

# FCA Senate Inquiry Submission

April 2017



FRANCHISE COUNCIL OF AUSTRALIA

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Stephen Palethorpe  
Secretary  
Senate Standing Committee on Education and Employment  
P O Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Committee Secretariat,

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

Thank you for your 24 March 2017 letter inviting the Franchise Council of Australia (FCA) to make a submission to the concurrent inquiry into three (3) Fair Work Act Amendment Bills.

The FCA makes this submission specifically in relation to the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 as this is the most relevant and prescient for the franchise community.

Our detailed submission is attached. It outlines the current state of franchising in Australia, an assessment of the public policy merits of the proposed legislation, addresses key areas of concern with the Bill as currently drafted and makes a number of specific recommendations for the Committee's consideration.

In support of the FCA's submission and recommendations, our Association welcomes the Committee's invitation to appear before it at your Canberra Hearing on Wednesday, April 12, 2017. At this hearing, we can provide further information in support of our submission, address any particular questions that the Committee may have and provide suggested steps to give effect to the FCA's recommendations if this is of interest to the Committee.

Further details of the FCA representatives attending the hearing will be provided to the Committee Secretariat once it is clear which senior representatives of the franchise community are available to travel to Canberra given the tight timeframes involved.

Given the importance and potential impact of this 'joint employer liability' legislation on the very nature and vitality of franchising as a successful business model that makes a very significant contribution to the Australian economy and community, we thank you for accepting our submission and for its consideration by the Committee.

Yours sincerely,

Hon Bruce Bilson  
Executive Chair  
Franchise Council of Australia

Damian Paul  
Chief Executive Officer  
Franchise Council of Australia



## About Us

The Franchise Council of Australia (the FCA) is the peak industry body representing franchisors, franchisees, service providers and suppliers involved in franchising.

The mission and purpose of the FCA is through franchising “driving economic and entrepreneurial success”.

The FCA pursues this mission and purpose by working to preserve and enhance Australia’s attractiveness as a preferred economy to start and grow a successful franchise businesses to the benefit of all involved and those who rely on these businesses for their livelihood.

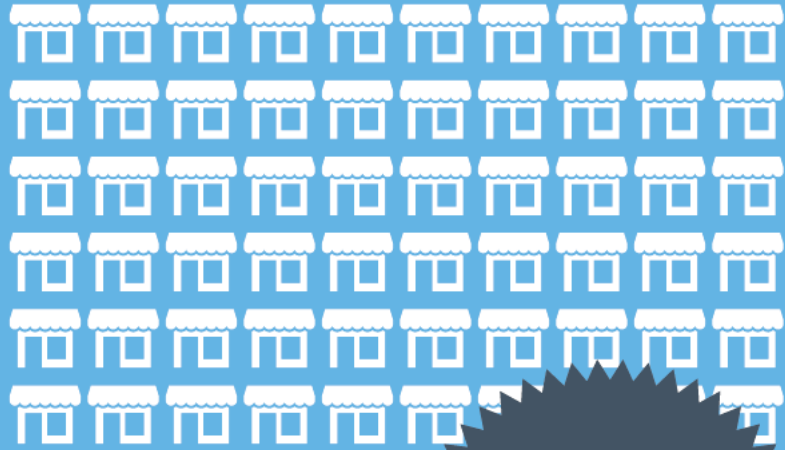
### Key Points

- Franchising is a significant economic driver (\$1 in every \$10 of GDP) & employer (Fact sheet)
- No-one in franchising wants to see an employee in any part of the economy underpaid
- Franchise systems are leading the way with industry-led action that will continue
- Legislation is unnecessary – ‘accessorial liability’ provisions are working and in heavy use
- The Government’s approach is a very heavy regulatory response when better options exist
- With it apparent that the parliament is unwilling to reconsider or postpone legislative action, a number of amendments are necessary to avoid serious harm to the sector - investment, growth and employment and detriment to franchisors, franchisees and the employees that rely upon them
- In keeping with the FCA’s constructive and collaborative approach, specific amendments have been drafted and the reasoning for them is in this submission to assist the Committee’s deliberations and formulation of its report to the Senate



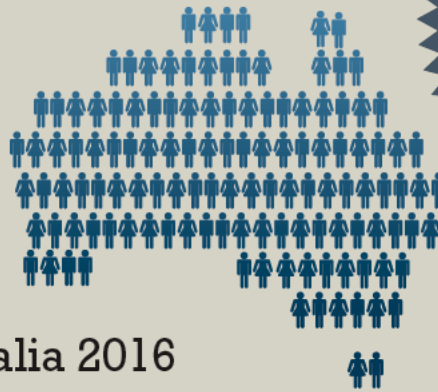


There are  
**79K**  
local small  
businesses  
franchise units



Creating  
over  
**460,000**  
local jobs

# Vital stats



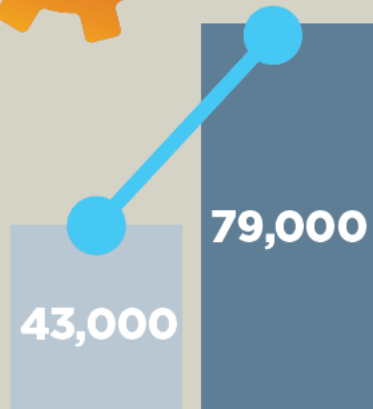
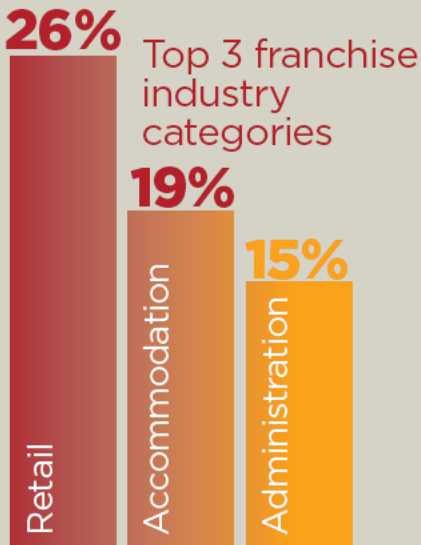
As part of  
**1,120**  
franchise  
systems

## Franchising in Australia 2016

Australia's appetite for franchising continues to grow unabated with the number of small businesses choosing the franchise format expanding to 79,000, employing nearly half a million people. With the support of FCA, confidence in the franchise sector remains strong.

Generating sales turnover estimated at

**\$146b**



Ensuring continued growth of small business units both locally & nationally

**1998-2016**



Source: Griffith University Franchising Australia 2016

# 01

## 1.0.0 Submission Synopsis

The franchise community does not want to see any employee underpaid or have their workplace entitlements infringed upon.

Concerns about Fair Work Act contraventions and workplace pay irregularities is an economy-wide issue.

As evidenced by widely publicised cases, the current law has proven to be effective and the Government's embrace of the FCA's recommendation to boost Fair Work Ombudsman resources, increases potential fines for breaches and enhance investigative powers will better support the enforcement of the current law.

It is unsafe to presume that there is a single model of franchising and that high profile cases are typical of the commercial arrangements between two separate businesses that characterises the franchisor-franchisee relationship.

A minority of franchise systems have control, exercise direction, impose workplace relations policies and practices or have a line-of-sight over Fair Work Act compliance matters. To mandate this change would be to force business models to be varied for regulatory convenience against the commercial judgement of the contracting parties.

Since the time when election commitments were made, Court determinations (Yogurberry) have proven the utility of the current 'accessorial liability' (section 550) provisions.

Industry-led compliance audit processes and assurance programs are lifting awareness and performance standards and the FCA is working collaboratively with the FWO to take these programs further.

With the stated public policy objectives in mind, the only area of legislative deficiency appears to be a desire for improved responsiveness of franchising systems to potential Fair Work Act breaches and encouragement for 'preventative' steps to help guard against the risk of FWA contraventions.

These public policy objectives extend the current risk of 'joint employer liability' beyond actual involvement in or abetting a Fair Work Act contravention, to franchisor responsibilities where there is knowledge of a potential contravention or some way of knowing about a possible contravention, and encouragement to franchise systems to put in place measures that lift franchisee awareness and understanding of their individual employer responsibilities and Fair Work Act compliance obligations.

The legislation as drafted, which singles out franchising for no apparent justification, reaches well beyond these public policy objectives and imposes new 'joint employer liabilities' onto franchisors for the actions of the separate franchisee business via a commercial relationship that may have no connection to workplace relations matters.

It would create a new franchisor 'joint employer liability' for franchisee conduct over which the franchisor has no control or line of sight, in ways not necessarily sought by or helpful to the franchisee fulfilling their employer obligations and for which there is no clear guidance on what businesses are expected to do to be confident they have satisfied these new laws.

As drafted the legislation triggers significant compliance and audit regulatory impact costs and creates new risks from private litigation that are not subject to the disciplines of regulator enforcement guidance.

The legislation materially detracts from the value and appeal of the successful franchising model of enterprise to the detriment of current and aspiring small business franchise owners, the workforce enabled by franchising and the economic and community benefits facilitated by franchising.

Without amendments, the legislation will result in a reduction in franchising activity, growth and investment and adversely impact on future employment enabled by franchising. It will trigger moves away from franchising and variations to business models despite franchising being considered the most effective and efficient to facilitate enterprise success because of the risk of the new 'joint employer liability' that singles out franchising.

The FCA proposes simple and reasonable amendments to Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 that will deliver the stated public policy objectives of the legislation that are not addressed by the current law with the regulatory over-reach and legislative misadventure that represent an existential threat to franchising.

# 02

## 2.0.0 Specific Recommendations For Legislative Amendment

### 1 558B(1)(d)(i) & (ii) Definition of a franchise entity

Amend 558B(1)(d)(i) & (ii) by replace **“Corporations Act 2001”** with **“Franchising Code of Conduct”**

### 2 558A Responsible franchisor entity

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”.

### 3 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”**

### 4 558B(7) Relevant civil remedy provisions

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

### 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 franchisee

### 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”**

### 7 New 558A (3) A franchise relationship not to be deemed an employment relationship

Insert a new **558A(3)** that reads **“Nothing in this Part 2 – Liability of responsible franchisor entities and holding companies shall cause:**

- (a) the creation of new liabilities for responsible franchisor entities and holding companies in addition to those arising from Part 2; or
- (b) the relationship between a franchisor entity and franchisee entity to be deemed to be other than a contractual relationship between separate business entities and not to be characterised as a workplace relationship between an employer and employee.

### 8 New 558A(4)(g) Franchisee owner, director or officer in control not an ‘employee’

Insert a new 558A(4)(g) that reads: **that where the person that is the subject of the alleged contravention of this Act is an owner, director or officer in control of the franchisee entity or a relative or dependent of an owner, director or officer in control of the franchisee entity, only under exceptional circumstances can that person be considered an employee for the purposes of this Part.**

# 03

## 3.0.0 Franchise Sector Overview

### 3.1.0 What is franchising

Franchising is not a business itself, but a way of doing business.

It is essentially a marketing concept - an innovative method of distributing goods and services. It is also an extremely successful and rapidly growing aspect of Australia's small business sector.

Franchising is a business relationship in which the franchisor (the owner of the business providing the product or service) assigns to independent people (the franchisees) the right to market and distribute the franchisor's goods or services, and to use the business name for a fixed period of time.

The International Franchise Association defines franchising as a "continuing relationship in which the franchisor provides a licensed privilege to do business, plus assistance in organising training, merchandising and management in return for a consideration from the franchisee".

"Franchising" is used to describe a number of business models, the most commonly identified of which is "business format franchising".

But there are other models which are also dependent on franchise relationships. These include:

**1 Manufacturer-Retailer:** Where the retailer as franchisee sells the franchisor's product directly to the public. (eg. New motor vehicle dealerships).

**2 Manufacturer-Wholesaler:** Where the franchisee under license manufactures and distributes the franchisor's product (eg. Soft drink bottling arrangements).

**3 Wholesaler-Retailer:** Where the retailer as franchisee purchases products for retail sale from a franchisor wholesaler (frequently a cooperative of the franchisee retailers who have formed a wholesaling company through which they are contractually obliged to purchase. eg. Hardware and automotive product stores).

**4 Retailer-Retailer:** Where the franchisor markets a service, or a product, under a common name and standardised system, through a network of franchisees. This is the classic business format franchise.

The first two categories above are often referred to as product and tradename franchises. These include arrangements in which franchisees are granted the right to distribute a manufacturer's product within a specified territory or at a specific location, generally with the use of the manufacturer's identifying name or trademark, in exchange for fees or royalties.

The business format franchise, however, differs from product and tradename franchises through the use of a format, or a comprehensive system for the conduct of the business, including such elements as business planning, management system, location, appearance and image, and quality of goods.

Standardisation, consistency and uniformity across all aspects are hallmarks of the business format franchise.

Business format franchising is today the fastest-growing segment of franchising and has spread to virtually every sector of the economy in Australia. It has significantly more franchise systems, more outlets, more employees and more opportunities than product and tradename franchises.



# 03

## 3.1.1 Variety of Franchise Systems

It is crucial to understand that franchising operates across industry sectors, such as retail, food, convenience, motor vehicle, home services, real estate, transport, financial services and so forth. Franchising is a way of doing business, and is not an homogenous industry sector itself.

A list of members of the FCA is included in Appendix A. Almost every one of those franchise networks has a different business model, with franchisor and franchisee responsibilities and fee structures varying markedly.

It needs to be seen in the context of the depth and breadth not only of the franchise sector, but of the legislative definition of a “franchise agreement” under the Franchising Code of Conduct, and even more so with the Government proposing the even broader definitional capture provided by the Corporations Act.

The Australian economy includes multi-level franchise systems with master franchising, area development arrangements, state and regional structures and franchisee expansion opportunities with defined areas.

Several franchise systems (including some of the largest service based systems, with around 1,000 franchisees) have arrangements such as a head franchisor, a sub-franchisor for each State, and possibly even regional franchisors within the State, then franchisees.

Motor vehicle dealership agreements are automatically deemed to be “franchise agreements” under the Code even if they do not exhibit all of the 3 elements of a “franchise agreement” as defined. As a consequence a motor vehicle distributor or manufacturer will be deemed a franchisor. Motor dealership arrangements regularly see a ‘franchisee’ engaged in commercial activity with a number of ‘brands’, with each ‘brand’ party performing certain obligations, making it difficult to establish who would be caught as the “franchisor”.

This provides a classic, but not unique, example of the complexity of the drafting challenge before the Parliament and why with the settled understandings of the operation of the Franchise Code of Conduct, it may be preferable not to use a less familiar ‘franchise’ definition.

Similarly, careful drafting would be needed to avoid simply inserting an interposed entity to side-step potential ‘joint employer’ liability.

## 3.1.2 Typical Model

The structural separation of responsibilities between franchisor and franchisee is critical to the ability of a franchised small business network to compete effectively against larger businesses.

While there is a diversity of business structure given the range of sectors involved, typically the franchisor will focus on the brand, the development and enhancement of the common franchise system used across the network, as well as product supply, group marketing and the bigger picture issues.

