonable to conclude that ‘workplace affairs’ is a broad term, and much broader than ‘workplace terms and conditions’. The Vulnerable Workers Bill Explanatory Memorandum suggests that the term ‘workplace affairs’ would capture a franchisee’s financial, operational and corporate affairs.<sup>8</sup> Whereas, workplace terms and conditions is necessarily a narrow formulation focusing on employment terms and conditions that apply in a particular workplace.

When combined with the suggested deletion of the word ‘influence’, the FCA proposed definition would only capture franchisor entities that ‘substantially control workplace terms and conditions.’ This would allow franchises to be excluded from the operation of this provision by simply having a franchise agreement with a contractual term that states that the franchisee was responsible for all workplace terms and conditions (whether or not, effectively the franchisor entity controlled the workplace terms and conditions through controlling every other variable in the business).<sup>9</sup> The practical implication of these changes would be to make the franchise provisions an ‘opt in or out’ for franchisor entities.

As we have already highlighted, instead of narrowly defining the scope of the application of the franchise provisions, it is essential to ensure they apply as broadly as possible for clarity and to encourage all franchises to take reasonable steps to prevent the exploitation of vulnerable workers. As the Vulnerable Workers Bill is currently drafted, franchisor entities that genuinely do not have any effective influence or control over underpayments, or other breaches of workplace terms and conditions, can make that argument in their defence.

## **2. Section 558B Responsibility of responsible franchisor entities...for certain contraventions**

### **2.1. WEstjustice recommendations**

We continue to support the recommendations set out in our submission in relation to section 558B of the Vulnerable Workers Bill:

#### Recommendation Five:

*Clarify liability of all relevant third parties: Insert a provision to clarify that responsible franchisor entities, holding companies and other indirectly responsible entities who contravene clause 558B should also be taken to have contravened the relevant provisions contravened by their franchisee entity/subsidiary/indirectly controlled entity.*

As it is currently drafted, the Vulnerable Workers Bill does not appear to make franchisor entities liable for the breaches of their franchisee entities. All it does is introduce a new civil remedy provision for failing to prevent a contravention by their franchisee entities in certain circumstances. For example, it appears that workers at 7/11 could not pursue head office for their underpayments: they could only seek that head office pays a penalty for a breach of section 558B. This is really a technical issue with the drafting, and can be easily rectified by a

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<sup>6</sup> Fair Work Act 2009 (Cth) section 12 and section 341(1) respectively.

<sup>7</sup> Ibid, section 43.

<sup>8</sup> Explanatory Memorandum, *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth), 9.

<sup>9</sup> Dr Tess Hardy and Dr Joo-Cheong Tham, above n1.

minor addition to the Vulnerable Workers Bill as set out in our drafting suggestions in our submission and Appendix One.

## Recommendation Six

*Clarify the 'reasonable steps' defence to incentivise compliance: Ensure that the 'reasonable steps' defence incentivises proactive compliance, including independent monitoring and financially viable contracts.*

The Vulnerable Workers Bill, as currently drafted, sets out a flexible standard of liability, to taking reasonable steps, that applies at discretion of the court taking into account all relevant matters.

As we've noted above, franchisor entities, even smaller ones, will be better placed to recover losses than a worker who has been paid less than the minimum wage. In this context, we would support additional measures to ensure that reasonable steps are being taken to comply with workplace law, for example, a strict liability positive duty on franchisor entities to undertake certain actions.

However, in terms of taking some initial steps to protect vulnerable works, and balancing the needs of different business models and the hope that these provisions can be extended to other indirectly responsible entities, we believe that the current drafting of the reasonable steps defence is more than fair.

It might be useful to provide guidance to franchisor entities and to encourage pro-active compliance, by including the examples set out in paragraph 67 of the Vulnerable Works Bill Explanatory Memorandum as a legislative note at the end of section 558B(4). In addition to these examples, the legislative note could also include ensuring that contracts are financially viable an example of a reasonable step (See Appendix One for drafting suggestions).

## **2.2. Franchising Council of Australia recommendations**

### Recommendation 3

*Amend 558B(1)(d)(i) Knew or could reasonably be expected to have known: Amend 558B(1)(d)(i) 'knew or reasonably should have known that the contravention by the franchisee entity would occur' by replacing "reasonably should have known" with "in the usual course of business should have known."*

We have already noted the strong policy reasons for ascribing, and increasing the practical utility, of accessorial liability to franchisor entities (and other indirectly responsible entities).

