



Fair Work Amendment (Protecting Vulnerable Workers) Act 2017

No. 101, 2017

**An Act to amend the *Fair Work Act 2009*, and for
related purposes**

Note: An electronic version of this Act is available on the Federal Register of Legislation
(<https://www.legislation.gov.au/>)

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Fair Work Amendment (Protecting Vulnerable Workers) Act 2017

No. 101, 2017

An Act to amend the *Fair Work Act 2009*, and for related purposes

[Assented to 14 September 2017]

The Parliament of Australia enacts:

1 Short title

This Act is the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	The day after this Act receives the Royal Assent.	15 September 2017

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

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

Fair Work Act 2009

1 Section 12

Insert:

serious contravention has the meaning given by section 557A.

2 Subsection 539(2) (after note 3)

Insert:

Note 4: See section 557A in relation to a serious contravention of a civil remedy provision.

3 Subsection 539(2) (cell at table item 1, column 4)

Repeal the cell, substitute:

for a serious
contravention
—600 penalty
units; or
otherwise—60
penalty units

4 Subsection 539(2) (cell at table item 2, column 4)

Repeal the cell, substitute:

for a serious
contravention
—600 penalty
units; or
otherwise—60
penalty units

5 Subsection 539(2) (cell at table item 3, column 4)

Repeal the cell, substitute:

Schedule 1 Amendments

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

for a serious
contravention
—600 penalty
units; or
otherwise—60
penalty units

6 Subsection 539(2) (cell at table item 4, column 4)

Repeal the cell, substitute:

for a serious
contravention
—600 penalty
units; or
otherwise—60
penalty units

7 Subsection 539(2) (cell at table item 5, column 4)

Repeal the cell, substitute:

for a serious
contravention
—600 penalty
units; or
otherwise—60
penalty units

8 Subsection 539(2) (cell at table item 7, column 4)

Repeal the cell, substitute:

for a serious
contravention
—600 penalty
units; or
otherwise—60
penalty units

9 Subsection 539(2) (cell at table item 8, column 4)

Repeal the cell, substitute:

for a serious
contravention
—600 penalty
units; or
otherwise—60
penalty units

10 Subsection 539(2) (cell at table item 9, column 4)

Repeal the cell, substitute:

for a serious
contravention
—600 penalty
units; or
otherwise—60
penalty units

11 Subsection 539(2) (cell at table item 10, column 4)

Repeal the cell, substitute:

for a serious
contravention
—600 penalty
units; or
otherwise—60
penalty units

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

Repeal the cell, substitute:

for a serious
contravention
—600 penalty
units; or
otherwise—60
penalty units

12A At the end of subsection 550(1)

Add:

Note: If a person (the *involved person*) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see

Schedule 1 Amendments

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

subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).

13 After section 557

Insert:

557A Serious contravention of civil remedy provisions

- (1) A contravention of a civil remedy provision by a person is a **serious contravention** if:
- (a) the person knowingly contravened the provision; and
 - (b) the person's conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons.

Note: For the liability of bodies corporate for serious contraventions, see section 557B.

Example: Generally, subsection 323(1) requires an employer to pay an employee the full amount payable to the employee in relation to the performance of work.

A contravention of subsection 323(1) is a serious contravention if the employer knowingly does not pay the employee in full (even if the employer does not know the exact amount of the underpayment) and that contravention is part of a systematic pattern of conduct by the employer. The systematic pattern of conduct of the employer may relate to more than one employee and may consist of different contraventions.

Systematic pattern of conduct

- (2) In determining whether the person's conduct constituting the contravention of the provision was part of a systematic pattern of conduct, a court may have regard to:
- (a) the number of contraventions (the **relevant contraventions**) of this Act committed by the person; and
 - (b) the period over which the relevant contraventions occurred; and
 - (c) the number of other persons affected by the relevant contraventions; and
 - (ca) the person's response, or failure to respond, to any complaints made about the relevant contraventions; and

- (d) except if the provision contravened is section 535—whether the person also contravened subsection 535(1), (2) or (4) by failing to make or keep, in accordance with that section, an employee record relating to the conduct constituting the relevant contraventions; and
 - (e) except if the provision contravened is section 536—whether the person also contravened subsection 536(1), (2) or (3) by failing to give, in accordance with that section, a pay slip relating to the conduct constituting the relevant contraventions.
- (3) Subsection (2) does not limit the matters that a court may have regard to.
 - (4) Subsection 557(1) does not apply for the purposes of determining whether the person’s conduct was part of a systematic pattern of conduct.
 - (5) Subsection (4) does not otherwise affect the operation of subsection 557(1) in relation to serious contraventions of civil remedy provisions.

Involvement in a serious contravention

- (5A) A person (the **involved person**) who is involved in a contravention of a civil remedy provision by another person (the **principal**) commits a **serious contravention** of the provision only if:
 - (a) the principal’s contravention was a serious contravention; and
 - (b) the involved person knew that the principal’s contravention was a serious contravention.