The independently and locally-owned and operated franchisee will focus on day to day operations, including appointing and managing employees. Just as the franchisee does not get involved in the franchisor’s activities, the franchisor does not get involved in the franchisee’s activities.

This synergistic relationship and the business efficiencies it generates would be compromised if legislation sought to impose additional liability, and therefore responsibility, on the franchisor for tasks that were fairly assumed by the franchisee alone under the business model.

Most franchise agreements would give a franchisor the theoretical ability to exercise some level of control over workplace compliance by the franchisee. Common provisions include a requirement for the franchisee to “comply with all laws”, and to “comply with the franchisor’s system as amended from time to time”.

In the case of employment matters, given the independent nature of the franchisee’s business, it is predominantly the franchisee’s responsibility to recruit, appoint, train, pay and manage all staff, and meet all workplace obligations. As good corporate citizens and in keeping with the concept of support for franchisees, many franchise systems disseminate information on compliance with employment laws to franchisees, including material provided by Fair Work Australia. They will also include content in training programs.

It is a significant stretch to expect a franchisor will essentially monitor and manage workplace compliance using these rather general provisions having regard to the expectations of the franchisor and franchisee when they entered the franchise agreement. To do so they would need to include contractual provisions to empower them to do so.

It would be highly interventionist and an unexpected if the Parliament was to impose a mode of operation and a redefinition of the synergistic relationships in franchising for regulatory convenience, where this was at odds with commercial judgements about how businesses should best arrange themselves to pursue commercial objectives and success.

# 03

### 3.1.3 Enterprise Success

Franchised business typically out-perform non-franchised businesses (and indeed major corporate chains) in every market economy because of the synergistic relationship between franchisor and franchisee.

Business Entry and Exit data published by the ABS points to only 1 in 4 standalone enterprises still operating 5 years after their formation. Griffith University research highlights how the success-failure rate is reversed for a franchise business, with 3 in 4 trading after 5 years.

This success rate is enabled by the structured synergistic relationship - franchisor and franchisee work collaboratively to achieve a mutually beneficial outcome and deliver the customer promise, but they do so by taking on clearly-defined, separate tasks. This structure accommodates and supports the independence and local market knowledge of the small business operator while providing the support and profiling benefits that flow from being part of a franchise brand.

Business format franchising requires a unique relationship between the franchisor (the owner of the system) and the franchisee (the owner of the individual outlet), which is commonly referred to as a “commercial marriage”.

This ongoing business relationship includes the product, service and trademark, as well as the entire business concept itself from marketing strategy and plan, operational standards, systems and formats, to training, quality control and ongoing assistance, guidance and supervision.

In short, it provides small business (the franchisee) with the tools of big business (provided by the franchisor).

It is also a Win-Win relationship where the franchisor is able to expand its market presence without eroding its own capital, and the franchisee gains through access to established business systems, at lower risk, for their own commercial advantage.

The “commercial marriage” between franchisor and franchisee is ultimately a legal relationship, with the full obligations and responsibilities of both parties outlined in a highly detailed franchise agreement. This commercial contract varies in length and conditions from one system to the next, such that it would be almost impossible for any two franchise systems to have identical agreements.

By nature of the relationship, the franchise agreement will be imbalanced in favour of the franchisor, as the franchisor must at all times remain in control over certain standards critical to the ongoing success of the business format.

For the small business owner or aspirant, franchising provides an opportunity to be ‘in their own business but not on their own’.

# 03

## 3.1.4 Model for small business ownership, investment and innovation

Franchising enables small businesses to compete very effectively against large corporations, but at the same time small businesses are particularly vulnerable to any structural inefficiencies in markets or anti-competitive or inappropriate conduct by larger market participants such as shopping centre owners.

The strong 'disclosure' and 'informed decision making' imperatives embedded in the Franchise Code of Conduct, and backed by fines and penalties for false or inaccurate information, provide an intending franchisee with a solid and reliable information basis upon which to make an investment decision. The ability to see a business model in operation and to speak with those already invested in the format provides a higher degree of certainty for prospective franchisees compared to other small business investor contemplating a new enterprise opportunity.

The franchise system ordinarily bring market intelligence, product and service pricing and positioning, branding, specialist technologies and business systems to the business relationship that would otherwise be out of reach to the small business owner.

A franchisee can contribute their commercial acumen, local market knowledge, investment and operational funds and personal drive and energy to add to the capacity for growth and success a franchisor brings to the business and economy.

Local market and customer insights can be brought into the franchise systems with a franchisor providing the analytical, research and product/service development expertise to carry forward these insights from the customer-facing franchisee to refine and deploy across the franchise system. Franchising is an exemplar model for successful and timely innovation.

Our members are market leaders in many industry sectors notwithstanding the fact that they have to compete with large corporations. Automotive retail, bakeries, casual dining, fast food, coffee shops, convenience stores, real estate, tyre retail, bedding, furniture retail, postal services and home services are just a few sectors in which FCA Members provide valuable services.

## 3.1.5 Franchise regulation

As 95% of franchisors, and almost all franchisees, are small businesses, the sector is also highly sensitive to the cost of regulation.

The franchise sector has been regulated by the ACCC since 1998.

A cornerstone of the regulation is the Franchising Code of Conduct. The 'Code' has been created to assist the ongoing relationship between the franchisee and franchisor. Issues covered include:

- Disclosure of the pertinent information regarding the Franchisor,
- Conditions contained within the Franchise Agreement, and
- Complaint handling and dispute resolution procedures.

The Code was originally introduced in 1998, amended on several occasions, and replaced by a comprehensive new Code with that came into effect from 1 January 2015.

The current strengthened Code seeks to encourage and sustain the 'shared purpose' and mutually supportive relationship at the heart of positive and respectful symbiotic franchising relationships. It aims to sustain the 'full disclosure' and 'informed decision-making' imperatives before investment decisions are made by a small business person into a franchise system throughout the franchise relationship.

The Code seeks to guard against unilateral actions or decisions or material changes to the commercial proposition parties entered into that may harm a party to the franchise undertaking.

This expectation is at the heart of recent protest action by Caltex franchisees aggrieved at the cost of company audits to establish Fair Work Act compliance amongst franchisees and the action taken to terminate some franchise agreements (via mechanisms under the Oil Code and franchise agreements) for identified contraventions. Franchisees felt they should have had time and support to remedy irregularities while Caltex was acting decisively to guard against brand damage and regulator penalties for being aware of breaches and failing to act.

# 03

## 3.1.5 Franchise regulation *(cont)*

The Franchising Code of Conduct currently restricts the action franchisors can take against franchisees in the event of non-compliance.

As was stated in evidence to this Committee's Inquiry in 7-Eleven by Dr Tess Hardy, 7-Eleven representatives and others, it is not currently possible under the Code to automatically terminate a franchise agreement even in the event of serious breach of workplace obligations by a franchisee.

A franchisor can only serve a notice of breach, which then allows a franchisee an opportunity (usually within 30 days) to remedy the breach. Remedial action by a franchisee such as providing an undertaking not to re-offend, compensating prejudiced employees and attending refresher training would prevent termination.

For this reason, if it is the Parliament's intention to encourage franchise agreement termination as evidence of a franchisor 'taking action' upon becoming aware of a franchisee committing a serious breach of its obligations under any workplace legislation, the Committee might consider recommending an amendment to the Franchising Code of Conduct to permit this course of action where it is not expressly provided for in the franchise agreement.

## 3.2.0 Scale of Franchising

### 3.2.1 Contribution to GDP

While the USA is considered the 'birthplace of franchising' with 2.7% of its GDP generated through the franchise model of enterprise, Australia is a 'capital of franchising' with 8% or \$146 billion p.a. (Griffith University Franchising Australia 2016) of its GDP generated through franchising.

This contribution extends to nearly 1 in every \$10 of Australia's economic activity is fuel and automotive retailing through franchise models is included (\$178 billion, Ibisworld Research January 2017).

The franchise sector comprises 1,120 franchise systems or 'brands' which has been relatively stable in recent years as Code reforms support higher disclosure standards and scrutiny of business performance and prospects, combining to guard discourage the premature marketing of under-developed franchise concepts.

The franchise sector continues to be a major contributor to the Australian economy and supports prominent and emerging systems expanding internationally.

The tops 3 franchise industry categories are retail (26%, accommodation (19%) and administration (15%).

# 03

## 3.2.2 Small business ownership

Franchising continues to be an attractive avenue for enterprising women and men to establish and grow a small business.

The 1,120 franchise systems facilitate 79,000 customer-facing units that are overwhelmingly locally (and often family) owned small businesses. This number of franchisees has grown from 43,000 in 1998 and continues to see a franchise operating in almost every type of business category, with varying levels of complexity and cost.

Prospective franchisees continue to look for opportunities and the Franchise Council of Australia provides guidance and support resources to potential franchisees, that aspirants should;

- 1 Assess your own reasons for wanting to own a business;
- 2 Assess the lifestyle and income implications of owning and operating a business;
- 3 Assess the franchise opportunities consistent with 1 and 2 above.
- 4 Build your understanding of the franchise relationship by reading the Franchise Guide.
- 5 Narrow your franchise search to a few systems, then request further information.
- 6 If appropriate, and you are comfortable with the decision, select a system and commence the application process.
- 7 Ensure you have adequate borrowing capacity, including working capital, to successfully establish this type of business.
- 8 Be sure you receive and evaluate all disclosure material during the application process.
- 9 Be sure you receive legal and accounting advice from lawyers and accountants with franchise experience before making any final commitment.
- 10 Use the cooling-off period to check your facts/figures and determine if you want to proceed.

This is by no means an exhaustive list, but is presented as guidance to guard against a prospective local small business franchisee rushing headlong into a hasty and ill-informed investment decision.

## 3.2.3 Franchise Employment

According to the Griffith University Franchising Australia 2016 report, the 79,000 local small business franchise units provide more than 460,000 local jobs.

Add the local franchise owners and the people involved in supporting franchise systems either with the franchisor or the extensive supplier and adviser network servicing franchising, more than 1/2 million Australian jobs are the direct benefit of franchising in Australia.

The most recent private research (Ibisworld, January 2017) seeks to quantify the broader impact of franchising in Australia by including the broader service supply chain, estimating employment to be 580,000 on annual sector turnover of \$178 billion.

System-specific and vocational training is available for employees and the FCA facilitates and internationally-recognised Certified Franchise Executive qualification.

The ACCC provides an on-line resource for small business people considering investing in a franchise unit.



# 03

## 3.2.4 Cultural Diversity

Cultural diversity has long been a feature of franchising, particularly for systems featuring a cultural element as a point of positive product or service differentiation. Prominent examples have been in hospitality and quick-service food segments, wellness and alternative therapy formats and where particular skills sets have been aligned to cultural traditions.

More recently, cultural diversity has emerged in mainstream and higher profile franchise systems where the format, expectations of entrepreneurial endeavour, effort and system entry requirements have aligned with a more culturally diverse community.

Specific visa categories and migration requirements have also acted to encourage a great cultural diversity engagement in some systems and business formats. In some cases, the recruitment of prospective franchise and business unit staff has been embraced to support growth and business operations.

The franchise community recognises cultural diversity as a strength but also understands that it represents an area of new challenges and learnings in terms of franchisee selection, system compliance and brand promotion, and in maintaining service standards and customer experiences.

The FCA has hosted cultural diversity workshops and is proposing a sector-wide research project involving leading systems in conjunction with Griffith University.

# 04

## 4.0.0 Employee Underpayment

In the lead-up to last year's election, media coverage of wage underpayment and workplace irregularities at 7-Eleven were prominent. A significant number of allegations of underpayment of employees of 7-Eleven franchisees had been before the Fair Work Ombudsman for some time and 7-Eleven were actively co-operating with the FWO and its inquiries.

The media coverage and public concern led to promises to 'get tough' on franchise systems where a franchisee had 'done the wrong thing' flowed in response from the Coalition, Labor and the Greens.

Essentially, the promises involved passing new laws to make the franchisor liable for a franchisee's contraventions of the Fair Work Act under particular circumstances.

The parties which formed Government following the election pledged that:

**"The Coalition will amend the existing accessorial liability provisions into the Fair Work Act to make both franchisors and parent companies liable for breaches of the Act by their franchisees or subsidiaries, in situations where they should reasonably have been aware of the breaches and could reasonably have taken action to prevent them from recurring. The proposed legal test to determine whether a franchisor is liable for the actions of franchisees will turn on the question of whether they should have or could have done something to prevent the breaches by the franchisee. This will be a legal test to be applied by the court. It will depend on the circumstances of the particular case."**

The policy document went on to state:

**Franchisors who have taken reasonable steps to educate their franchisees, who are separate and independent businesses, about their workplace obligations and have assurance processes in place, will not be captured by these new provisions.**

In the media commentary and discussion that followed the policy release, it was understood that the provisions were not intended to capture a situation where a subsidiary or franchisee chooses to breach workplace laws without the knowledge or implicit support of the higher up entity. Likewise, where the franchisor is a smaller business that does not have the resources to control the actions of its franchisees or step in to deal with breaches by franchisees, then they would also not be captured.

# 04

## 4.1.0 Economy-wide concern

Despite the high degree of media, regulator and political scrutiny, relatively few breaches to workplace laws in franchise systems have been revealed and most of the public commentary has focused on cases where contraventions have been identified and the perpetrators held to account.

Less has been heard about Fair Work compliance being an economy-wide issue, of the other influences that have contributed to confirmed franchising irregularities, or of the industry-led quality and assurance initiatives. The sector's constructive collaboration with regulators is ignored.

No-one in the franchise community wants to see an employee underpaid and the Association's experience is that small business people overwhelmingly go out of their way to do the right thing.

Examples where people have set out to or have conspired to rip off employees, the current law and Fair Work Ombudsman should and has held these people to account.

No evidence provided makes the case for singling out franchising when Fair Work compliance concerns are an economy-wide issue.

The risk of regulatory misadventure and unfairness in targeting the franchise business model is highlighted by considering other commercial arrangements between separate and individual businesses participating in captive supply chains.

It is unfair and unreasonable to create a potential new 'joint employer liability' risk determined by reference to being parties to a franchise agreement when an emphasis on some other mechanism more linked to control would be fairer and avoid singling out a single model of enterprise.

Any new legislation should reflect the economy-wide nature of the employee underpayment concern. An economy-wide approach may be assisted by contemplating if the definition of "parent" company was extended beyond parent and subsidiary to a situation where one party exercised reasonable allocation of responsibilities and significant control over another party, such as in a closely controlled supply chain or a franchise, licence or product distribution arrangement.

## 4.2.0 Franchise System Compliance

The franchise systems most prominently mentioned in the media are very different to the vast majority of franchise networks.

Where underpayment has occurred, highly competitive, lower margin & high volume business models and a predominance of low and semi-skilled award-paid employees where there is considerable competition for work, appear to be where contraventions have arisen and enforcement action has occurred.

Limited cases have emerged outside of these particular markets and vast numbers of workplaces are characterised by stiff competition for quality and qualified staff attracted by over-award remuneration and with considerable workplace mobility.