In our view, an objective standard of constructive knowledge, as provided for by the formulation 'could reasonably be expected to have known,' is more than very fair approach. It reduces the evidentiary difficulties in proving 'actual knowledge' under the current accessorial liability provisions of the FW Act. However, as currently drafted it does not provide strict liability even where there is sufficient evidence to prove constructive knowledge: it only creates liability for franchisor entities where a flexible reasonableness standard was not met.

We do not agree with confining the factual matrix on which to assess a standard of constructive knowledge to the 'usual course of business.' A standard which refers to usual industry practice, such as 'in the usual course of business,' is not a helpful standard by which to encourage change and incentivize pro-active compliance with workplace laws: particularly in the context of a documented 'culture of non-compliance'. Indeed, restricting liability to where franchisor entities knew or 'should have known in the usual course of business' about the contraventions rewards willful blindness and encourages businesses that operate on this model to continue to do so: undermining the entire purpose the Vulnerable Workers Bill.

## Recommendation 1

*558B(1)(d)(i) Definition of a Franchise Entity: Amend 558B(1)(d)(i) & (ii) by replace "Corporations Act 2001" with "Franchising Code of Conduct."*

It would appear that this recommendation is based on a misinterpretation of the Vulnerable Workers Bill. In our view, the reference to 'within the meaning of the Corporations Act' in the above provisions relates only to 'officer' and not 'the responsible franchisor entity.'

As far as we are aware, the *Corporations Act 2001* (Cth) defines franchise, but does not provide a definition of responsible franchisor entity.

The Franchising Code of Conduct definition in Division 2, section (4)(2) already imports the definition of 'officer' from the *Corporations Act 2001* (Cth), so there is no reason to alter these sections as proposed by the FCA.

## Recommendation 6

*558B(3) Reasonable Steps to prevent a contravention: Amend 558B(3) to provide that "a person does not contravene subsection (1) or (2) if, as at the time of the contravention referred to in paragraph (1)(a) or (2) (b), the person had taken reasonable steps to prevent a contravention by the franchisee entity or subsidiary of the same or a similar character" by adding "such as by having in place and complying with a compliance program that meets the relevant Australian Standards or has been approved for use by the Fair Work Ombudsman."*

This recommendation is problematic. The proposed wording creates ambiguity by suggesting that franchisor entities can escape liability where they have met a general compliance standard even if, in a particular case, there were reasonable steps that they should have taken, not contained in the compliance standard, to prevent the contravention (or contraventions of the same or similar character). We wish to encourage proactive compliance with workplace laws, by requiring franchisor entities to turn their mind to what is reasonable in their circumstances.

We agree that if there is a compliance program that meets the relevant Australia Standards, or a compliance deed has been entered into with the Fair Work Ombudsman, that these should be considered by the court when they are deciding whether all reasonable steps were taken to prevent a contravention. However, no changes need to be made to the Vulnerable Workers Bill for this to occur as it could already be considered under section 558B(4).

As per our Recommendation Six, discussed above, we would consider it appropriate to provide some guidance by including examples of reasonable steps in a legislative note at the end of section 558B(4). E.g. a reference to a compliance program that meets the relevant Australia Standards, or a compliance deed that has been entered into with the Fair Work Ombudsman, could be included as examples of reasonable steps in this legislative note.

## Recommendation 5

*558B(4) Court Considerations as to whether a person took reasonable steps: Amend 558B(4) by replacing a court "may" have regard to relevant matters with "must" have regard to relevant matters which include the size and resources of the franchise.*

We do not have a strong view about changing the word the word 'may' to 'must' in this section. We are not against this proposal, and indeed it may prove helpful clarify some of the relevant matters to be considered. However there is no need to single out one of the relevant matters in the non-exhaustive list set out in section 558(4)(a)-(f).

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In addition, on a technical point, any inclusion of the modifier 'must' should only apply to the non-exhaustive list in s558B(4)(a)-(f) and not to 'all relevant matters' generally. This is because of the potential for legal challenges on a technical an error of law because a court might not have considered a minor factor which can non-the less be categorized as a 'relevant matter.'