Application for a serious contravention order and alternative orders

- (6) If a person is applying for an order in relation to a serious contravention of a civil remedy provision, the person’s application under subsection 539(2) must specify the relevant serious contravention.
- (7) If, in proceedings for an order in relation to a serious contravention of a civil remedy provision, the court:

Schedule 1 Amendments

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

- (a) is not satisfied that the person has committed a serious contravention against that provision; and
 - (b) is satisfied that the person has contravened that provision;
- the court may make a pecuniary penalty order against the person not for the serious contravention but for the contravention of that provision.

557B Liability of bodies corporate for serious contravention

- (1) For the purposes of subsection 557A(1), a body corporate knowingly contravenes a civil remedy provision if the body corporate expressly, tacitly or impliedly authorised the contravention.
- (2) This section does not limit section 793.

Part 2—Liability of responsible franchisor entities and holding companies

Fair Work Act 2009

14 Section 12

Insert:

franchisee entity of a franchise: see subsection 558A(1).

responsible franchisor entity for a franchisee entity: see
subsection 558A(2).

15 Section 537 (after the paragraph relating to Division 4)

Insert:

Division 4A imposes obligations on responsible franchisor entities
in relation to certain contraventions of civil remedy provisions by
franchisee entities and on holding companies in relation to certain
contraventions of civil remedy provisions by subsidiaries.

16 Subsection 539(2) (after table item 29)

Insert:

Part 4-1—Civil remedies

29A	558B(1)	(a) an employee;	(a) the Federal Court;	60 penalty units
	558B(2)	(b) an employee organisation;	(b) the Federal Circuit Court	
		(c) an inspector		

17 After Division 4 of Part 4-1

Insert:

Division 4A—Responsibility of responsible franchisor entities and holding companies for certain contraventions

558A Meaning of *franchisee entity* and *responsible franchisor entity*

- (1) A person is a *franchisee entity* of a franchise if:
 - (a) the person is a franchisee (including a subfranchisee) in relation to the franchise; and
 - (b) the business conducted by the person under the franchise is substantially or materially associated with intellectual property relating to the franchise.
- (2) A person is a *responsible franchisor entity* for a franchisee entity of a franchise if:
 - (a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and
 - (b) the person has a significant degree of influence or control over the franchisee entity's affairs.

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

Responsible franchisor entities

- (1) A person contravenes this subsection if:
 - (a) an employer who is a franchisee entity of a franchise contravenes a civil remedy provision referred to in subsection (7); and
 - (b) the person is a responsible franchisor entity for the franchisee entity; and
 - (c) the contravention by the franchisee entity occurs in the franchisee entity's capacity as a franchisee entity; and
 - (d) either:
 - (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

- (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.

Note: This subsection is a civil remedy provision (see this Part).

Holding companies

- (2) A person contravenes this subsection if:
 - (a) the person is a body corporate; and
 - (b) a subsidiary (within the meaning of the *Corporations Act 2001*) of the body corporate who is an employer contravenes a civil remedy provision referred to in subsection (7); and
 - (c) either:
 - (i) the body corporate or an officer (within the meaning of the *Corporations Act 2001*) of the body corporate knew or could reasonably be expected to have known that the contravention by the subsidiary would occur; or
 - (ii) at the time of the contravention by the subsidiary, the body corporate or an officer (within the meaning of the *Corporations Act 2001*) of the body corporate knew or could reasonably be expected to have known that a contravention by the subsidiary of the same or a similar character was likely to occur.

Note: This subsection is a civil remedy provision (see this Part).

Reasonable steps to prevent a contravention of the same or a similar character

- (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.
- (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:

- (a) the size and resources of the franchise or body corporate (as the case may be);
 - (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;
 - (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);
 - (d) the person's arrangements (if any) for assessing the contravening employer's compliance with the applicable provisions referred to in subsection (7);
 - (e) the person's arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of this Act within:
 - (i) the franchise; or
 - (ii) the body corporate or any subsidiary (within the meaning of the *Corporations Act 2001*) of the body corporate;as the case may be;
 - (f) the extent to which the person's arrangements (whether legal or otherwise) with the contravening employer encourage or require the contravening employer to comply with this Act or any other workplace law.
- (5) Subsection (4) does not limit subsection (3).

Civil proceedings in relation to contravention by franchisee entity or subsidiary not required

- (6) To avoid doubt, a reference in paragraph (1)(a) or (2)(b) to a contravention by a franchisee entity or subsidiary includes any contravention whether or not an order has been sought or made against the franchisee entity or subsidiary under Division 2 for the contravention.

Relevant civil remedy provisions

- (7) The civil remedy provisions are the following:
- (a) subsection 44(1) (which deals with contraventions of the National Employment Standards);
 - (b) section 45 (which deals with contraventions of modern awards);
 - (c) section 50 (which deals with contraventions of enterprise agreements);
 - (d) section 280 (which deals with contraventions of workplace determinations);
 - (e) section 293 (which deals with contraventions of national minimum wage orders);
 - (f) section 305 (which deals with contraventions of equal remuneration orders);
 - (g) subsection 323(1) (which deals with methods and frequency of payment);
 - (h) subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);
 - (i) subsection 325(1) (which deals with unreasonable requirements on employees to spend or pay amounts);
 - (ia) subsection 325(1A) (which deals with unreasonable requirements on prospective employees to spend or pay amounts);
 - (j) subsection 328(1), (2) or (3) (which deal with employer obligations in relation to guarantees of annual earnings);
 - (k) subsection 357(1) (which deals with misrepresenting employment as an independent contracting arrangement);
 - (l) section 358 (which deals with dismissing an employee to engage as an independent contractor);
 - (m) section 359 (which deals with misrepresentations to engage an individual as an independent contractor);
 - (n) subsection 535(1), (2) or (4) (which deal with employer obligations in relation to employee records);
 - (o) subsection 536(1), (2) or (3) (which deal with employer obligations in relation to pay slips).