For the 24 hour business models, many of the franchisors are large corporations with extensive resources.

In contrast over 95% of the 1,120 franchisors in Australia are small businesses with less than 25 franchisees, and a small handful (estimated to be an average of 7 employees) at head office.

The legislation currently catches all franchise systems due to the breadth of the definition of "responsible franchisor entity", and where there has been no evidence of systematic Fair Work Act contraventions.

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## 4.3.0 Franchising Supporting Fair Work Act Compliance

Overlooked are the genuine efforts of franchise systems to make things right for employees and weed out any brand 'bad eggs'.

### 4.3.1 Help line

Systems where contraventions have arisen have put in place 'Help Lines' for the local small business franchise owner who is uncertain about their obligations as an individual employer. These lines have been activated as part of the support provided by the franchisor to the franchisee and through external providers where the franchisor lacks the expertise and resources to provide expert advice.

External providers of advice and support has also been activated within some systems to facilitate access to expertise without necessarily engaging the franchisor and for employees keen to establish their entitlements before raising a concern with their employer.

### 4.3.2 FCA / HR Central initiative

In March 2017, the FCA, in conjunction with its franchising sector human resources specialist partner, HR Central, began offering its members a free dedicated Help Desk to the best advice regarding compliance and best practice.

This initiative recognised that navigating the Fair Work Act and workplace relations complexity as a small business owner is never easy. This new service aims to assist the franchise community with their knowledge and expertise to support small franchise businesses being entirely policy compliant.

### 4.3.3 Proactive Compliance Deeds

As at April 7 2017, the Fair Work Ombudsman's website lists 16 Proactive Compliance Deeds entered into by organisations that have been the subject of inquiries by the FWO into alleged Fair Work Act contraventions:

- FoodCo Group Pty Ltd
- 7-Eleven Store Pty Ltd
- CW Retail Services Pty Ltd (Chemist Warehouse)
- Baiada Poultry Pty Ltd
- Minor DKL Good Group Pty Ltd
- JB Hi-Fi Group Pty Ltd
- Domino's Pizza Enterprises Pty Ltd
- Retail Zoo Pty Ltd
- Compass Group (Australia) Pty Ltd
- United Trolley Collections Pty Ltd
- La Porchetta
- McDonald's Australia Limited
- Australian Fast Foods Pty Ltd
- Hays Specialist Recruitment (Australia) Pty Ltd
- Breadtop Pty Ltd
- Asset Industries Australia Pty Ltd

To date, no PCDs have been executed by a franchise on their own volition due to the cost, complexity and undertakings inherent in the deeds prompted by and executed as a response to FWO investigations. The majority of franchise business have concluded that PCDs in their current form are not 'right sized' and responsive to their business size, resourcing and circumstances.

# 04

#### **4.3.4 FWO collaboration and Assurance programs**

The FCA has initiated collaborative work with the Fair Work Ombudsman's office to develop an assurance framework that is more 'fit for purpose' for smaller franchise systems, with less available resourcing and expertise, no apparent contraventions but a commitment to do and be seen to be doing the right thing by employees, current and potential franchisees, the regulators, financiers and the broader community.

The goal of an assurance framework is to provide 'right sized' and relevant tools adaptable for the vast array and varying sizes and sophistication across Australia's 1,120 franchising systems.

These assurance programs would take the operative parts of the FWO's Proactive Compliance Deeds and tailor their use in a way that is more responsive to the franchise business size, resourcing and circumstances in templates endorsed by the FWO.

Alternatively, franchise business could develop and deploy their own customised program using the respected Australian Standards assurance program framework.

For smaller systems, the Government has spoken about simply supplying information to franchisees to satisfy its stated policy objectives and the FCA plans to continue with its collaboration with the FWO on information availability and distribution to meet this stated requirement.



# 04

## 4.4.0 FWO Enforcement

### 4.4.1 Franchise System Co-operation

Reported cases of alleged Fair Work Act contraventions and FWO investigations have reflected the cooperative approach of franchise systems to the FWO and its inquiries.

It is believed to be the case that the FWO's decision not to prosecute 7-Eleven under the current law (and specifically the accessorial liability provisions) may have been in part influenced by 7-Eleven's cooperation with the FWO investigation and clear desire to provide redress for the franchisee employees clearly harmed by the action of their employer.

In the Explanatory Memorandum accompanying the Government's Bill, no mention is made of any lack of cooperation or lack of preparedness to assist FWO contravention investigations by franchisors.

The Regulatory Impact Statement highlights the FWO's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales when citing behaviour that was unhelpful to the FOW's investigation into Fair Work Act contraventions. Baiada Group is not a franchise business.

### 4.4.2 Publicised Prosecution and Enforcement

The public interest and media scrutiny has centred on alleged Fair Work Act contraventions involving franchise systems where the currently available investigative, prosecutorial and enforcement framework available to the Fair Work Ombudsman has worked.

The results arising from the use by the FWO of its 'compliance toolkit' have included the repayment of underpaid workers, fines and penalties for the wrong-doing employers and the entering into Proactive Compliance Deeds which have effectively 'recruited' franchise systems to directly undertake compliance monitoring, auditing and surveillance activity of franchisee employers that would otherwise be the domain of the regulator.

At the time of the Government's policy announcement, it was being inferred that the current law was inadequate. This was able to be contested by the evidence of direct franchisee employer prosecutions and the FWO's enforcement 'reach' to engage franchise systems in audit function, remediation of irregularities and activities to prevent contravention reoccurrence.

It has been argued that the current law is deficient in its capture of parties that were not the direct employer but were involved in the contravention.

However, subsequently to the election campaigning commitment, a court decision provides compelling evidence that in fact the current law has greater utility than was appreciated, has proven to be quite far-reaching and shown to be adequate and effective.

Late last year, the FWO successfully prosecuted parties associated with the Yogurberry franchise network, securing fines against the employer, the master franchisor, the out-sourced payroll provider and an individual part-owner of the franchisee business for their involvement in exploiting the workers.

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## 4.4.3 Accessorial Liability

On November 3, 2016 the FWO successfully prosecuted a franchisor and related companies and individuals in relation to the Yogurberry franchise network where four Korean backpackers were underpaid a total of \$17,827, securing fines of \$75,000 against the employer, \$25,000 against the master franchisor, \$35,000 against the related payroll company and \$11,000 against an individual part-owner for her involvement in exploiting the workers.

Total wage underpayments were \$17,827, substantially less than the total fines imposed, illustrating how the current law provides an effective enforcement mechanism. The proposed changes to enhance the investigative powers of FWO have been supported by the franchise sector, and will further improve the regulatory framework.

The FCA has argued there is no compelling public policy case that the current law is deficient and that additional new law and regulation burden is justified and proportionate.

The Yogurberry judgement was heralded by FWO as “precedent- setting” in its November 3 2016 press release:

**“The judgment – which includes \$146,000 in penalties and an order for a national audit of the Yogurberry chain – is the first time the Fair Work Ombudsman has secured penalties against a master franchisor for being an accessory to the exploitative practices of one its associated companies.**

**Significantly, almost half of the total penalties were imposed against companies in the Yogurberry Group for being accessories to the exploitation of the workers and the national audit requires the master franchisor to take extensive steps to ensure future compliance.”**

In her October 10, 2016 remarks to the National Franchise Convention, FWO Natalie James stated:

**“The accessorial liability provisions have been well utilised by the Fair Work Ombudsman. Ninety- two percent of matters my agency filed in court last financial year took action against an alleged accessory.**

And accessories don't just include company directors, or advisers. We've also joined other companies in the supply chain – companies that contracted or outsourced to the employing entity, and should have known workers' entitlements were not being met”.

On the FWO website under the ‘What is accessorial liability?’ tab, it states:

**The Fair Work Ombudsman takes around 50 matters to court each year. Increasingly these litigations include action against both the employing entity and a third party who, we believe, is involved in the alleged contravention.**

**This has broad implications for businesses that use outsourcing, franchise arrangements or complex supply-chains. The full scope of section 550 in these arrangements has not been settled by the courts, however, the Fair Work Ombudsman is determined to take action to ensure a culture of compliance is established and maintained broadly across all businesses.**

The Yogurberry judgement for the successful FWO prosecution of the employing franchisee, master franchisor and outsourced payroll provider demonstrates the utility of the current law and diminishes the public policy justification for change on the basis the law as it is currently written is inadequate.

The law functioned as it was intended and the public policy imperatives advanced as the basis for change have been displaced by events. The FWO is pursuing an abundance of other cases to further test the utility of the ‘accessorial liability’ provisions while recognising that the law is not settled.

Th FCA has argued that a revised and updated articulation is needed of what is the public policy problem, inadequate reach or conduct not captured that amendments to the law would seek to solve in light of events.

# 04

#### 4.4.4 FWO enhanced tool kit

The Franchise Council of Australia advocated for more resources, larger penalties and expanded investigative powers for the Fair Work Ombudsman in its submission to this Committee's 7-Eleven inquiry, to enable the existing law, particularly the 'accessorial liability' provisions of the current Act to be fully tested and deployed.

The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 contains provisions for higher penalties for 'serious contraventions' of payment-related workplace laws, protections against employers asking for 'cash back' from their employees, a strengthening of the FWO's evidence gathering powers and provisions to compel a person to provide information or answer questions.

These measures have been designed to respond to particular and proven shortcomings in the current law, and should be allowed to function to see if the desired preventative, investigative and enforcement outcomes are achieved and the deficiencies in the current law have been remedied.

No case has been made to prove a legislative deficiency that warrants the creation of a 'joint employer liability' targeting to franchise business models.

A purely legislative solution risks seeing a diversion of effort towards 'work arounds', rather than the current focus on compliance, raising standards and propagating best practice.

On the other hand, if the Senate Committee sees merit in and supports the FCA recommendations for measured, modest and sensible amendments to the legislation, risks and harm will be reduced and the franchise sector is likely to continue to flourish, and will devote efforts towards developing compliance programs that actually enhance compliance.

Let's be frank, this is a complex problem – if more than a superficial assessment is undertaken of the instances of alleged workplace abuse in the business sector the problem is intertwined with complex issues such as immigration, cultural and ethnic behavioural norms, lack of mainstream workplace opportunities for immigrants and even repatriation of funds overseas to alleviate poverty.

# 05

## 5.0.0 Legislation

Notwithstanding the position the FCA has argued and evidenced that a case has not been made to introduce a new 'joint employer liability' targeting franchising, the Government appears insistent on legislating this internationally-unprecedented measure.

As has been the approach of the FCA to the consultation process, a constructive and collaborative disposition has been applied to examining the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

The FCA reached out to its membership, and established a Working Group of leading lawyers to assist in obtaining the best possible information concerning the potential impact of any amending legislation.

The Working Group felt the complexities were very significant, and that in their view it would be extremely difficult to enact legislation that did not have economic impact, or unintended consequences. That comment is not intended to be a comment on policy, but rather a comment on the sheer legal complexity of the assigned task, particularly if the legislation targets "franchising" but does not address other competitive forms of distribution.

The FCA has dedicated considerable resources to responding to this policy challenge as a poor legislative outcome poses an existential threat to the appeal, vitality and viability of the franchise model of enterprise.

The FCA considers its proposals represent a highly constructive and very workable solution to refine and augment the proposed legislation, and deliver a vastly improved outcome and dramatically lower regulatory compliance cost.

### 5.1.0 Regulatory Overreach

The legislation appears to be framed with very large major prominent brands that have been involved in media and public commentary primarily in mind, with some secondary consideration and adjustment for smaller franchise systems.

Reassurances arising from the consultation process are echoed in the Second Reading Speech but are not adequately and dependably reflected in the legislation to ensure their reliable and durable impact.

The fact that 95% of franchisors, and almost all franchisees, are small businesses lead the FCA to submit that any regulatory intervention should be guided by a 'small first' frame, as smaller businesses are particularly vulnerable to regulatory overreach and disproportionate compliance costs.

The formulations in the legislation give rise to a much broader capture and compliance burden than is appreciated and known within the business and broader community.

### 5.1.1 Franchise definition

Throughout the consultation process, the FCA argued for consistent definitions to be used for regulatory purposes.

This point seems to have been accepted by the Government but surprisingly the legislation does not apply the commonly understood Franchising Code of Conduct definition. An obscure 'franchise' definition under the Corporations Act designed to deal with equity funding requirements is used.

Under the Corporations Act a franchise is defined as "an arrangement under which a person earns profits or income by exploiting a right conferred by the owner of the right, to use a trademark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services. An arrangement is not a franchise if the person engages the owner of the right, or an associate of the owner, to exploit the right on the person's behalf."

The consequence is that there will be many businesses caught by the legislation that do not currently see themselves as a franchise. It would seem that there will also be franchise agreements caught by the current Franchising Code of Conduct definition that will not be covered. This creates substantial additional compliance cost, as a business needs to consider afresh whether it is or is not a franchise for the purposes of the Fair Work Act.

Under the Franchising Code of Conduct a Franchise Agreement is defined (paraphrased) as an agreement in which a person (the franchisor ) grants to another person (the franchisee ) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor; and under which the operation of the business will be substantially or materially associated with a trade mark, advertising or a commercial symbol owned, used or licensed by the franchisor or an associate of the franchisor; or specified by the franchisor or an associate of the franchisor; and under which, before starting business or continuing the business, the franchisee must pay or agree to pay to the franchisor or an associate of the franchisor an amount, including, for example:

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## 5.1.1 Franchise definition (cont)

- (i) an initial capital investment fee; or
  - (ii) a payment for goods or services; or
  - (iii) a fee based on a percentage of gross or net income whether or not called a royalty or franchise service fee; or
  - (iv) a training fee or training school fee;
- but excluding:
- (v) payment for goods or services at or below their usual wholesale price; or
  - (vi) repayment by the franchisee of a loan from the franchisor; or
  - (vii) payment of the usual wholesale price for goods taken on consignment; or
  - (viii) payment of market value for purchase or lease of real property, fixtures, equipment or supplies needed to start business or to continue business under the franchise agreement.

Further, each of the following is taken to be a franchise agreement: (a) transfer, renewal, extension, or extension of the scope of a franchise agreement; and (b) a motor vehicle dealership agreement.

The franchise sector is currently defined by the current definition of a “franchise agreement” in the Franchising Code of Conduct and is extremely broad. In simplified terms all that is required is the use of a trademark, the payment of an amount of money other than stock or equipment and some form of system or marketing plan that applies to some or all of the business.

The proposed legislation does not define a franchise arrangement, and does not reference the definition in the Franchising Code of Conduct. Instead there is a general reference to the Corporations Act that has the effect of incorporating the definition of a franchise under the Corporations Act.

While during the consultation process the FCA highlighted shortcomings in the Code ‘inclusive’ definitions of “franchisor” and “franchisee” and the unclear and not well understood additional reference to “a person who otherwise participates in a franchise as a franchisor / franchisee”, concerns about ambiguity and a lack of certainty are amplified by the use of an entirely different (and largely unknown) definition of franchising in the Corporations Act.