#### Recommendation 4:

*558B(7) Relevant civil remedy provisions: Amend 558B(7) relevant civil remedy provisions by deleting (g), (j), (k), (l), (m), (n) and (o).*

We see no logical reason to limit liability by removing most of these additional contraventions where a franchisor entity knew or could reasonably be expected to have known that the contravention by the franchisee would occur, (or contraventions of the same of similar character were likely to occur), and has not taken reasonable steps to stop the contravention.

The provisions singled out for removal, namely those dealing with employee records, payment methods and frequency and sham contracting, all relate to systemic corporate non-compliance issues that have well documented and identified, including in franchises.

The exception to this is section 588B(7)(j) of the Vulnerable Workers Bill. We do not have strong views about whether this is deleted.

Along with keeping the majority of the relevant civil remedy provisions referred to in section 558B(7) of the Vulnerable Workers Bill, we also recommend that franchisor entity liability for contraventions of these civil remedy provisions is clarified (see Recommendation 5 from the WEstjustice submission as summarised in section 2.1 above).

However, we do agree that there is no logical reason to limit liability for these contraventions of the FW Act to franchises and holding companies, and that they should be extended to other business practices and arrangements, like labour hire and supply chains that benefit from the exploitation of vulnerable workers (see Recommendation Three from the WEstjustice submission as summarized in section 1.1 above).

#### **Concluding comments**

This response is limited to specific comments on the franchise provisions of the Vulnerable Workers Bill. As outlined above, we continue to endorse the positions as set out in our submission.

Please let me know if you would like any further information.

Kind regards



**Tarni Perkal**  
**Employment Project Senior Solicitor**  
**WEstjustice – Footscray Office**

## Appendix One: Comparison of drafting suggestions

Vulnerable Workers Bill	FCA recommendations	WEstjustice recommendations
<b>558A Meaning of franchisee entity and responsible franchisor entity</b>		
<p>(1) <i>A person is a franchisee entity of a franchise if:</i></p> <p><i>(a) the person is a franchisee (including a subfranchisee) in relation to the franchise; and</i></p> <p><i>(b) the business conducted by the person under the franchise is substantially or materially associated with intellectual property relating to the franchise.</i></p>	<p>No changes.</p>	<p>Option one:</p> <p>No changes</p> <hr/> <p>Option two: Widen scope</p> <p>Change to make definitions more consistent with Franchising Code of Conduct definitions set out in the <a href="#">Competition and Consumer (Industry Codes—Franchising) Regulation 2014</a>, Schedule 1 Franchising Code of Conduct, Part 1, Division 2, Sections 4 and 5.</p> <p>Including e.g.:</p> <p><i>franchisee includes the following:</i></p> <p><i>(a) a person to whom a franchise is granted;</i></p> <p><i>(b) a person who otherwise participates in a franchise as a franchisee;</i></p> <p><i>(c) a subfranchisor in its relationship with a franchisor; or</i></p> <p><i>(d) a subfranchisee in its relationship with a subfranchisor.</i></p>

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		<p><i>franchise includes the following:</i></p> <ul style="list-style-type: none"> <li><i>(a) the rights and obligations under a franchise agreement;</i></li> <li><i>(b) a master franchise</i></li> <li><i>(c) a subfranchise</i></li> <li><i>(d) an interest in a franchise.</i></li> </ul> <p><i>franchisor includes the following:</i></p> <ul style="list-style-type: none"> <li><i>(a) a person who grants a franchise;</i></li> <li><i>(b) a person who otherwise participates in a franchise as a franchisor;</i></li> <li><i>(c) a subfranchisor in its relationship with a subfranchisee;</i></li> <li><i>(d) a subfranchisor in a master franchise system;</i></li> <li><i>(e) a subfranchisor in its relationship with a franchisee.</i></li> </ul>
<p><i>(2) A person is a responsible franchisor entity for a franchisee entity of a franchise if:</i></p> <ul style="list-style-type: none"> <li><i>(a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and</i></li> <li><i>(b) the person has a significant degree of influence or control over the franchisee entity's affairs.</i></li> </ul>	<p>Limit scope.</p> <p><i>(2) A person is a responsible franchisor entity for a franchisee entity of a franchise if:</i></p> <ul style="list-style-type: none"> <li><i>(a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and</i></li> <li><i>(b) the person has a <b>substantial</b> degree of <b>control</b> over the franchisee entity's <b>workplace terms and conditions</b>.</i></li> </ul>	<p>Option one: Widen scope</p> <p><i>(2)A person is a responsible franchisor entity for a franchisee entity of a franchise if the person is a franchisor (including a subfranchisor) in relation to the franchise.</i></p> <hr/> <p>Option two: Widen scope</p> <p>Change to make the definition more consistent with Franchise Code of Conduct. See above.</p>