558C Right of responsible franchisor entity or holding company to recover

- (1) This section applies if:
 - (a) a person pays an amount to, or on behalf of, an employee pursuant to an order under subsection 545(1) relating to a contravention by the person of subsection 558B(1) or (2) in relation to a franchisee entity or subsidiary (the **contravening employer**); and
 - (b) the person has not otherwise recovered from the contravening employer an amount (the **recoverable amount**) equal to the amount paid by the person.
- (2) The person may commence proceedings against the contravening employer for payment to the person of so much of the recoverable amount as has not been recovered.
- (3) The proceedings may be commenced in:
 - (a) the Federal Court; or
 - (b) the Federal Circuit Court; or
 - (c) an eligible State or Territory court.
- (4) The court may make an order requiring the contravening employer to pay the person the recoverable amount (or so much of it as has not been recovered from the contravening employer), if the court is satisfied that this section applies as referred to in subsection (1).
- (5) In making the order, the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.
- (6) Without limiting subsection (5), in determining the amount of interest, the court must take into account the period between the day when the amount referred to in paragraph (1)(a) was paid by the person and the day when the order is made.
- (7) Proceedings cannot be commenced under this section more than 6 years after the time when the person paid the amount referred to in paragraph (1)(a).

Part 3—Unreasonable requirements

Fair Work Act 2009

18 Section 151

Repeal the section, substitute:

151 Terms about payments and deductions for benefit of employer etc.

A modern award must not include a term that has no effect because of:

- (a) subsection 326(1) (which deals with unreasonable deductions for the benefit of an employer); or
- (b) subsection 326(3) (which deals with unreasonable requirements to spend or pay an amount); or
- (c) subsection 326(4) (which deals with deductions or payments in relation to employees under 18).

19 Subsection 253(1) (note 2)

Repeal the note, substitute:

Note 2: Certain terms of enterprise agreements relating to deductions, or requiring employees to spend or pay amounts, have no effect (see section 326).

20 Division 2 of Part 2-9 (heading)

Repeal the heading, substitute:

Division 2—Payment of wages etc.

21 Section 325 (heading)

Repeal the heading, substitute:

325 Unreasonable requirements to spend or pay amount

22 Subsection 325(1)

Repeal the subsection, substitute:

- (1) An employer must not directly or indirectly require an employee to spend, or pay to the employer or another person, an 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, if:
- (a) the requirement is unreasonable in the circumstances; and
 - (b) for a payment—the payment is directly or indirectly for the benefit of the employer or a party related to the employer.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (1A) An employer (the *prospective employer*) must not directly or indirectly require another person (the *prospective employee*) to spend, or pay to the prospective employer or any other person, an amount of the prospective employee's money if:
- (a) the requirement is in connection with employment or potential employment of the prospective employee by the prospective employer; and
 - (b) the requirement is unreasonable in the circumstances; and
 - (c) the payment is directly or indirectly for the benefit of the prospective employer or a party related to the prospective employer.

Note: This subsection is a civil remedy provision (see Part 4-1).

22A Subsection 325(2)

After “subsection (1)”, insert “or (1A)”.

23 Section 326

Repeal the section, substitute:

326 Certain terms have no effect

Unreasonable deductions for benefit of employer

- (1) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work, if the deduction is:
- (a) directly or indirectly for the benefit of the employer or a party related to the employer; and
 - (b) unreasonable in the circumstances.

- (2) The regulations may prescribe circumstances in which a deduction referred to in subsection (1) is or is not reasonable.

Unreasonable requirements to spend or pay an amount

- (3) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:
- (a) permits, or has the effect of permitting, an employer to make a requirement that would contravene subsection 325(1); or
 - (b) directly or indirectly requires an employee to spend or pay an amount, if the requirement would contravene subsection 325(1) if it had been made by an employer.

Deductions or payments in relation to employees under 18

- (4) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:
- (a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or
 - (b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person;
- if the employee is under 18 and the deduction or payment is not agreed to in writing by a parent or guardian of the employee.

24 Section 327 (heading)

Repeal the heading, substitute:

327 Things given or provided, and amounts required to be spent or paid, in contravention of this Division

25 Paragraph 327(b)

Repeal the paragraph, substitute:

- (b) any amount that the employee has been required to spend or pay contrary to subsection 325(1), or in accordance with a term to which subsection 326(3) applies, is taken to be a deduction, from an amount payable to the employee, made by the employer otherwise than in accordance with section 324.