The Corporations Act definition is deliberately broad and somewhat vague as it was included to exclude franchise arrangements from the complex fundraising provisions of the Corporations Act, and is therefore totally inappropriate for use when creating a new ‘joint employer liability’ for franchise systems.

The definition of a franchise is as defined in the Corporations Act and not the Franchising Code of

Conduct creates additional unnecessary uncertainty as:

- The definition is different, and broader, than under the Code:
- Businesses that as a result of the Code do not characterise themselves as franchises will unwittingly be caught;
- There are no important definitions of franchisor and franchisee in the Corporations Act –

it would have been easier and preferable to simply reference the Code definitions.

### Recommendation 1

Amend 558B91)(d)(i) & (ii) by replace “Corporations Act 2001” with “Franchising Code of Conduct”



# 05

## 5.1.2 Responsible Franchisor Entity

Some franchises do not have any business systems or control over the franchisee's business.

Obvious examples include cooperatives, buying or group marketing groups and branded product distribution arrangements. A significant number of franchised businesses have quite low fees, and therefore minimal capacity to oversee compliance.

The FCA submits that it is essential that a party must not only be a "franchisor" to be caught, but that the franchisor must exercise some form of actual control over the workplace relations compliance.

This consistent with the intent of the aiding and abetting provisions that the franchisor or parent actually does exercise control, not just has the power to do so.

The connection between a franchisee and a franchisor is made by a new definition of "responsible franchisor entity" in section 558A(2), with the requisite connection being "the person has a **significant degree of influence** or control over the franchisee entity's **affairs**".

This connection goes beyond the stated intent of the law, and will catch many franchise systems where the franchisor has no capacity to control or direct workplace relations matters.

The highlighted words are unnecessarily broad.

The FCA submits that this provisions be amended to focus on the correct subject matter as articulated in the Second Reading Speech being payment-related workplace laws and workplace matters, and would catch involvement but not embrace situations where a franchisor simply made recommendations or provided access to third party information.

"Substantial" reflects that some connection of substance is required – in the very nature of a franchise arrangement means there is some connection between franchisor and franchisee, and 'significant' is too low a bar.

The legislation currently makes no distinction between the parent/subsidiary relationship and that of franchisor/franchisee.

The FCA submits that this is totally unreasonable, as the nature of the relationship is fundamentally different. Apart from the obvious ownership difference (unlike the parent/subsidiary), in franchising both businesses are owned by completely independent people and as a consequence the extent of control and legal accountability is entirely different.

Indeed in some franchise systems the franchisor has no control except in relation to use of intellectual property or product range.

The FCA submits to the Committee that to properly target inappropriate workplace conduct the legislation must be more focused.

This is consistent with the Government's Policy statement, and limits the extension of the law to workplace law matters. Otherwise virtually every franchise system would come within the definition of a "responsible franchisor entity", as every franchise would have significant control over some aspect of the franchisee's affairs. For example, every franchisor would control either use of brand, sale of products, conduct of marketing, conduct of group purchasing, or perhaps a technology or bookings platform.

Yet most would not have significant control over the franchisee's workplace terms and conditions. Those that choose to do so, such as 7-Eleven, have a higher degree of responsibility.

Fractional franchises (where turnover for sale of the franchisor's goods is less than 20% of the total business) are common in relation to motor vehicle dealerships, equipment franchises and farm machinery. By properly targeting control over workplace law matters to determine a 'responsible franchise entity' will assist in dealing with this commercial reality seemingly not contemplated with the current legislative drafting.

Making this simple change ensures franchise systems that have no real control over workplace affairs are not caught in the first place, or not forced to reengineer their business model or franchise system to respond to regulatory overreach. Excluding these franchisors from the ambit of the legislation in the first place saves millions of dollars in compliance costs.

### 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"

# 05

## 5.1.3 'Should reasonably have known'

The current law is consistent with other legislation imposing penalties on third parties involved in a breach directly or as accessories. The current legislative requirement – for actual knowledge – is an appropriate limit. Extending that to circumstances where a third party “ought to have known” just because they are linked by a common brand or some undefined contextual frame ‘of the same or similar circumstance’ is highly uncertain and represents a significant regulatory overreach.

Efforts to clarify what the ‘could reasonably be expected to have known’ provision actually means in terms of what circumstances risk a FWO investigation or prosecution have been unsuccessful. References to an allegation or contravention having occurred elsewhere in a system as being the threshold or accounts of the FWO’s likely enforcement approach are not reflected in the legislation nor will restrain speculative plaintiff lawyer activity.

Creating liability “where a franchisor ... could reasonably be expected to have known” is too uncertain in the context of a normal franchise relationship where there is ongoing interchange on all range of matters between franchisor and franchisee.

The phrase “could reasonably be expected to have known” is a low benchmark for franchisors because they are likely to have some contractual ability to require information, conduct inspections and audit franchisees for non-compliance with a range of matters.

It is extremely difficult to draft legislation that will extend the current accessory liability provisions to circumstances where a franchisor “should reasonably have been aware” of a breach and “could reasonably have taken action” without creating unreasonable regulatory overreach and/or significant unintended consequences.

In this context, the FCA notes that for all other identified accessory liability provisions (Eg: s181 Crimes Act (Vic), s249F Crimes Act 1900 (Cth), s75B Competition and Consumer Act 2010 (Cth)), the application is limited to the current wording of the Fair Work Act and no attempt has been made to impose liability on the basis proposed by the Bill.

The drafting challenge is exacerbated by a number of factors such as the very broad definition of a “franchise agreement” under the Franchising Code of Conduct, the significant differences between franchise models used by businesses, the fact that franchising operates across industry sectors rather

than as a sector itself, and the fact that there are many foreign based franchise systems operating in Australia.

To our knowledge there is no similar legislation to that proposed anywhere in the world, and this has triggered international interest and given rise for trade and investment considerations.

It is submitted that legislative intervention is better to focus on actual awareness and failure to take specific action. The FCA believes it is better to have specific wording to encourage situational awareness and responsiveness than use a nebulous phrase that might lead a court to assert generalised theoretical degrees of control and operational knowledge.

The legislative intent appears to be to address a situation where a franchisor knew, but in essence did nothing. The policy commitment public commentary also described how the legislation would aim to address behaviour amounting to ‘wilful blindness’ or franchisors ‘turning a blind eye’ (as stated in the Second Reading Speech) to alleged workplace contraventions by franchisees.

The FCA submits that it should not be for the legislation to try to tell a franchisor how to run its franchise model for the regulatory convenience. If legislation is deemed necessary it should be able to accommodate all franchise models without imposing the need for redesign.

It is submitted that a better, more certain and surefooted approach with the additional benefit of reducing compliance costs is to focus on what a ‘responsible franchise entity’ knew or ‘reasonably should have known’ given the franchise model operation and business systems deployed. The FCA captures the actual commercial reality without mandating a change to this mode of operations as ‘the usual course of business’ terms applied elsewhere in commercial law.

### Recommendation 3

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**”

# 05

## 5.1.4 Applicable Provisions

The legislation as drafted applies well beyond underpayment of so-called vulnerable workers, and strays unnecessarily into a large number of additional areas of workplace law compliance.

The FCA submits that this is not the expressed intention of the legislation as reflected in the Second Reading Speech references to ‘underpayments’ and ‘payment-related workplace laws’, and that the addition of further civil remedy matters is an unreasonable escalation of the compliance burden the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 seeks to impose on a franchisor.

If implemented the legislation would essentially require franchisors to monitor and audit on an ongoing basis all employer requirements under the Fair Work Act, extending to matters such as correct record keeping, pay slip content, induction processes, and proper relationship characterisation, with franchisors likely to have limited line of sight of these matters.

For example, the legislation intends for a franchisor to be made liable for breaches of s328, which in fact deals with high income employees – hardly consistent with the stated purpose of the Bill being improving protections for vulnerable workers.

Further, a number of matters for which a franchisor is to be made liable are questions of fact or law – for example whether a person is an employee or a contractor. This would be determined by a Court and as such, a franchisor is incapable of taking reasonable steps to prevent a contravention.

The FCA submits that this is totally unreasonable, and would cause a massive compliance burden on the sector and risks undermining the fundamental purpose of the franchise model.

The legislation goes well beyond the protection of vulnerable workers and extends to workplace obligations that should rest solely with an employer, and not with a franchisor.

The FCA submits that the specific Fair Work Act obligations to be captured by this new proposed ‘joint employer liability’ be contained to matters of underpayment/employee financial loss and not matters of paperwork and procedure requiring extensive audits or questions of legal interpretation.

## 5.2.0 Uncertainty

A franchisor has very limited investigative powers. In the publicised instances of breaches by 7-Eleven franchisees it was clear that the franchisees went to considerable lengths to disguise breaches, and denied breaches when challenged by the franchisor.

Only the FWO will have the investigative powers, and even then FWO reports significant difficulties in proving their case when faced with franchisee denials. This is in part the rationale for the strengthened investigative powers contained in the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

The FCA submits that there needs to be clarity about what precisely a franchisor is expected to do not just when they know there is a breach, but when they suspect there might be a breach?

Is contacting the FWO sufficient, for example, to show “reasonable steps”? Normally that is the case with any other offence.

A franchisor has very limited enforcement powers. Ultimately if a franchisee breaches and fails to remedy the breach when required a franchisor may be able to terminate the franchise agreement. In rare circumstances a franchisor may be able to terminate immediately due to proven fraud. Such a severe course of action may do little to really enhance compliance, or for that matter address employee underpayments. And a franchisor would be at risk of an unconscionable conduct claim for terminating for workplace law breaches in many situations.

### Recommendation 4

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

# 05

## 5.2.1 Reasonable Steps

The FCA submits that greater clarity is required as to what specific actions amount to 'reasonable steps' to avoid the risk or investigation and represent a 'safe harbour' from prosecution. Franchise systems will rightly ask 'what does the law and FWO expect me to do?' and some clear action steps will help guide franchise system better practice and conduct.

The FCA will continue to pursue this kind of practical guidance to assist risk management, reduce excessive compliance cost and uncertainty and to help inform the market and financiers about what amounts to 'best practice' for different kinds and sizes of franchise systems and which systems are exhibiting this standard.

Clause 558B(4) of the Bill provides that for purposes of determining whether a person took reasonable steps to prevent a contravention ... a court **may** have regard to all relevant matters, including a range of factors.

This provision has been pointed to as the mechanism for ensuring performance expectations of major complex and well-resourced systems are not 'fitted up' to small systems with far more limited resources, different business models and processes, and capacities to monitor and respond.

However, the problem is the courts have clearly indicated that they are not legally bound to consider indicia have been included in legislation. For example see s51AC of the Competition and Consumer Act concerning unconscionable conduct, where there are many indicia and the word "may" has clearly been held to also mean "may not").

Assurances about regulator enforcement intentions properly taking account of the 558B factors need to be enforced by the provisions which would also ensure some constraint of plaintiff lawyers arguing a 'one size fits all' framework where actions and steps are 'reasonable one system' they should be reasonable for all.

The key issue is the word "**may**" - not only is the word of no legal effect, but Courts have indicated on numerous occasions that they will not be bound by such a general guidance.

The FCA submits that judgements about a concept as vague as 'reasonable steps to prevent a contravention of the same or a similar character' should at least be arrived at by an obligation to consider the relevant matters specified in 558A(4) to give true effect to policy reassurances.

This is also consistent with other provisions of the Fair Work Act. For example section 387 of the Act (that deals with Fair Work Commission considerations as to the harshness of a dismissal) details a number of considerations that the FWC must take into account.

### Recommendation 5

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



# 05

## 5.2.2 Defence

Other laws recognise it is a defence to take 'reasonable steps'. What does that mean given the multiplicity of different franchise models under the 'joint employer liability' provisions of Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017?

This legislation requires franchisors to prove they have taken "reasonable steps" to ensure compliance. In many, and probably most, franchise systems the franchisor has no insight or control over workplace matters. The legislation is then extremely vague as to what 'reasonable steps' might mean.

As a consequence, the legislation in its current form and the uncertainty it creates will impose very significant and unnecessary compliance costs on the franchise sector – estimated at \$20,000,000 annually. With some relatively minor amendments that FCA is proposing and asks the Senate Committee to consider could reduce compliance costs by as much as 75% without detracting from the intent of the legislation.

The FCA submits that there should be explicit "safe harbour" provisions that every franchise system at least knows and can be confident what is required to meet the test.

Implementing an appropriate compliance program having regard to the nature of the business model, the size and resources of the franchisor, the size and resources of the franchisee and other relevant facts should be a certain defence against prosecution or civil action.

The likelihood of plaintiff lawyer class action needs to be considered alongside what is the more predictable and measured enforcement action of the respected Fair Work Ombudsman.

It is submitted that the 'safe harbour' provisions should embrace the FWO's Proactive Compliance Deeds, the 'right sized' information supply requirements and 'simple steps' foreshadowed in the Second Reading Speech to be developed by the FWO in conjunction with the sector and tailored approaches that respond to specific franchise system characteristics and circumstances developed and implemented in accordance with the Australia Standards assurance system framework.

This combination of regulation and industry backed responses will yield a superior compliance outcome, and at much lower cost.

This amendment will give effect to the Governments Policy statement, that "franchisors who have taken reasonable steps to educate their franchisees ... about their workplace obligations and have assurance processes in place, will not be captured by the new provisions."

### Recommendation 6

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"**



# 05

## 5.3.0 Unintended Consequences

### 5.3.1 Risks of deeming a franchise relationship as an employment relationship

Arising from FWO enforcement activity, other agencies and interested parties have reported sought to extend the preparedness of a franchise system to remedy identified wage underpayment to employees into other areas of claimed franchisee employer liabilities and obligations.

Plaintiff law firms have even sought to draw in international associated parties into legal proceeding in Australia premised on an extending 'joint employer liabilities' of the back of Fair Work Act contraventions and/or irregularity remediation actions instigated by franchise systems.

The application of 'joint employer liability' concepts enabled by this legislation in other areas of law risk seeing taxing authorities deem the relationship between franchisors and the employees of franchisees to be 'employment like'. The imposition of new tax liabilities and further 'employer' obligations on franchisors arising from franchisee employment will add further secondary compliance and operational costs on franchise systems.

This will increase the likelihood of business structuring their business operations so as to avoid coming within the definition of a franchise, and therefore avoiding liability entirely. The FCA has been advised that legal advisers would have no option but to advise their clients to this effect, and that it may be negligent to fail to advise a client that non-franchise model should be considered.

It is submitted that re-designing business models so that franchisors legally distance themselves further from their franchisee should not be incentivised by legislation or regulator/taxing authority action. Such an incentive is inconsistent with the purpose and intent of the Franchise Code of Conduct which seeks to encourage providing support to franchisees.

Risk minimisation, which is most undesirable, has already been observed in other jurisdictions where the 'joint employment' concept has been canvassed and assessed to be a significant potential risk for franchisors.

To allay concerns about an extending deeming that a franchise relationship amounts to an employment relationship between the franchisor and franchisee and/or a joint employment relationship extending to franchisors for franchisee employees, jurisdictions have legislated that such an inference or interpretation is entirely inconsistent with franchising.