Vulnerable Workers Bill	FCA recommendations	WEstjustice recommendations
<b>558B Responsibility of responsible franchisor entities...for certain contraventions</b>		
<p>(1) A person contravenes this subsection if:</p> <p>(a) an employer who is a franchisee entity of a franchise contravenes a civil remedy provision referred to in subsection; and</p> <p>(b) the person is a responsible franchisor entity for the franchisee entity; and</p> <p>(c) the contravention by the franchisee entity occurs in the franchisee entity's capacity as a franchisee entity; and</p> <p>(d) either:</p> <p>(i) the responsible franchisor entity or an officer (within the meaning of the Corporations Act 2001) of the responsible franchisor entity knew or could reasonably be expected to have known that the contravention by the franchisee entity would occur; or</p> <p>(ii) at the time of the contravention by the franchisee entity, the responsible franchisor entity or an officer (within the meaning of the Corporations Act 2001) of the responsible franchisor entity 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.</p> <p><i>Note: This subsection is a civil remedy provision (see this Part).</i></p>	<p>(1) A person contravenes this subsection if:</p> <p>(a) an employer who is a franchisee entity of a franchise contravenes a civil remedy provision referred to in subsection; and</p> <p>(b) the person is a responsible franchisor entity for the franchisee entity; and</p> <p>(c) the contravention by the franchisee entity occurs in the franchisee entity's capacity as a franchisee entity; and</p> <p>(d) either:</p> <p>(i) the responsible franchisor entity or an officer (within the meaning of the <b>Franchising Code of Conduct</b>) of the responsible franchisor entity knew or <b>in the usual course of business should have known</b> that the contravention by the franchisee entity would occur; or</p> <p>(ii) at the time of the contravention by the franchisee entity, the responsible franchisor entity or an officer (within the meaning of the <b>Franchising Code of Conduct</b>) of the responsible franchisor entity 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.</p> <p><i>Note: This subsection is a civil remedy provision (see this Part)</i></p>	<p>To clarify liability add the following section to VWB to insert new section into FW Act:</p> <p><b>558AA A person who is responsible for a contravention of a civil remedy provision is taken to have contravened that provision.</b></p> <p>Note: To extend liability to indirectly responsible entities, either section 550 or this section as 558B(2A) will need to include a new subsection. If a new subsection 558B(2A) is inserted to extend liability, then new definition of indirectly responsible entities will also need to be inserted, logically as 558A(3). See our submission for drafting suggestions. Minor amendments will also need to be made to 558*3), 558C and in Part 7 –application and transitional provisions. We do not provide drafting instructions for these minor amendments.</p>

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<p>(3) A person does not contravene subsection (1) or (2) if, as at the time of the contravention referred to in paragraph (1)(a) or (2)(b), the person had taken reasonable steps to prevent a contravention by the franchisee entity or subsidiary of the same or a similar character.</p>	<p>(3) A person does not contravene subsection (1) or (2) if, as at the time of the contravention referred to in paragraph (1)(a) or (2)(b), the person had taken reasonable steps to prevent a contravention by the franchisee entity or subsidiary of the same or a similar character <i>such as by having in place and complying with a compliance program that meets the relevant Australian Standards or has been approved for use by the Fair Work Ombudsman.</i></p>	<p>No change (expect as may be required to extend liability to indirectly responsible entities).</p>
<p>(4) For the purposes of subsection (3), in determining whether a person took reasonable steps to prevent a contravention by a franchisee entity or subsidiary (the contravening employer) of the same or a similar character, a court may have regard to all relevant matters, including the following::</p> <p>(a) the size and resources of the franchise or body corporate (as the case may be);</p> <p>(b) the extent to which the person had the ability to influence or control the contravening employer's conduct in relation to the contravention referred to in paragraph (1)(a) or (2)(b) or a contravention of the same or a similar character;</p> <p>(c) any action the person took directed towards ensuring that the contravening employer had a reasonable knowledge and understanding of the requirements under the applicable provisions referred to in subsection (7);</p> <p>(d) the person's arrangements (if any) for assessing the contravening employer's compliance with the applicable provisions referred to in subsection (7);</p> <p>(e) the person's arrangements (if any) for receiving</p>	<p>Changes to ensure consideration of all elements in the list, focusing on size and resources.</p> <p>(4) For the purposes of subsection (3), in determining whether a person took reasonable steps to prevent a contravention by a franchisee entity or subsidiary (the contravening employer) of the same or a similar character, a court <i>must</i> have regard to all relevant matters, <i>which include the size and resources of the franchise:</i></p>	<p>Option One: Legislative note of examples from explanatory memorandum:</p> <p><i>Note: Reasonable steps that franchisor entities, holding companies and indirectly responsible entities can take to show compliance with this provision may include: ensuring that the franchise agreement or other business arrangements require all parties to comply with workplace laws, providing all parties with a copy of the FWO's free Fair Work handbook, encouraging all parties to cooperate with any audits by FWO, establishing a contact or phone number for employees to report any potential underpayment or other workplace law breaches and undertaking independent auditing.</i></p> <p>Could also include in the legislative note:</p> <ul style="list-style-type: none"> <li><i>'considering whether prices payable under contracts with the person are sufficient to enable the contract to be performed without contraventions of the Act', and</i></li> <li><i>Have in place and comply with a compliance program that meets the relevant Australian Standards or has been approved for us by the Fair Work Ombudsman.'</i></li> </ul>