25A Subsection 539(2) (after table item 10)

Insert:

10A	325(1A)	(a) a prospective employee; (b) an employee; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit Court; (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
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25B After paragraph 540(1)(a)

Insert:

- (aa) a prospective employee;

26 Paragraph 557(2)(i)

Repeal the paragraph, substitute:

- (i) subsection 325(1) (which deals with unreasonable requirements on employees to spend or pay amounts);
- (ia) subsection 325(1A) (which deals with unreasonable requirements on prospective employees to spend or pay amounts);

Part 4—Powers of the Fair Work Ombudsman

Fair Work Act 2009

27 Section 12

Insert:

AAT presidential member means a person who is a presidential member of the Administrative Appeals Tribunal under the *Administrative Appeals Tribunal Act 1975*.

Commonwealth Ombudsman means the person for the time being holding office as Ombudsman under the *Ombudsman Act 1976*.

FWO notice: see subsection 712A(1).

28 Subsection 539(2) (after table item 32)

Insert:

32A	712B(1)	an inspector	(a) the Federal Court;	600 penalty
			(b) the Federal Circuit Court;	units
			(c) an eligible State or Territory court	

29 Subsection 683(1)

Omit “(other than his or her functions or powers as an inspector)”, substitute “(subject to subsections (1A) and (1B))”.

30 After subsection 683(1)

Insert:

- (1A) The Fair Work Ombudsman must not delegate his or her functions or powers as an inspector.
- (1B) The Fair Work Ombudsman may delegate to a member of the staff of the Office of the Fair Work Ombudsman who is an SES employee or an acting SES employee:

- (a) the power under subsection 712AA(1) to apply for the issue of an FWO notice; and
- (b) the power under subsection 712AD(1) to give an FWO notice; and
- (c) the power under subsections 712AD(3) and (4) to give notice of a later time.

Note: *SES employee* and *acting SES employee* are defined in the *Acts Interpretation Act 1901*.

31 At the end of subsection 685(1)

Add:

Note: A report must not include information relating to an individual's affairs (see section 714A).

32 At the end of section 686

Add:

Note: An annual report must not include information relating to an individual's affairs (see section 714A).

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

Repeal the heading, substitute:

Subdivision D—Functions and powers of Fair Work Inspectors—general

34 Section 703

Before “The functions”, insert “(1)”.

35 At the end of section 703

Add:

- (2) To avoid doubt, the power to apply for the issue of an FWO notice under section 712AA and the power to give an FWO notice under section 712AD are not compliance powers.

36 Before section 708

Insert:

Subdivision DA—Power to enter premises

37 Before section 711

Insert:

Subdivision DB—Powers to ask questions and require records and documents

38 After section 712

Insert:

712A Minister may nominate AAT presidential members to issue FWO notices

- (1) The Minister may, by writing, nominate an AAT presidential member to issue written notices (***FWO notices***) under section 712AB.
- (2) The Minister may nominate an AAT presidential member who is a Judge to issue FWO notices under section 712AB only if the Judge has consented, by writing, to the nomination.
- (3) A nomination ceases to have effect if:
 - (a) the nominated AAT presidential member ceases to be an AAT presidential member; or
 - (b) the Minister, by writing, withdraws the nomination.
- (4) A nominated AAT presidential member has, in performing a function of or connected with issuing an FWO notice under this Subdivision, the same protection and immunity as a Justice of the High Court has in relation to proceedings in the High Court.

712AA Fair Work Ombudsman may apply to nominated AAT presidential member for FWO notice

General requirements

- (1) The Fair Work Ombudsman may apply, in writing, to a nominated AAT presidential member for the issue of an FWO notice referred to in subsection (2) if the Fair Work Ombudsman believes on reasonable grounds that a person:

- (a) has information or documents relevant to an investigation by an inspector into a suspected contravention of a provision of this Act, a fair work instrument or a safety net contractual entitlement that relates, directly or indirectly, to:
 - (i) the underpayment of wages, or other monetary entitlements, of employees; or
 - (ii) the unreasonable deduction of amounts from amounts owed to employees; or
 - (iii) the placing of unreasonable requirements on employees to spend or pay amounts paid, or payable, to employees; or
 - (iv) the unfair dismissal of an employee; or
 - (v) the bullying of a worker at work; or
 - (vi) the unlawful discrimination of a person in relation to employment; or
 - (vii) a contravention of a provision of the National Employment Standards; or
 - (viii) the coercion of an employee by an employer; and
 - (b) is capable of giving evidence that is relevant to such an investigation.
- (2) The FWO notice may require the person:
- (a) to give information to the Fair Work Ombudsman, or a specified member of the staff of the Office of the Fair Work Ombudsman; or
 - (b) to produce documents to the Fair Work Ombudsman, or a specified member of the staff of the Office of the Fair Work Ombudsman; or
 - (c) to attend before the Fair Work Ombudsman, 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, and answer questions relevant to the investigation.

Form and content of application

- (3) An application for an FWO notice must:
- (a) if a form is prescribed by the regulations—be in that form; and
 - (b) include any information prescribed by the regulations.

- (4) An application for an FWO notice must not relate to more than one person, but may relate to more than one investigation.