To guard against the provisions for 'joint employer liability' provided for in the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 that target franchising being applied to other areas of law to the further detriment of franchising as an enterprise model, it is submitted that a new provision be added to make it clear that this is not the intention of the Parliament.

#### Recommendation 7

**Insert a new 558A(3) that reads "Nothing in this Part 2 – Liability of responsible franchisor entities and holding companies shall cause:**

- (a) the creation of new liabilities for responsible franchisor entities and holding companies in addition to those arising from Part 2; or**
- (b) the relationship between a responsible franchisor entity and franchisee entity to be deemed to be other than a contractual relationship between separate business entities and not to be characterised as a workplace relationship between an employer and employee.**

# 05

## 5.3.2 Franchisor Response

Currently franchisors and advisors embrace the franchise definition, leading to enhanced regulatory compliance. This will not be the case if there is a new legislative disincentive to being a franchisor.

If a purely legislative solution is introduced it is likely that businesses will consider converting their network to a fully corporate model. This would likely lead to closure of outlets currently operated by franchisees, as the corporate model is typically significantly more costly and less efficient. If forced to corporatize, our FCA Joint Employer Regulatory Taskforce estimates somewhere between 10-15% of outlets/small businesses would be at risk. That is somewhere between 7,000 – 10,000 small businesses, and perhaps 50,000 employees across Australia, that would be at risk.

In the absence of clear guidance on what amounts to 'reasonable steps' and action required to satisfy a 'safe harbour' defence, franchise systems may simply avoid circumstances and culturally diverse groupings that appear to have been prominent in the publicised instances of workplace law contraventions.

Without the sensible and measured amendments the FCA has proposed to deal with regulatory over-reach, uncertainty and unintended consequences, it is submitted that the legislation risks acting to effectively encourage discrimination, and cut across the ethnic diversity that the Australian franchise sector has championed.

## 5.3.3 Directors and dependents Exclusion

Significant questions have been raised in relation to claims by employees who are the principals or relatives of the franchisee, but who come within the application of the legislation.

This situation arises because the franchisee has chosen (as most do) to operate the franchised business through a company, family trust or other legal entity. Claims arising from the people effectively operating and in control of the franchisee business ought to be prohibited, but they are clearly possible under the current legislation.

It is submitted that directors, shareholders, owners and officers in control of a corporate franchisee entity and their immediate dependents making a claim against a franchisor, ought to be treated as business and family enterprise owners and not employees, for the purposes of this 'joint employer liability' legislation.

It is not fair or reasonable for the franchisor to be liable to these sorts of employees, who are really not arms-length employees. 7-Eleven reported that there were several questionable claims made against the voluntary fund it established by parties who asserted they were "employees" for the purposes of the fund, but were considered by 7-Eleven to be more akin to principals of the franchisee.

It is submitted that prospect of the persons who own and operate a franchisee or are involved in the control of franchisee operations, and their spouses and immediate dependents should not be the subject of actions to activate the 'joint employer liability' provisions for alleged Fair Work Act contraventions within a business they operated.

### Recommendation 8

Insert a new 558A(4)(g) that reads: **that where the person that is the subject of the alleged contravention of this Act is an owner, director or officer in control of the franchisee entity or a relative or dependent of an owner, director or officer in control of the franchisee entity, only under exceptional circumstances can that person be considered an employee for the purposes of this Part.**

# 05

## 5.3.4 Contravening Franchisee

The legislative response proposed by the Government seek to ensure strengthened protections for vulnerable workers and the introduction of a 'joint employer liability' targeting franchising that would impose burden and obligations on franchisors for the Fair Work Act contraventions of franchisees.

The Franchise Council has already recommended that the Federal Government lift the capability of the Fair Work Ombudsman, the regulator responsible for enforcing the Fair Work Act by boosting its resources and enhancing its evidence collecting powers, as well as increasing penalties for breaches of the Act. The Government has embraced these initiatives proposed by the franchise community.

The legislative and policy response include no new sanction on the person/persons responsible for the workplace contravention and no new measure to guard against the disgraced franchisee repeating this unlawful conduct and potentially cheating future employees.

It is submitted that another sector-led initiative could be the establishment of a register for franchisees who are terminated for wage fraud (similar to the bankruptcy register) so offending franchisees can't readily move from franchise system to franchise system, or another small business opportunity.

This register could represent an effective 'sanction for life' for franchisees who have contravened Fair Work Act requirements to the detriment of their employees and guard against future risks these proven 'rule breakers' represent to future employees and franchisees.

This industry-led measure, accompanied by the amendments recommended by the FCA represent a considered and comprehensive package of measure the franchise community can get behind to the benefit of all stakeholders in continued franchise sector success.

## 5.3.5 Delays to Employee Remedy

Under s 570, a franchisor ought to be able to recover expenditure where it has made a payment in settlement of a legitimate claim, whereas the section currently requires that the payment by the franchisor has to have been made pursuant to a court order.

It is submitted that this is unreasonable, and also disadvantages the vulnerable employee who would be supportive of the earliest possible remedy.

In most cases the franchisor, and indeed the employee, will want payment to have been made as early as possible, not wait for a court order.

It is submitted that the Committee may see merit in a recommending the amendment of Section 570 of the Fair Work Act to enable a franchisor to also recover its costs, and the interplay between s570 and the new provisions needs to be more carefully considered.

## 5.3.6 Litigation

The FCA is also keen to avoid a very real threat from opportunistic plaintiff law firms eager to create a new form of business.

As we have noted, the current wording of the legislation is very open to interpretation in several key areas, with plaintiff law firms attracted to speculative class actions due to the breadth of definitions, and the fact that all franchisors are caught.

Although it would be expected that the Fair Work Ombudsman would take a practical approach to interpretation and enforcement, the threat of a civil legal claim against a franchisor (including indeed a foreign franchisor with no knowledge of Australian employment law requirements) is very real under the current wording of the legislation.

Many plaintiff law firms already actively use the media to endeavour to extract financial settlements. It is submitted that the legislation should aim not to provide a new avenue to launch spurious or unreasonable legal claims.

There are significant opportunities for the legislation to be abused. It is submitted that the FCA recommendations, if implemented would limit the capacity for spurious class actions while preserving the intent of strengthening protection for vulnerable workers.

# 05

## 5.3.7 International Considerations and Ramifications

There is also considerable concern from foreign franchise systems in relation to the reach of the legislation. This is not an idle claim – in the 7-Eleven case initial rhetoric from at least one law firm involved was that they intended to attempt to sue 7-Eleven in the USA.

The FCA estimates there would be around 50 foreign franchise systems operating in Australia, and the International Franchise Association (IFA) and the World Franchise Council (WFC) have already reached out to the FCA to express their concerns with the current legislation.

The World Franchise Council, at its recent London meeting, unanimously passed a resolution urging greater collaboration between Government, regulators and the Australian franchise community to guard against regulatory overreach with the ‘joint employer liability’ legislation.

In its declaration (full statement attached to this submission) the WFC stated (in part) that:

**“The World Franchise Council can attest to how the global franchising community has looked to Australia for many years for examples of better practice regulation, public policy insight, franchise system innovation and brand creativity.**

**Sadly, we now look with concern at Australia’s unprecedented step to consider legislating to introduce new ‘joint employer’ liabilities not seen anywhere in the world.**

**The World Franchise Council believes embracing the collaborative approach outlined in this declaration and being pursued by the Franchise Council of Australia, will ensure that Australia continues to be ‘a beacon of better franchise practice and opportunity’ for years to come”.**

The IFA has pointed out that this legislation is the first of its kind anywhere in the world, and that it may well raise its concerns directly with Government via diplomatic and trade and investment channels.

At the request of the FCA, the IFA has for the moment refrained from advising its members to prioritize other potential markets (where ‘joint employer liability’ is not an additional commercial risk) for growth and investment, until the final legislative outcome is known.

Although international franchisors would have some protection in terms of knowledge and assurances contained in the Explanatory Memorandum (clause 41) about the Fair Work Act not imposing franchisor obligations on corporation completely operating outside Australia, the law currently creates a connection that could easily link many foreign systems.

The legislation as introduced simply requires that the foreign franchisor have a “significant degree of influence or control over the franchisee entity’s affairs”.

It is submitted that without the amendments proposed by the FCA, a court could potentially be persuaded that having a right of termination of the rights to use a brand is very significant, and therefore sufficient nexus to the foreign franchisor.

The IFA and WFC have expressed support our recommendations as outlined in this submission, which would resolve their concerns.

Without our recommended changes they would remain seriously concerned.

There is also considerable concern and disquiet from foreign franchise systems in relation to the role of the legislation as a precedent for other interventionist jurisdictions.

The WFC and IFA has pointed out that this legislation is the first of its kind anywhere in the world, and does not understand the justification for singling out franchising.

The IFA does not understand how the Government can justify legislation that has such potential unwarranted and unreasonable extra-territorial application. A foreign franchisor or trade mark owner that has granted some form of master franchise or licence for Australia, and therefore fits within the definitions contained in the legislation, can under the current legislation be liable for breach of Australian workplace law.

The IFA also has made the point in discussions with the FCA that enforcement of workplace law should be the responsibility of the local regulator, not a foreign franchisor. It seems difficult to logically contest this view.

Absent the recommended amendments proposed by the FCA, it is likely that many foreign franchisors would avoid Australia, as this liability is beyond that existing in any other jurisdiction.

The required expertise is not available to the FCA to assess if there are any international trade and treaty implications given that the legislation could be portrayed as discriminating against foreign franchisors or imposing an extra-territorial liability.

# 05

## 5.4.0 Other Areas of Concern

In addition to the most significant concerns and opportunities for sensible and measured legislative amendments, the special FCA Legal and Regulatory Working Group convened to examine the 'joint employer liability' provisions targeting franchising in the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, identified other aspects of the legislation the FCA seeks to bring to the Committee attention.

These involved limitation periods for claims, the impact of some form of insolvent administration, avoidance structuring and the recovery of payments made by a franchisor in settlement of a legitimate claim.

The legislation is silent on deliberate under-payment of employees by franchisees, potentially combined with ultimate liquidation of the franchisee entity so that when the employees claim against the franchisor the franchisor's claim against the franchisee is effectively nullified.

These are not hypothetical examples, but are in fact actual examples of conduct identified to the FCA.

There are also concerns about limitation periods for claims, and circumstances where a franchisee has sold the business yet claims against the franchisor are not extinguished.

There are concerns as to the position of a franchisor where a franchisee is under some form of insolvent administration, as the franchisor has little control in such a situation, and the legislation may produce perverse outcomes.

It is submitted that the provisions would need to interface with the laws regarding insolvency. Indeed, they would appear open to abuse if the franchisee simply appoints some form of insolvent administrator and walks away.

# 06

## 6.0.0 Regulatory Impact And Compliance Costs

A failure to address the regulatory overreach and legislative uncertainty in ways equivalent to those being submitted by the FCA will result in very significant regulatory compliance costs. The FCA's submission proposes with recommendations for minor legislative amendment that can alleviate these concerns and reduce compliance cost dramatically reduced without impacting the intent of the legislation.

Oddly, the Explanatory Memorandum make no attempt to quantify these costs, with the Regulatory Impact Statement (RIS) requirement asserting that earlier Fair Work Ombudsman's report and this Committee's earlier inquiry, "A National Disgrace: The Exploitation of Temporary Work Visa Holders report" satisfies RIS requirements.

It is submitted that this is an inadequate basis for assessing the regulatory impact and compliance cost of the proposed policy response embodied in the franchise targeting 'joint employer liability' provisions of Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017. No attempt has been made in the RIS to compare the intended legislative course of action with other public policy responses.

As a result, and within the tight timeframes since the tabling of the Bill and this inquiry, the FCA commissioned FranData to undertake an independent survey of a significant sample of franchise systems to quantify the likely impact and anticipated cost of responding the provisions of the legislation before the Parliament.

A copy of the FranData Australian Franchise Sector Survey on the proposed 'joint employer liability' provisions targeting franchising contained in The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, is included as an attachment to this submission for the Committee's consideration.

The survey results validate the key concerns regarding cost, impact in growth and identifies the small business nature of franchisors, highlighting unsafe assumptions about the extent of resourcing and workplace relation support general available within the franchise system head office.

In addition, it highlights the types of activity being undertaken by survey respondents in response to legislation creating new 'joint employer liabilities' and proposed changes to current practices.

Worryingly, nearly 30% of respondents saw the legislation as a catalyst to review the use of the franchise model in future growth opportunities, potentially slowing down what has been a growth success story.

### 6.1.0 FranData Survey Process

An invitation to complete the survey has been extended FCA and non-FCA members with a total of 181 responses received as at the close of business 6th April, 2017.

The final sample is 161 responses with 14 having been disqualified based on authenticity concerns or not being directly attributable to a franchise brand (e.g. consultant or advisor). A further 5 were omitted due to multiple respondents from the one brand.

The estimated number of contributing franchise systems is 181 noting that 7 group respondents covered 27 brands between them.

Where relevant Disclosure Documents received and registered with the Australian Franchise Registry™ were also cross checked to verify the authenticity of survey responses. Franchisors are required under the Franchising Code of Conduct to produce and deliver Disclosure Documents to prospective franchisees. These documents must be accurate by law.

Responses were collected over a 9 day period and covered 20,809 franchised units and a further 1,233 company operated units. The total of 22,042 units represents 27.9% of the reported 79,000 units operating in the Australian Franchise sector.

### 6.2.0 Economic and Employment Scope of Survey Respondents

The aggregate annual network turnover of the respondents is estimated at \$49.06 billion. (Based on an extrapolation from the 137 respondents that answered this question in the survey. 24 units did not provide details).

Franchise employment data provided by participating respondents covered an estimated 206,941 employees across franchised units and an estimated 21,841 employees engaged across company units.

The reported 'head office' employment across 143 franchisor head offices was 2,696 employees with 12 respondents reported employing more than 100 people in their head office.



# 06

## 6.3.0 Survey Findings

The Australian Franchise Sector Survey on the proposed amendments to the Fair Work Act contained in The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 shows very high levels of concern about the Bill throughout the franchise sector.

Although only 17% of respondents were not aware of the Bill, only 2% indicated they were not concerned, and 88% indicated they were either “extremely concerned” or “concerned”.

Only 3% of respondents indicated they understood the implications and are ready, with 23% having an action plan in place and 51% investigating what needs to be done. 23% indicated they had not yet given any consideration as to what needed to be done.

The Survey indicates that many franchise systems already provide substantial support to franchisees to assist in workplace law compliance.

Only 9.4% said support was not part of their franchise model or was not provided.

Whilst the provision of information (73%), ongoing training (50%), provision of policies and templates (53%) and facilitating access to external HR/IR advice (44.4%) was common, only 6.9% provided centralized payroll services.

31.9% conducted internal audits and checks. These statistics are consistent with the most common response (59%) that franchisors provide some training and general guidance on workplace matters, but franchisees must take responsibility for workplace compliance.

A further 26% expected franchisees to take full compliance for workplace issues, and only 12% provided strong guidance or took joint responsibility.