<p>and addressing possible complaints about alleged underpayments or other alleged contraventions of this Act within:</p> <p>(i) the franchise; or (ii) the body corporate or any subsidiary (within the 21 meaning of the Corporations Act 2001) of the body 22 corporate; as the case may be;</p> <p>(f) the extent to which the person's arrangements (whether legal or otherwise) with the contravening employer to comply with this Act or any other workplace law.</p>		<p>Option Two: Positive Duty instead of reasonable steps defence.</p> <p><i>We have not provided any drafting suggestions.</i></p>
<p>(7) The civil remedy provisions are the following:</p> <p>(a) subsection 44(1) (which deals with contraventions of the National Employment Standards);</p> <p>(b) section 45 (which deals with contraventions of modern awards);</p> <p>(c) section 50 (which deals with contraventions of enterprise agreements);</p> <p>(d) section 280 (which deals with contraventions of workplace determinations);</p> <p>(e) section 293 (which deals with contraventions of national minimum wage orders);</p> <p>(f) section 305 (which deals with contraventions of equal remuneration orders);</p> <p>(g) subsection 323(1) (which deals with methods and frequency of payment);</p> <p>(h) subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);</p>	<p>Reduce liability for certain provisions.</p> <p>(7) The civil remedy provisions are the following:</p> <p>(a) subsection 44(1) (which deals with contraventions of the National Employment Standards);</p> <p>(b) section 45 (which deals with contraventions of modern awards);</p> <p>(c) section 50 (which deals with contraventions of enterprise agreements);</p> <p>(d) section 280 (which deals with contraventions of workplace determinations);</p> <p>(e) section 293 (which deals with contraventions of national minimum wage orders);</p> <p>(f) section 305 (which deals with contraventions of equal remuneration orders);</p> <p>(g) <i>[delete]</i></p> <p>(h) subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);</p>	<p>No changes.</p> <p><i>Not opposed to the deletion of (7)(j).</i></p>

# WEstjustice

<p>(i) subsection 325(1) (which deals with unreasonable requirements to spend or pay amounts);</p> <p>(j) subsection 328(1), (2) or (3) (which deal with employer obligations in relation to guarantees of annual earnings);</p> <p>(k) subsection 357(1) (which deals with misrepresenting employment as an independent contracting arrangement);</p> <p>(l) section 358 (which deals with dismissing an employee to engage as an independent contractor);</p> <p>(m) section 359 (which deals with misrepresentations to engage an individual as an independent contractor);</p> <p>(n) subsection 535(1), (2) or (4) (which deal with employer obligations in relation to employee records);</p> <p>(o) subsection 536(1), (2) or (3) (which deal with employer obligations in relation to pay slips).</p>	<p>(i) subsection 325(1) (which deals with unreasonable requirements to spend or pay amounts);</p> <p>(j) [delete]</p> <p>(k) [delete]</p> <p>(l) [delete]</p> <p>(m) [delete]</p> <p>(n) [delete]</p> <p>(o) [delete]</p>	
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