Application must be accompanied by affidavit

- (5) An application for an FWO notice must be accompanied by an affidavit by the Fair Work Ombudsman including the following:
- (a) the name of the person to whom the application relates;
 - (b) details of the investigation (or investigations) to which the application relates;
 - (c) the grounds on which the Fair Work Ombudsman believes the person has information or documents, or is capable of giving evidence, relevant to the investigation (or investigations) referred to in paragraph (b);
 - (d) details of other methods used to attempt to obtain the information, documents or evidence;
 - (e) the number (if any) of previous applications for an FWO notice that the Fair Work Ombudsman has made in relation to the person in respect of the investigation (or investigations) referred to in paragraph (b);
 - (f) information about whether the Fair Work Ombudsman has made, or expects to make, any other applications for an FWO notice in relation to the investigation (or investigations) referred to in paragraph (b) and, if so, the persons to whom those applications relate.

Further information

- (6) A nominated AAT presidential member to whom an application for an FWO notice is made may request the Fair Work Ombudsman to give the presidential member further information in relation to the application.
- (7) If a request for further information is made under subsection (6), the Fair Work Ombudsman must give the further information in writing as soon as practicable after receiving the request.

712AB Issue of FWO notice

- (1) A nominated AAT presidential member to whom an application for an FWO notice has been made must issue the FWO notice if the presidential member is satisfied of the following:

- (a) that an inspector has commenced the investigation (or investigations) to which the application relates;
 - (b) that there are reasonable grounds to believe that the person to whom the application relates has information or documents, or is capable of giving evidence, relevant to the investigation (or investigations);
 - (c) that any other method of obtaining the information, documents or evidence:
 - (i) has been attempted and has been unsuccessful; or
 - (ii) is not appropriate;
 - (d) that the information, documents or evidence would be likely to be of assistance in the investigation (or investigations);
 - (e) that, having regard to all the circumstances, it would be appropriate to issue the FWO notice;
 - (f) any other matter prescribed by the regulations.
- (2) A nominated AAT presidential member must not issue an FWO notice except in the circumstances referred to in subsection (1).
- (3) An FWO notice must not be issued in relation to more than one person, but may be issued in relation to more than one investigation.
- (4) If:
- (a) an application for an FWO notice is made in relation to more than one investigation; and
 - (b) the nominated AAT presidential member to whom the application is made is not satisfied of the matters referred to in subsection (1) in relation to each of those investigations;
- the nominated AAT presidential member must issue the FWO notice in relation to the investigation (or investigations) in relation to which the nominated AAT presidential member is satisfied of the matters referred to in subsection (1).

712AC Form and content of FWO notice

An FWO notice must:

- (a) if a form is prescribed by the regulations—be in that form; and
 - (b) if the notice requires a person to give information under paragraph 712AA(2)(a)—specify the time by which, and the
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- manner and form in which, the information is to be given;
and
- (c) if the notice requires a person to produce documents under paragraph 712AA(2)(b)—specify the time by which, and the manner in which, the documents are to be produced; and
- (d) if the notice requires a person to attend to answer questions relevant to an investigation—specify the time and place for the attendance; and
- (e) be signed by the nominated AAT presidential member who issued it; and
- (f) include any other information prescribed by the regulations.

712AD Fair Work Ombudsman may give FWO notice to person in relation to whom it is issued and vary time for compliance

Fair Work Ombudsman may give FWO notice to person in relation to whom it is issued

- (1) If a nominated AAT presidential member issues an FWO notice, the Fair Work Ombudsman may give the notice to the person in relation to whom it is issued.
- (2) If an FWO notice is not given to the person in relation to whom it is issued within 3 months after the day on which it was issued, the notice ceases to have effect at the end of that period.

Variation of time for compliance with FWO notice

- (3) If:
 - (a) the Fair Work Ombudsman gives an FWO notice to a person under subsection (1); and
 - (b) the time specified in the notice under paragraph 712AC(b), (c) or (d) is not at least 14 days after the notice is given to the person;the Fair Work Ombudsman must, at the same time as the FWO notice is given to the person, also give notice to the person of a time later than the time specified in the notice.
- (4) The Fair Work Ombudsman may, at any time after giving an FWO notice to the person in relation to whom it is issued, give notice to the person of a time later than the time:

- (a) specified in the notice under paragraph 712AC(b), (c) or (d);
or
 - (b) notified under subsection (3).
- (5) A later time notified under subsection (3) or (4) must be at least 14 days after the FWO notice is given to the person.
- (6) If the person is notified of a later time under subsection (3) or (4), the FWO notice has effect as if the later time (or the latest of those times) were the time specified in the FWO notice.

712AE Conduct of examination

Legal representation

- (1) A person attending before the Fair Work Ombudsman, or a member of the staff mentioned in paragraph 712AA(2)(c), may be represented by a lawyer if the person chooses.

Oath or affirmation

- (2) The Fair Work Ombudsman, or a member of the staff mentioned in paragraph 712AA(2)(c), may require the information or answers to be verified by, or given on, oath or affirmation, and either orally or in writing. For that purpose, the Fair Work Ombudsman, or any member of the staff of the Office of the Fair Work Ombudsman, may administer the oath or affirmation.
- (3) The oath or affirmation is an oath or affirmation that the information or answers are or will be true.

712B Requirement to comply with FWO notice

- (1) A person who has been given an FWO notice must do the following (as applicable):
 - (a) give information or produce a document in accordance with the notice;
 - (b) attend to answer questions in accordance with the notice;
 - (c) take an oath or make an affirmation when required to do so under subsection 712AE(2);
 - (d) answer questions relevant to the investigation while attending as required by the FWO notice.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) Subsection (1) does not apply to the extent that the person is not capable of complying with the requirement.