Franchise systems say they would need to undertake a significant amount of additional work if the legislation is introduced, notably various types of risk assessment (56.5%), introducing an ongoing compliance program (56.5%),

implementing a formal risk assessment and audit program (41%) and establishing a compliance rectification plan (29.2%). 13.7% were unsure what they would do, and only 3.7% indicated they would not take any of the identified actions.

Respondents listed the specific activities they would need to undertake on top of existing measures, with enhanced training (62.4%), increased communications (70.7%), annual certification by franchisees (36.2%) and risk based audit and inspection program (36.9%) among the most common responses.

54% of respondents saw the changes as adding substantial additional cost and changes to business processes, 17% felt they would need to fundamentally review whether they would continue with a franchise model and 4% said they would cease franchising. Only 2% saw little or no material cost or process impact.

However 66% said they would continue their current program of opening franchised units, and only 7% would suspend or cancel openings.



# 06

## 6.4.0 Estimated Cost Impacts

Asked to estimate the total cost of the actions over the first 12 months, 71% indicated it would be more than \$20,000 and 22% indicated the cost would be more than \$100,000.

These cost impacts are consistent with or lower estimates compared to actual cost information provided by franchise businesses that have entered into Proactive Compliance Deeds with the FWO.

10% indicated the cost would be under \$5,000.

Adding the total compliance costs for all respondents, the total cost is conservatively estimated at \$11,800,000, taking the mid-point of each section as the average and taking \$250,000 as the maximum cost given no upper average is possible.

Extrapolating that cost over the 1,100 franchise systems identified in the most recent Franchising Australia Survey by Griffiths University would yield a total estimated compliance cost for the Australian franchise sector of \$81,125,000.

The survey shed new light on franchisor resourcing at head office, with 67% not having an in-house legal function and 61% not having an in-house human resource function.

## 6.5.0 Survey Conclusion and Response

The FranData Australian Franchise Sector Survey on the proposed 'joint employer liability' provisions targeting franchising contained in The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 is substantial research. It is made all the more significant by the absence of any regulatory impact and compliance cost analysis accompanying the legislation.

It is submitted that the FranData survey finding add compelling evidence and powerful support for considered analysis and measured amendments to the legislation the FCA has recommended. These amendments retain the purpose and support the objectives of the legislation, substantial reduce compliance costs by an estimated 75% and preserve the appeal, success and vitality of franchising.

# 07

## 7.0.0 Transition

### 7.1.0 Commencement

The legislation to create a new 'joint employer liability' for franchisors for Fair Work Act contraventions by franchisees adopts the definition of a 'franchise' contained in the Corporations Act.

As canvassed earlier in this submission, this definition is much wider in application and is intended to be used to "exclude" a certain category of agreement or arrangement that meets that test from the fundraising provisions of the Corporations Act.

It is for that reason that it will capture many more types of agreements as a 'franchise' than simply a 'franchise agreement' that is already regulated under the Franchising Code of Conduct (the Code).

As a consequence, those who are likely to be affected or captured by this reform are much wider than the pool of franchisors whose agreements and conduct are currently regulated by the Code.

There is a strong concern that much of the dialog to date has not focussed on this difference and many potential 'responsible franchisor entities' would not even be aware of the potential application of this legislation.

Distributors and licensors who enter into distributorship agreements and licence agreements would easily fall within the definition of a 'franchise' under the Corporations Act. They often are at lengths to explain that their distributorships and licenses are not "franchises" because they do not meet the tests of a franchise agreement under the Code.

It is submitted that as this broader group would now be captured by the use of the definition of a 'franchise' under the Corporations Act, these parties would not anticipate that this legislation would directed to them and will not have taken the opportunity to put forward their views on this legislation to this Committee for consideration.

The FCA submits that proactive outreach to this broader Corporations Act defined 'franchise community' be undertaken before the legislation is settled.

It is also submitted that the 6 week introduction period for this new potential liability is too short, even for franchise businesses already aware and anticipating the passage of legislation. Franchise businesses should be afforded at least 3 months for the development, implementation and enforcement of compliance programs to enable them to avail themselves of the reasonable steps defence.

### 7.2.0 FWO Collaboration

The FCA is currently working with FWO to develop enhanced compliance processes, and intends to present a draft Compliance Program to supplement FWO's proactive compliance deeds.

Fradata Australia has produced a draft Transparency Standard that draws upon the compliance deeds, but is less complex for smaller franchise systems.

These industry solutions offer more cost-effective options than regulatory intervention alone, particularly when the Yogurberry decision shows the current law does in fact already enable successful third party prosecution of a franchisor that is involved in workplace breaches or fails to take appropriate action.

A combined legal and industry solution will produce better outcomes, and provide a model that can be considered for the broader business sector.

Already a combined FWO-industry solution has generated positive outcomes, with large franchise systems such as McDonalds and 7-Eleven voluntarily agreeing to compliance initiatives that go beyond what the letter of the law might be able to secure.

The Proactive Compliance Deeds signed by these and other parties are a matter of public record, and the FCA and FWO have been collaborating to develop consistent but appropriately modified programs for smaller or less sophisticated franchise systems.

The FCA urges Committee to recommend to the Senate to encourage this ongoing collaboration and the provisions of adequate time and regulator attention working with the FCA, to swiftly reach

agreement with FWO on specifically what is required to satisfy the 'reasonable steps' to provide a durable and dependable safe harbour defence. These 'reasonable steps' should be an FWO endorsed approach or an assurance program developed and implemented to satisfy the relevant Australian Standard.

This model is already used and well understood by FWO and by business, and it applies in areas such as Competition and Consumer Law, Food Safety, OH&S and quality assurance.

The FCA is also concerned about the potential for a relatively trivial breach of the law by a franchisor that leads to a disproportionate legal liability.

# 08

## 8.0.0 Conclusion

The separation of responsibilities between franchisors and franchisees underpins the competitive advantage the franchise model delivers to small business.

It is also vital that franchisors and franchisees work collaboratively, not in an adversarial mode.

The proposed changes to the Fair Work Act to make franchisors liable for workplace law breaches by franchisees are well intentioned, but without amendments, will undermine the franchise model and drive a wedge between franchisor and franchisee collaboration.

Fine tuning is required to avoid significant damage to the \$146 billion Australian franchise sector. No one in the franchise community wants to see an employee underpaid or knowingly taken advantage of, in a franchise setting or any other kind of workplace.

The FCA welcomes the Government's boost to the resources available to the Fair Work Ombudsman, increased penalties for Fair Work Act breaches and enhancing the powers of the FWO to collect evidence.

However, we need to overcome significant uncertainty and harm from the 'joint employer' provisions in the Bill.

The current draft of the Fair Work Amendments imposes new obligations that do not exist in any other member country of the World Franchise Council, which includes the USA, Canada, the UK, NZ, and key countries from Europe and Asia.

The FCA believes improvements must be made to the legislation that:

- reflect reassurances about 'right sizing' the law for the diverse and small business nature of franchising;
- use a trigger for liability being substantial control over workplace relations;
- require Courts and regulators to take account of a system's size and resources;
- clarify what 'reasonable steps' actually means;
- focus on underpayment, not paper work and technical judgements; and
- provide for an approved compliance program as a clear defence against prosecution

The FCA will continue to engage constructively with the legislative process with the aim of ensuring vulnerable workers are protected while not undermining the franchise sector and the model of enterprise which contributes between 8-10% of Australia's GDP.

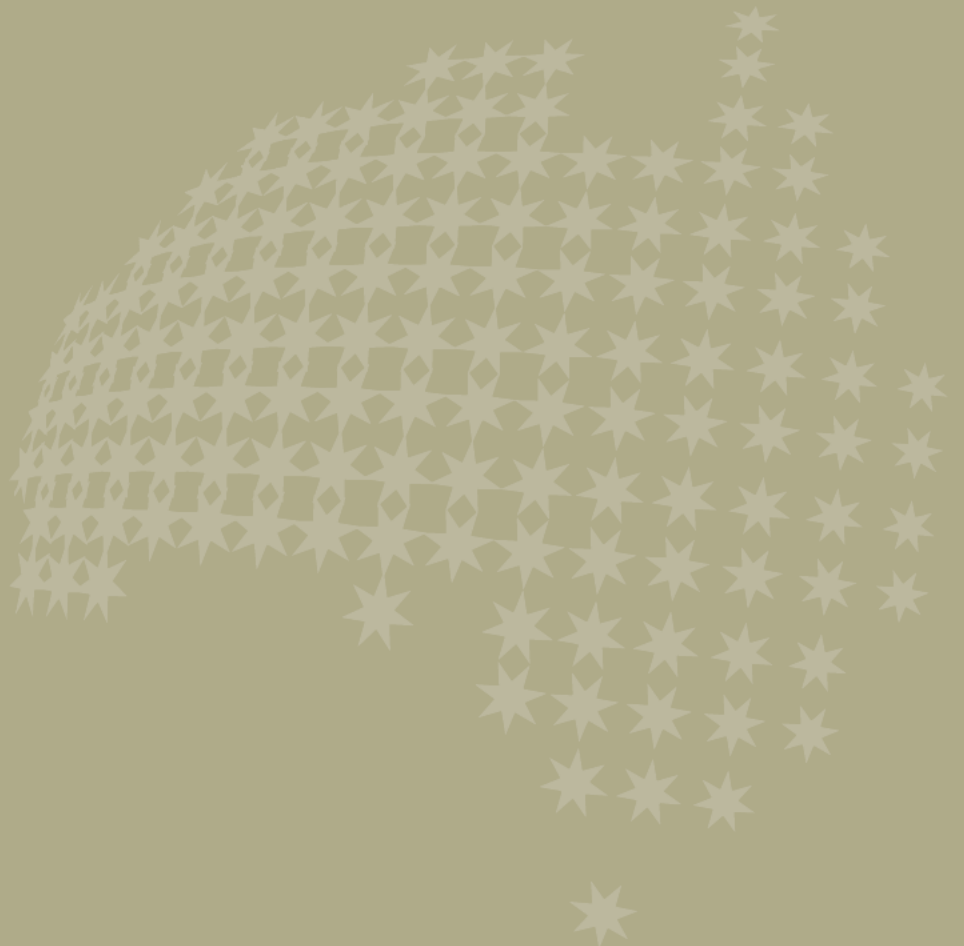
This submission sets out sensible, considered and measured amendments that ensure the policy objective of strengthening vulnerable worker protection is delivered without unnecessarily harming franchising by regulatory overreach, excessive and unjustified compliance cost, legal uncertainty and unintended consequences that undermine the very foundations of successful franchising.

These amendments are submitted for the Committee's consideration.

The FCA is grateful for the opportunity to provide this submission and to be afforded an opportunity to address the Committee in support for the recommendations.

# A1

## Appendix 1 Current FCA Members



# 2017

## Current FCA Members

10 Thousand Feet

1582 Coffee

7-Eleven

### A

ABS Auto

Accurate Franchising Inc.

Ace Body Corporate Management

ActionCOACH

ADP

Advantage Partners Lawyers

Aktiv Brands Pty Ltd

Ali Baba

Allens

Amazing Clean

Amber Group

AMC Commercial Cleaning

Amcal

Andersens Floorcoverings

Anytime Fitness

ANZ Mobile Lending

Aon Risk Services Australia

APCO Service Stations

Appliance Tagging Services

Aroma Cafe

Asia-Pacific Centre for Franchising

Excellence - Griffith University

Southbank Campus

Aussie Home Loans

Aussie Pooch Mobile

Australia Post

Australian Accounting & Franchising

Professionals Pty Ltd

Australian Hot Water

Australian Skin Clinics

Auto Masters Australia

Auto One

Autobarn

Automotive Brands

Autopro

Axsess Today

### B

Babo Group

Baby Sensory

Back in Motion Physiotherapy

Baker & McKenzie

Bakers Delight

Balance Internet

Bank of Melbourne

Bank of Queensland

Bank SA

Barbeques Galore

Bartercard Australia

Base Zero

Bathroom Werx

Baybridge Lawyers

BCI Business Brokers

Beacon Lighting

Beaumont Tiles

Bedshed

Begin Bright

Benga Designs

BforB

Big4 Holiday Parks

BizNerve

Blue Rock Partners

Blue Wheelers

Bonbons Bakery

Books and Gifts Direct

Bookwiz Franchising

Boost Juice

Borrello Graham

Boulangerie de France

Brandon Industries

Brazilian Butterfly

Bridgestone Select

Bucking Bull

Burger and Beer Joint

Business Development Alliance

Business Essentials

Busy Bookkeeping

Buy Australian Properties

### C

Caltex

Cappuccino Xpress

Carpet Court

Cartridge World Australia Pty Ltd

Cash Converters

Cashflow It

CDL Insight Consulting

CGB Publishing

Chatime

Cherry Bridge Station

Chicken Treat

Chocolateria San Churro

Choice Hotels

Cibo Espresso

Cirillo Lighting And Ceramics

City Farmers Dogwash

Clark Rubber

Coco Cubano

Coerver Coaching

Coffee Guru

Coffee Hit

Coffee News Australia

Coleman & Greig

Condon Associates

Coochie HydroGreen

Coolabah Tree Cafe

Cooper Grace Ward

Crema Espresso

Croissant Express

Curves

# 2017

## Current FCA Members

### D

David Legal  
DC Strategy  
Decoglaze Pty Ltd  
Didasko Group  
Discount Drug Stores  
Dixon Systems  
DogTech International  
Dogue  
Dollar Curtains and Blinds  
Dosa Plaza  
Doyles In Car  
Dream Doors  
Dreamy Donuts  
Drummond Golf

### E

Ecomist Australia  
EFM Health Clubs  
Elemental Hot Yoga  
Elite Carpet Dry Cleaning Pty Ltd  
Ella Bache  
Endota Spa  
Enviro Chasing Services  
ENZED  
Executive Property Maintenance  
Experimac

### F

FAD Cheer And Dance  
Family Car Rentals  
Fasta Pasta Pty Ltd  
Fastway Couriers Australia  
FC Business Solutions  
FCF Fire & Electrical  
Ferguson Plarre  
Fernwood  
Fifo Capital Australia  
Find It Smart Global  
Finn Franchise Brokers  
First Class Accounts  
First Class Capital  
Fisher & Paykel  
Fitness Enhancement  
Fix 'n' Chips  
Flannerys Natural &  
Organic Supermarket  
Flooring Xtra  
Floorworld  
Foodco  
Fordham Business Advisors Pty Ltd  
Forte School of Music  
Forty Winks Franchising Pty Ltd  
Franchise & Business  
Opportunities Expo  
Franchise Advisory Centre  
Franchise Advisory Service  
Franchise Australia Pty Ltd  
Franchise Business  
Franchise Connxtion  
Franchise Fitouts Australia Pty Ltd  
Franchise Relationships Institute  
Franchise Retail Brands  
Franchise Right  
Franchise Simply  
Franchise Systems Group  
FRANdata  
Frontline Recruitment Group  
Fully Promoted