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

- (1) A person who attends as required by an FWO notice is (subject to subsection (2)) entitled to be paid fees and allowances, fixed by or calculated in accordance with the regulations, for reasonable expenses (including legal expenses) incurred by the person in so attending.
- (2) The person is not entitled to be paid for expenses under this section unless the person:
 - (a) applies, in writing, to the Fair Work Ombudsman for payment of the expenses within 3 months after the attendance; and
 - (b) provides to the Fair Work Ombudsman sufficient evidence to establish that the person incurred the expenses.
- (3) An application under paragraph (2)(a) must:
 - (a) if a form is prescribed by the regulations—be in that form; and
 - (b) include any information prescribed by the regulations.

712D Protection from liability relating to FWO notices

A person who, in good faith, gives information, produces a record or document, or answers a question, when required to do so under an FWO notice is not liable to:

- (a) any proceedings for contravening any other law because of that conduct; or
- (b) civil proceedings for loss, damage or injury of any kind suffered by another person because of that conduct.

712E Fair Work Ombudsman must notify Commonwealth Ombudsman of issue of FWO notice

- (1) As soon as practicable after an FWO notice has been issued, the Fair Work Ombudsman must:

- (a) notify the Commonwealth Ombudsman that the FWO notice has been issued; and
 - (b) give the Commonwealth Ombudsman a copy of:
 - (i) the FWO notice; and
 - (ii) the affidavit that accompanied the application for the FWO notice; and
 - (iii) any other information in relation to the FWO notice that was given to the nominated AAT presidential member who issued the notice.
- (2) If notice under subsection 712AD(3) or (4) is given to a person, the Fair Work Ombudsman must notify the Commonwealth Ombudsman as soon as practicable after giving notice.

712F Review and report by Commonwealth Ombudsman

Fair Work Ombudsman to give report etc. to Commonwealth Ombudsman

- (1) As soon as practicable after an examination of a person under paragraph 712AA(2)(c) is completed, the Fair Work Ombudsman must give the Commonwealth Ombudsman:
 - (a) a report about the examination; and
 - (b) a video recording of the examination; and
 - (c) a transcript of the examination.
- (2) The report under paragraph (1)(a) must include:
 - (a) a copy of the FWO notice under which the examination was conducted; and
 - (b) the following information:
 - (i) the time and place at which the examination was conducted;
 - (ii) the name of each person who was present at the examination;
 - (iii) any other information prescribed by the rules.

Review of exercise of powers under this Subdivision

- (3) The Commonwealth Ombudsman:

- (a) must review the exercise of powers under this Subdivision by the Fair Work Ombudsman and any member of the staff of the Office of the Fair Work Ombudsman; and
 - (b) may do anything incidental or conducive to the performance of that function.
- (4) The Commonwealth Ombudsman's powers under the *Ombudsman Act 1976* extend to a review by the Ombudsman under this section as if the review were an investigation by the Ombudsman under that Act.
- (5) The exercise of those powers in relation to a review by the Ombudsman under this section is taken, for all purposes, to be an exercise of powers under the *Ombudsman Act 1976*.

Commonwealth Ombudsman to report to Parliament

- (6) As soon as practicable after the end of each quarter of each financial year, the Commonwealth Ombudsman must prepare and present to the Parliament a report about examinations conducted during that quarter. The report must include the results of reviews conducted under this section during that quarter.
- (7) The Commonwealth Ombudsman may prepare and present to the Parliament any other reports about the results of reviews conducted under this section the Commonwealth Ombudsman considers appropriate.

Subdivision DC—Other rules relating to answers, records and documents

39 Section 713

Repeal the section, substitute:

713 Self-incrimination etc.

Excuses that are not available

- (1) A person is not excused from giving information, producing a record or document, or answering a question, under paragraph 709(d) or subsection 712(1), or under an FWO notice,

on the ground that to do so might tend to incriminate the person or otherwise expose the person to a penalty or other liability.

Use/derivative use indemnity in relation to requirement under paragraph 709(d) or subsection 712(1)

- (2) In the case of an individual who produces a record or document, under paragraph 709(d) or subsection 712(1), none of the following:
- (a) the record or document produced;
 - (b) producing the record or document;
 - (c) any information, document or thing obtained as a direct or indirect consequence of producing the record or document;
- is admissible in evidence against the individual in criminal proceedings, other than:
- (d) proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to this Act (false or misleading information or documents); and
 - (e) proceedings for an offence against section 149.1 of the *Criminal Code* that relates to this Act (obstruction of Commonwealth officials).

Use indemnity in relation to FWO notices

- (3) In the case of an individual who gives information, produces a record or document, or answers a question, under an FWO notice, any information or answer given, or record or document produced, is not admissible in evidence against the individual in proceedings, other than:
- (a) proceedings for a contravention of section 712B or 718A (requirement to comply with FWO notice and false or misleading information or documents); and
 - (b) proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to this Act (false or misleading information or documents); and
 - (c) proceedings for an offence against section 149.1 of the *Criminal Code* that relates to this Act (obstruction of Commonwealth officials).