### G

G.J. Gardner Homes  
Gadens Lawyers Melbourne  
Gametraders  
Gaze Burt Solicitors  
GB Oceania  
Gecko Sports  
Gelare  
Gelatissimo  
Genesis Fitness Clubs  
Geotech Information Services  
Globalart  
GMO WA's Business Broker  
Godfreys  
Goldsteins  
Goop Guys  
Granite Transformations Australia  
Grey Army  
Grill'd  
Groove Train  
Groutpro Australia  
Grubers Beckett  
Guardian Pharmacy  
Gutter-Vac

# 2017

## Current FCA Members

### H

Haagen Dazs  
Haarsma Lawyers  
Hairhouse Warehouse  
Hall & Wilcox Lawyers  
Hannaford Seedmaster Services  
Harry's Cafe de Wheels  
Hatch Chicken Shop  
Helen O'Grady Drama Academy  
helloworld  
Hertz  
Hill Mayoh  
Hip Pocket Workwear & Safety  
Hire A Hubby  
Hog's Breath Cafe  
Holman Webb Lawyers  
Home Ice Cream  
Home Instead Senior Care  
Hosemasters International  
Houspect  
HR Central  
HR Dept  
Hudsons Coffee  
Hungry Jack's  
HWL Ebsworth Lawyers  
Hydrokleen

### I

I Can Read  
ICMI Speakers & Entertainers  
Ignite PR and Marketing Pty Ltd  
Inspect My Home  
Inspirations Paint Store (Holdings) Ltd  
Insurance Made Easy  
InXpress Australia Pty Ltd  
Ivan Poole Lawyers

### J

Jamaica Blue  
James' Home Services  
Jan-Pro Cleaning Systems  
Jani-King  
JAX Tyres  
Jesters Pies  
Jim's Antennas  
Jim's Bath Resurfacing  
Jim's Bin Cleaning  
Jim's Blinds  
Jim's Bookkeeping  
Jim's Building Inspections  
Jim's Building Maintenance  
Jim's Car Cleaning  
Jim's Carpet Cleaning  
Jim's Cleaning  
Jim's Computers  
Jim's Conveyancing  
Jim's Diggers  
Jim's Dog Wash  
Jim's Electrical  
Jim's Fencing  
Jim's Finance Professionals  
Jim's Glass  
Jim's Group  
Jim's Heating and Cooling  
Jim's Locksmith  
Jim's Mowing  
Jim's Painting  
Jim's Paving  
Jim's Pest Control  
Jim's Plumbing  
Jim's Pool Care  
Jim's Removals  
Jim's Roofing

Jim's Security  
Jim's Shade Sails  
Jim's Skip Bins  
Jim's Test & Tag  
Jim's Traffic Control  
Jim's Trees  
Jim's Window & Pressure Cleaning  
Jim's Window Tinting  
Jump! Swim Schools  
Just Cuts Franchising

### K

K & L Gates Melbourne  
Keen to Clean Group  
Kelly Sports  
Kenny's Cardiology  
KFC  
Kidz 'N Sport  
Kindy Dance Time  
Knauf  
Knight Frank Australia  
Koala Krane  
Kubarz Beverage Catering  
Kubed Legal  
Kumon Australia Pty Ltd  
Kwik Kopy Australia  
KX Pilates



# 2017

## Current FCA Members

### L

La Porchetta  
Laser Clinics Australia  
Laser Group  
Laubman & Pank  
Lava Coffee  
Lease1  
LeaseEagle  
Leasewise Group  
Legal Vision  
Lenard's  
Lewrap  
Line-X Australia  
Listen To Your Body  
Little Kickers & Little Rugby  
Living Here  
LJ Hooker  
Loan Market  
Lonestar Rib House  
Looksmart Alterations  
Lookup Solutions Pty Ltd  
Lord of the Fries  
Luxottica Retail Australia

### M

Macpherson Kelley - Victoria  
Mad Mex Fresh Mexican Grill  
Maddocks  
Madgwicks  
Mail Boxes Etc.  
Malaysia Convention & Exhibition Bureau  
Marsh & Maher Lawyers  
MarShere Dance Studios  
Massage Club  
Massage Envy  
Mastercare Franchising  
MBCM Strata Specialists  
McDonald's Australia Ltd  
McInnes Wilson Lawyers  
McKinley Plowman  
MDS Legal  
Megasealed Bathrooms  
Midas Australia  
Mills Oakley Lawyers  
Minor DKL Food Group  
Mister Minit  
Mobile Filtration Services  
MoneyQuest  
Mortgage Choice  
Movenpick Ice Cream  
Mpower Franchising Pty Ltd  
Mr Rental  
Mrs Fields  
MSI Taylor Business Services Pty Ltd  
MST Lawyers  
Muffin Break  
Murray Pest Control  
Muzz Buzz  
MYOB

### N

N-Hance  
Nandos  
Narellan Pools  
National Drones  
National Franchise Insurance Brokers P/L  
New Life Repair Services  
New York Slice  
New Zealand Natural  
Newhouse & Arnold Solicitors  
NightOwl Convenience  
Norton Rose Fulbright Australia

### O

Office Brands  
Office Choice  
Oliver's Real Food  
Oporto  
Opposite Lock  
OPSM  
OrderMate  
Outback Jacks Bar & Grill  
Outside Concepts  
Oven & BBQ Cleaning  
Ovenu  
Oz Design Furniture  
Ozspy

# 2017

## Current FCA Members

### P

Pack & Send  
Pandora  
Paraserve Pty Ltd  
Party Plus  
Pastacup  
PCG Consultancy  
Pedders  
Piccolo Me  
Piper Alderman Victoria  
Pirtek  
Pitcher Partners - Victoria  
Pizza Hut  
Platinum Electricians  
Plumbcall  
Plus Fitness Health Clubs  
Pointon Partners  
Poolwerx  
Presse Cafe  
Pro Axle Australia  
Provender Australia

### Q

Quest Apartment Hotels  
Quick Service Restaurant Holdings

### R

RAMS Financial Group  
Rashays Cafes and Restaurants  
Raw Energy  
Ray White  
RE/MAX Australia  
Ready Steady Go Kids  
Real Mastery Consulting  
Real Property Photography  
Red Rooster  
Redcat  
Refresh Renovations  
Refuelling Solutions  
Reliance Partners  
Remarkable Franchises  
Rent the Roo  
Rent With Style  
Residential Garage Doors  
REST Industry Super  
ReStart1000  
Retail Zoo  
Ribs and Rumps  
Right At Home Australia  
Robbins Watson  
Robert James Lawyers  
Rolld Australia  
Roof Seal  
Rouse Lawyers  
Rozzi's Italian Canteen  
Rucker Financial  
RYCO 24.7

### S

Sabatini's  
SafetyQuip (Australia) P/L  
Sailtime Australia  
Salsa's Fresh Mex Grill  
Salts of the Earth  
Samsung  
SBA Law  
Schnitz  
SEEK Business  
Sensory Lab  
Sheds n Homes  
Sherpa Kids Australia  
Shift8  
Shingle Inn  
Shoebox Bookkeeping  
Sigma Pharmaceuticals  
Signarama  
SILK Laser Clinics  
Silver Chef  
SkewerZ  
Snap-on Tools (Australia) Pty Ltd  
Snooze Sleep Well  
Solomon Humble Commercial Lawyers  
Soul Origin Australia  
Spanline Australia  
Specsavers  
Spectrum Analysis  
Speedfit  
Sport Star Academy

# 2017

## Current FCA Members

### S

Sportsco  
Sportzing Court Care  
Sprint Auto Parts  
Spudbar  
St. George Bank  
Steamatic  
Steelx Group  
Stellarossa  
Stephens Lawyers & Consultants  
Stewart Germann Law Office  
STIHL Australia  
Storage King  
Strategic Flow Management  
Subway  
Success Tax Professionals  
Sumo Salad Franchising Pty Ltd  
Supanews  
Superfinish Express  
Sushi Izu  
Swaab Attorneys  
Swimart

### T

TapSnap  
Tasty Trucks  
Tatts Lotteries  
TaxAssist Accountants  
The Barry Plant Group  
The Cheesecake Shop  
The Coffee Club  
The Franchise Shop  
The Frenchams Group  
The Interface Financial Group  
The Leather Doctor Australia  
The MBA Partnership Pty Ltd  
The Shed Company  
The Tea and Coffee Merchant  
The Toenail People Australia  
The Touch Up Guys  
Theobroma Chocolate Lounge  
Think DONE Management Consultancy  
Think Water Pty Ltd  
Thomson Geer Lawyers  
Three Beans Coffee, Vanilla, Mung  
Tiger Pistol  
Tile Rescue  
Tokyo Sushi Kitchen  
Top Snap International  
Totalspan Australia  
Town& Country Pizza & Pasta  
Towncars Australia  
Trade Travel  
Transworld Business Advisors  
Traxion Training  
TRL Australia  
TSG Franchise Management  
Turner Freeman Lawyers  
Tutor Doctor

### U

United Franchise Group  
Urban Clean

### V

V.I.P. Home Services  
Veneziano Coffee  
Venture X  
Venues and Events UNSW Australia  
Vision Personal Training

### W

Walker Wayland  
Watkins Tapsell Solicitors and Barristers  
Weeding Women Franchising  
Wendy's Milk Bar  
Westpac Banking Corp  
Wet-seal  
WH Smith  
Whirlwind Print  
Wild Cards and Gifts  
Workforce Extensions  
World Manager

### X

Xpresso Delight  
Xpresso Mobile Cafe

### Y

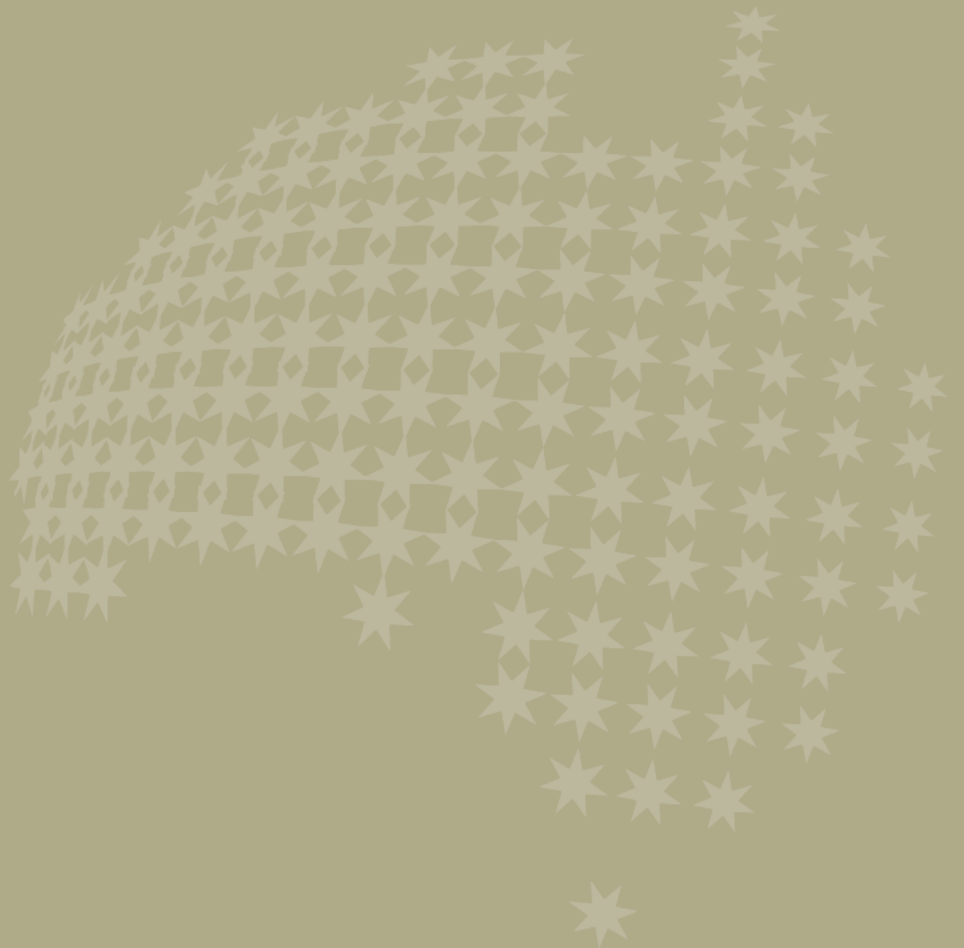
Yes Optus  
Your Law Firm  
Yum Restaurants International

### Z

Zambrero  
Zarraffa's Coffee  
ZEN Home Energy Systems  
Zeus Street Greek

# A2

## Appendix 2 FranData Survey





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## Australian Franchise Sector Survey April 6, 2017

The Fair Work Amendment  
(Protecting Vulnerable  
Workers) Bill 2017

# Australian Franchise Sector Survey April 6, 2017

The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

## Source Material

All information in this report was compiled from an electronic survey completed by FRANdata Australia.

***“Reaction and Impacts Survey on the Australian Franchise Sector following the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017”.***

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## EXECUTIVE SUMMARY

The Australian Franchise Sector Survey on the proposed amendments to the Fair Work Act contained in *The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* shows very high levels of concern about the Bill throughout the franchise sector.

Although only 17% of respondents were not aware of the Bill, only 2% indicated they were not concerned, and 88% indicated they were either “extremely concerned” or “concerned”. Only 3% of respondents indicated they understood the implications and are ready, with 23% having an action plan in place and 51% investigating what needs to be done. 23% indicated they had not yet given any consideration as to what needed to be done.

The Survey indicates that franchise systems already provide substantial support to franchisees to assist in workplace law compliance. Only 9% said support was not part of their franchise model or was not provided. Whilst the provision of information (73%), ongoing training (50%), provision of policies and templates (53%) and facilitating access to external HR/IR advice (44%) was common, only 7% provided centralized payroll services. 32% conducted internal audits and checks. These statistics are consistent with the most common response (59%) that franchisors provide some training and general guidance on workplace matters, but franchisees manage workplace compliance issues. A further 26% indicated franchisees took full responsibility for all workplace issues, and only 12% provided strong guidance or took joint responsibility.

Franchise systems say they would need to undertake a significant amount of additional work if the legislation is introduced, notably various types of risk assessment (57%), introducing an ongoing compliance program (56%), implementing a formal risk assessment and audit program (41%) and establishing a compliance rectification plan (29%). 14% were unsure what they would do, and only 4% indicated they would not take any of the identified actions.

Respondents listed the specific activities they would need to undertake on top of existing measures, with enhanced training (63%), increased communications (71%), annual certification by franchisees (39%) and risk based audit and inspection programs (40%) among the most common responses. 54% of respondents saw the changes as adding substantial additional cost and changes to business processes, 17% felt they would need to fundamentally review whether they would continue with a franchise model and 4% said they would cease franchising. Only 2% saw little or no material cost or process impact. However 66% said they would continue their current program of opening franchised units, and only 7% would suspend or cancel openings.