40 After section 713A

Insert:

713AA Legal professional privilege

Nothing in this Part requires a person to produce a document that would disclose information that is the subject of legal professional privilege.

41 Subsection 714(1)

Omit “an inspector”, substitute “the Fair Work Ombudsman, an inspector or any other person”.

42 Subsection 714(1)

Omit “the inspector”, substitute “he or she”.

43 Subsection 714(2)

Omit “an inspector”, substitute “the Fair Work Ombudsman, an inspector or any other person”.

44 Subsection 714(2)

Omit “the inspector”, substitute “he or she”.

45 After section 714

Insert:

714A Reports not to include information relating to an individual’s affairs

- (1) Information relating to the affairs of an individual must not be 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:
 - (a) the individual is named, or otherwise specifically identified, in the report as the individual to whom the information relates; or
 - (b) it is reasonably likely that people generally (other than people to whom the individual has disclosed information relating to the individual’s affairs) would be able to work out the identity of the individual to whom the information relates.
- (2) For the purposes of applying paragraph (1)(b) to information relating to a particular individual’s affairs, the context in which the

information appears, and information that is otherwise publicly available, must be taken into account (as well as any other relevant matter).

46 Before section 715

Insert:

Subdivision DD—Enforceable undertakings and compliance notices

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

Fair Work Act 2009

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

Insert:

30A	707A(1)	an inspector	(a) the Federal Court; (b) the Federal Circuit Court; (c) an eligible State or Territory court	60 penalty units
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48 After section 707

Insert:

707A Hindering or obstructing the Fair Work Ombudsman and inspectors etc.

- (1) A person must not intentionally hinder or obstruct:
- (a) the Fair Work Ombudsman or an inspector in the performance of his or her functions or the exercise of his or her powers as the Fair Work Ombudsman or an inspector; or
 - (b) an assistant referred to in section 710 assisting an inspector on premises; or
 - (c) a member of the staff of the Office of the Fair Work Ombudsman in the performance of his or her functions or the exercise of his or her powers in relation to an FWO notice.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) Subsection (1) does not apply if:
- (a) the person has a reasonable excuse; or
 - (b) if the Fair Work Ombudsman or inspector referred to in paragraph (1)(a) or (b) (as the case requires) was required to show his or her identity card to the person under

Schedule 1 Amendments

Part 5 Hindering and obstructing the Fair Work Ombudsman and inspectors

subsection 708(3) or paragraph 711(3)(b)—the Fair Work Ombudsman or inspector:

- (i) failed to do so; or
 - (ii) failed to tell the person of the effect of this section.
- (3) A reference in subsection (1) to the Fair Work Ombudsman includes a reference to a delegate of the Fair Work Ombudsman.

Part 6—False or misleading information or documents

Fair Work Act 2009

49 At the end of section 535

Add:

- (4) An employer must not make or keep a record for the purposes of this section that the employer knows is false or misleading.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (5) Subsection (4) does not apply if the record is not false or misleading in a material particular.

50 At the end of section 536

Add:

- (3) An employer must not give a pay slip for the purposes of this section that the employer knows is false or misleading.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (4) Subsection (3) does not apply if the pay slip is not false or misleading in a material particular.

51 Subsection 539(2) (table item 29, column 1)

After “535(2)”, insert “535(4)”.

52 Subsection 539(2) (table item 29, column 1)

After “536(2)”, insert “536(3)”.

53 Subsection 539(2) (after table item 33)

Insert:

33A	718A(1)	an inspector	(a) the Federal Court;	60 penalty
			(b) the Federal Circuit Court;	units
			(c) an eligible State or Territory court	

54 Paragraph 557(2)(n)

Omit “and (2)”, substitute “, (2) and (4)”.

55 Paragraph 557(2)(o)

Omit “and (2)”, substitute “, (2) and (3)”.

56 At the end of Division 3 of Part 5-2

Add:

Subdivision F—False or misleading information or documents

718A False or misleading information or documents

- (1) A person must not give information or produce a document to the Fair Work Ombudsman, an inspector, or a person referred to in subsection 712AA(2), (the *official*) exercising powers or performing functions under, or in connection with, a law of the Commonwealth if the person knows, or is reckless as to whether, the information or the document:
- (a) is false or misleading; or
 - (b) for information—omits any matter or thing without which the information is misleading.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

- (2) Subsection (1) does not apply as a result of paragraph (1)(a) if the information or the document is not false or misleading in a material particular.
- (3) Subsection (1) does not apply as a result of paragraph (1)(b) if the information did not omit any matter or thing without which the information is misleading in a material particular.
- (4) Subsection (1) does not apply to a person who produces a document if the document is accompanied by a written statement signed by the person or, in the case of a body corporate, by a competent officer of the body corporate:
- (a) stating that the document is, to the knowledge of the person, false or misleading in a material particular; and

- (b) setting out, or referring to, the material particular in which the document is, to the knowledge of the person, false or misleading.
- (5) Subsection (1) does not apply if, before the information was given or the document was produced by a person to the official, the official did not take reasonable steps to inform the person that the person may be liable to a civil remedy for contravening subsection (1).
- (6) For the purposes of subsection (5), it is sufficient if the following form of words is used:

“You may be liable to a civil remedy for giving false or misleading information or producing false or misleading documents”.

Part 7—Application and transitional provisions

Fair Work Act 2009

57 In the appropriate position in Schedule 1

Insert:

Part 4—Amendments made by the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017

15 Definitions

In this Part:

amended Act means this Act as amended by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.

16 Application of amendments—unreasonable requirements to spend or pay amounts

Subsections 325(1) and (1A) of the amended Act apply in relation to requirements made after this clause commences.

17 Saving of regulations—unreasonable deductions

Regulations in force, immediately before the commencement of this clause, for the purposes of subsection 326(2) of the *Fair Work Act 2009* have effect after that commencement as if they had been made for the purposes of subsection 326(2) of the amended Act.

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

- (1) Sections 539, 557A and 557B of the amended Act apply in relation to conduct engaged in on or after the commencement of this Part.
- (2) If:

- (a) conduct was engaged in by a person before and after that commencement; and
 - (b) the conduct is part of a course of conduct referred to in subsection 557(1);
- the conduct engaged in before that commencement is to be treated as constituting a separate contravention from the conduct engaged in after that commencement for the purposes of section 557.
- (3) However, a court may still consider a contravention of a civil remedy provision (whether or not the provision is referred to in subsection 557(2)) by a person that occurred before the commencement of this Part for the purposes of determining whether a person's conduct was part of a systematic pattern of conduct referred to in paragraph 557A(1)(b).

19 Application of amendments—responsibility of responsible franchisor entities and holding companies

- (1) Section 558B of the amended Act applies in relation to contraventions of civil remedy provisions by franchisee entities or subsidiaries that occur after the end of the period of 6 weeks beginning on the day this Part commences.
- (2) To avoid doubt, in determining for the purposes of paragraph 558B(1)(d) or (2)(c) of the amended Act whether a person could reasonably be expected to have had knowledge as referred to in that paragraph, a court may have regard to conduct that occurred, or circumstances existing, before the end of the period referred to in subclause (1).

20 Application of amendments—hindering or obstructing the Fair Work Ombudsman and inspectors etc.

Section 707A of the amended Act applies in relation to conduct engaged in at or after the commencement of this Part.

21 Application of power to give FWO notices

Sections 712A to 712F of the amended Act apply in relation to an FWO notice given after this Part commences, whether the investigation to which the notice relates is begun before or after the commencement of this Part.

22 Application of amendments relating to self-incrimination etc.

Section 713 of the amended Act applies in relation to information given, records or documents produced or questions answered after the commencement of this Part.

23 Application of requirement for reports not to include information relating to an individual's affairs

Section 714A of the amended Act applies in relation to reports prepared after the commencement of this Part.

24 Application of amendments—false or misleading information or documents

Subsections 535(4) and 536(3) and section 718A of the amended Act apply in relation to conduct engaged in after the commencement of this Part.

24A Application of amendments—presumption where records not provided

Section 557C of the amended Act applies in relation to contraventions of civil remedy provisions that occur after the commencement of this Part.

Part 8—Records

Fair Work Act 2009

1 At the end of subsection 535(3)

Add:

Note: If an employer fails to comply with subsection (1), (2) or (3), the employer may bear the burden of disproving allegations in proceedings relating to a contravention of certain civil remedy provisions: see section 557C.

2 Subsection 536(2) (note)

Omit “Note”, substitute “Note 1”.

3 At the end of subsection 536(2)

Add:

Note 2: If an employer fails to comply with subsection (1) or (2), the employer may bear the burden of disproving allegations in proceedings relating to a contravention of certain civil remedy provisions: see section 557C.

4 Before section 558

Insert:

557C Presumption where records not provided

(1) If:

- (a) in proceedings relating to a contravention by an employer of a civil remedy provision referred to in subsection (3), an applicant makes an allegation in relation to a matter; and
- (b) the employer was required:
 - (i) by subsection 535(1) or (2) to make and keep a record; or
 - (ii) by regulations made for the purposes of subsection 535(3) to make available for inspection a record; or
 - (iii) by subsection 536(1) or (2) to give a pay slip; in relation to the matter; and
- (c) the employer failed to comply with the requirement;

the employer has the burden of disproving the allegation.

- (2) Subsection (1) does not apply if the employer provides a reasonable excuse as to why there has not been compliance with subsection 557C(1)(b).
- (3) The civil remedy provisions are the following:
 - (a) subsection 44(1) (which deals with contraventions of the National Employment Standards);
 - (b) section 45 (which deals with contraventions of modern awards);
 - (c) section 50 (which deals with contraventions of enterprise agreements);
 - (d) section 280 (which deals with contraventions of workplace determinations);
 - (e) section 293 (which deals with contraventions of national minimum wage orders);
 - (f) section 305 (which deals with contraventions of equal remuneration orders);
 - (g) subsection 323(1) (which deals with methods and frequency of payment);
 - (h) subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);
 - (i) subsection 325(1) (which deals with unreasonable requirements to spend or pay amounts);
 - (j) any other civil remedy provisions prescribed by the regulations.

*[Minister's second reading speech made in—
House of Representatives on 1 March 2017
Senate on 13 June 2017]*

(37/17)