Asked to estimate the total cost of the actions over the first 12 months, 71% indicated it would be more than \$20,000 and 22% indicated the cost would be more than \$100,000. 10% indicated the cost would be under \$5,000. Adding the total compliance costs for all respondents, the total cost is conservatively estimated at \$11,800,000, taking the mid-point of each section as the average and taking \$250,000 as the maximum cost given no upper average is possible. Extrapolating that cost over the 1,100 franchise systems identified in the most recent Franchising Australia Survey by Griffith University would yield a total estimated compliance cost for the Australian franchise sector of \$81,125,000.

The survey shed new light on franchisor resourcing at head office, with 67% not having an in-house legal function and 61% not having an in-house human resource function.

**Darryn McAuliffe**  
**CEO - FRANdata Australia**



## INTRODUCTION

With reportedly more than 1,100 active franchise brands and a population of around 24 million people, Australia is one of the most franchised nations per capita in the world. The Australian franchise sector is well recognized for its significant contribution to both GDP and employment.

Over recent years the sector has been the subject of intense and adverse media coverage following the actions of individual franchisees in particular franchise systems that have failed to meet their workplace relations obligations in their respective businesses.

On 3<sup>rd</sup> March, 2017 these media, social and resulting political concerns culminated in the introduction of **The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017**.

In response to concerns from its members the **Franchise Council of Australia (FCA)** has commissioned FRANdata to conduct a survey to gauge the impact of the Fair Work Amendment and to provide further key metrics data to support their intended submissions and related representative work. The survey is attached in Appendix - A.

## SAMPLE

An invitation to complete the survey was extended to FCA and non-FCA members with a total of 181 responses received as at the close of business 6<sup>th</sup> April, 2017.

The final sample is 161 responses with 14 having been disqualified based on authenticity concerns or not being directly attributable to a franchise brand (e.g. consultant or advisor). A further 5 were omitted due to multiple respondents from the one brand. (Where multiple responses have been received, the response coming from the person deemed to be the most senior officer of the organisation has been used).

The estimated number of contributing franchise systems is 181 noting that 7 group respondents covered 27 brands between them.

Where relevant Disclosure Documents received and registered with the Australian Franchise Registry™ were also cross checked to verify the authenticity of survey responses. Franchisors are required under the Franchising Code of Conduct to produce and deliver Disclosure Documents to prospective franchisees. These documents must be accurate by law.

Responses were collected over a 9 day period and covered 20,809 franchised units and a further 1,233 company operated units. The total of 22,042 units represents 27.9% of the reported 79,000 units operating in the Australian Franchise sector.

The aggregate annual network turnover of the respondents is estimated at \$49.06 billion. (Based on an extrapolation from the 137 respondents that answered this question in the survey. 24 units did not provide details.)

### Response by industry.

The majority of responses were derived from the retail, accommodation and food services sectors which are dominant industries in business format franchising.



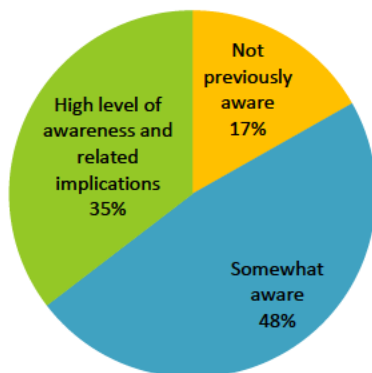
Responses: 160

### Franchise employment data provided by participating brands:

- Estimated employment across franchised units = 206,941
- Reported employment across company units = 21,841
- Reported head office employment across 143 franchisor head offices = 2,696
- An additional 12 respondents reported employing more than 100 people in their head office

**SURVEY FINDINGS**

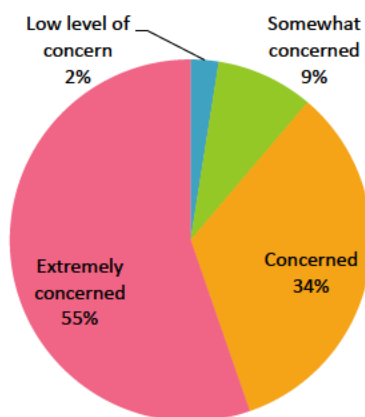
**Q. How would you rate the level of awareness of your franchise system in relation to this amendment?**



Responses: 161

- 77 (47.8%) of the 161 respondents indicated they were “somewhat aware” of the proposed amendments posed with a further 57 (35.4%) claiming they had a “high level of awareness around the amendments and their related implications”.
- 27 (16.8%) respondents indicated they were “not previously aware of the amendments” with 20 of those responses coming from brands with less than 100 units.

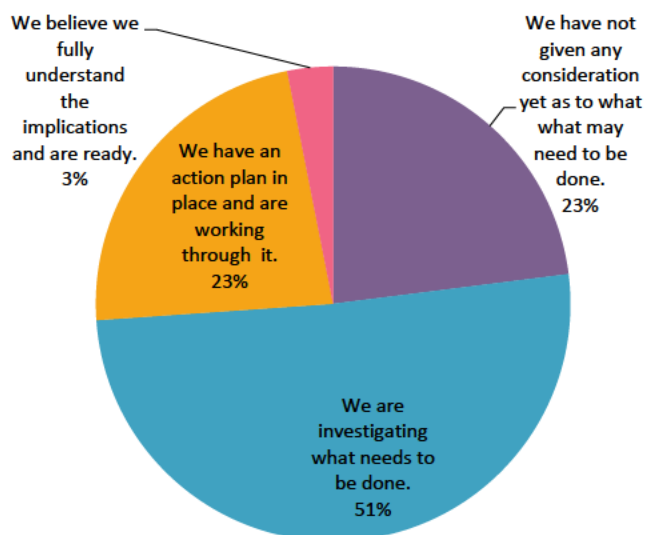
**Q. How would you rate your level of concern in relation to these changes?**



Responses: 161

- The survey responses indicated a high level of concern by franchisors over the proposed amendments with 54 (33.5%) of respondents indicating they were “concerned” and a further 89 (55.3%) indicating they were “extremely concerned”.
- 14 (8.7%) respondents indicated they were only “somewhat concerned” and 4 (2.5%) had a “low level of concern”.

**Q. How would you describe your readiness to deal with this change?**



Responses: 161

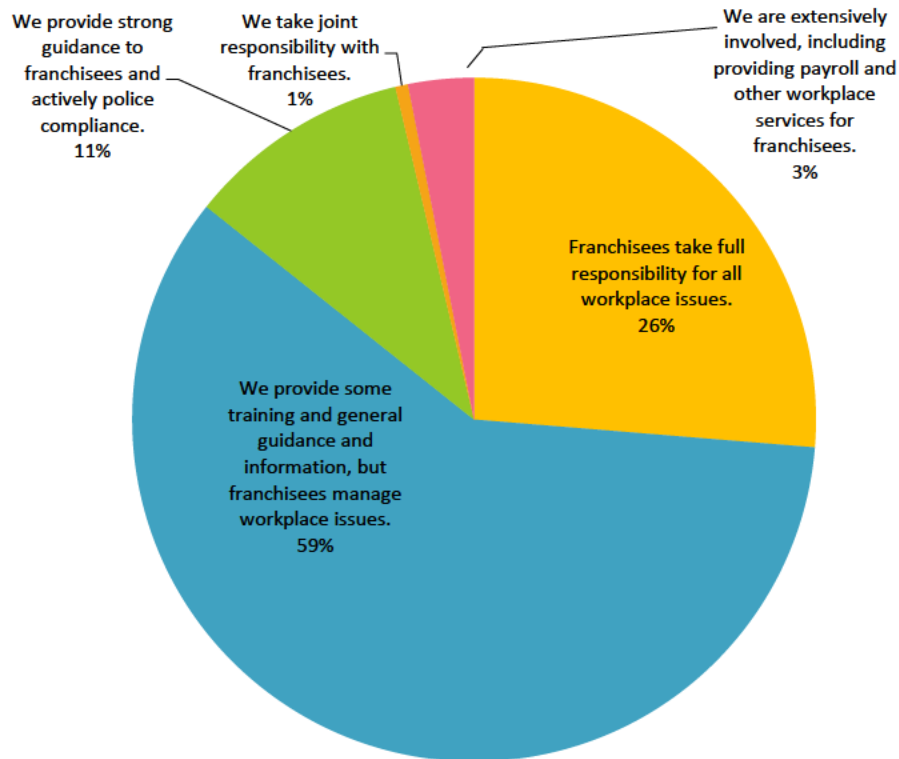
- More than half of the respondents 82 (50.9%) indicated they were investigation what needs to be done and with 37 (23%) claiming they already had an “action plan” in place which they were working through.
- 5 (3.1%) believed they fully understood the implications for their and were ready if the changes were implemented in their current format.
- 37 (23%) of the 161 respondents advised they had not given any consideration as to what may need to be done. This response was also dominated by smaller systems and is consistent with a lower level of awareness of the amendments returned in the first question of the survey.

**Q. What types of support do you provide franchisees in relation to employing staff and meeting minimum wages and conditions (multiple responses permitted)?**

Participants were provided with a range of potential support services and were asked to select all that were applicable to their operations.

Response	Percentage	Respondents
Information in operations manual	73.1%	117
Ongoing training and updates	50.0%	80
Advice about relevant pay rates	53.1%	85
Provision of HR/IR policies, procedures or templates	53.1%	85
Recruitment of staff	20.6%	33
Facilitating access to external HR/IR advice and support	44.4%	71
Internal checks or audits	31.9%	51
Centralised payroll services	6.9%	11
Other support	10.0%	16
Not applicable (no support provided)	9.4%	15

**Q. In your franchise network which statement most accurately describes how workplace issues are currently addressed:**



Responses: 160

The majority of franchisors provide some training and general guidance and information around workplace issues but ultimately these are managed by franchisees.

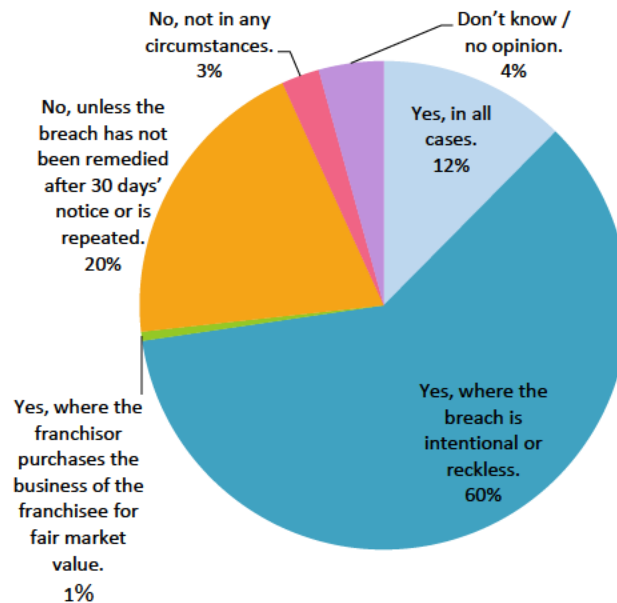
**Q. Are you aware that the Franchise Council of Australia has a free HR help desk in place for members and their franchisees?**



Responses: 160

This sample includes responses from non FCA members.

**Q. Are you in favour of amending the Franchising Code of Conduct to allow a franchisor to immediately terminate a franchise agreement where there are reasonable grounds for believing that serious contraventions of the Fair Work Act have occurred?**



Responses: 160

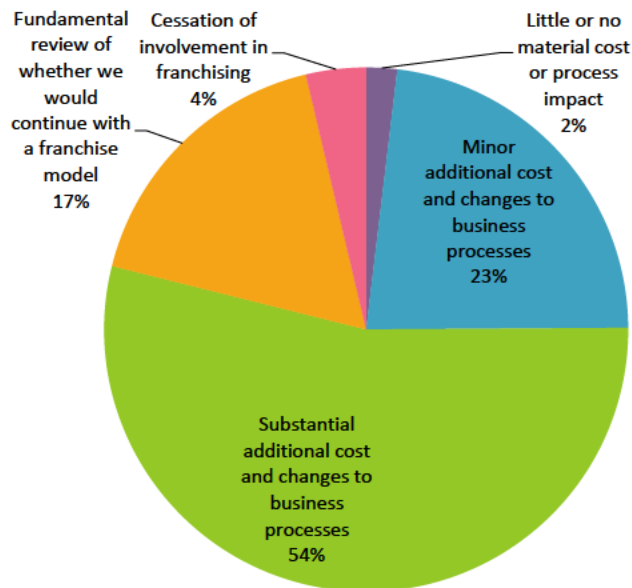
**Q. Which of the following activities would you expect to undertake if the legislation is introduced (multiple responses permitted)?**

Response	Percentage	Respondents
Independent Assessment of whether the company is caught by the legislation	28.1%	45
A risk assessment and exposure to FWA obligations, including the identification of risk indicators, identification of high risk exposures assessment of previous and current complaints, interviews with field managers	33.1%	53
Risk framework including inherent risk assessment, identification of risk control or mitigation plans, assessment of residual risk and control testing schedules	23.8%	38
Risk based assessment and audit program	41.3%	66
Compliance rectification plans including assessment of training program, field support, franchisee profitability, communications processes to franchisee network, and any network escalation processes	29.4%	47
Implementation of an ongoing compliance program to detect and address franchisee work place non-compliance.	56.3%	90
None of the above	3.8%	6
Not sure	13.8%	22

**Q. We would expect to include the following components in any implemented compliance program (multiple responses permitted):**

Response	Percentage	Respondents
Enhanced initial and ongoing training	63.1%	99
Increased communications re work place compliance	71.3%	112
Specific work place compliance field support programs	35.7%	56
Annual certification by franchisees	38.9%	61
External certification of high risk franchisees	15.9%	25
Risk based audit and inspection program	40.1%	63
Increased due diligence as part of the franchisee recruitment program	36.9%	58
All of the above	18.5%	29

**Q. If changes are introduced to make franchisors directly or jointly liable for the workplace relations breaches by franchisees, which of the following impacts best describe the impact on your business: -**

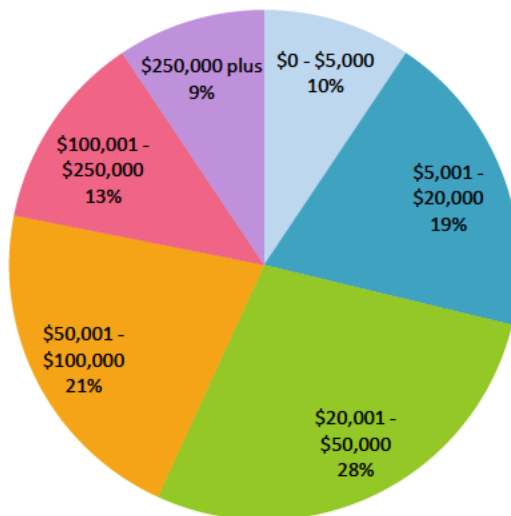


Responses: 160

- 87 (54%) of 160 respondents anticipate substantial additional costs and changes to their business process from if changes are introduced to make franchisors directly or jointly liable for the workplace relations breaches by franchisees.
- 27 (17%) planned a fundamental review of whether they would continue with a franchise business model and 6 (4%) of respondents indicated they would cease franchising.
- 37 (23%) of respondents anticipated minor additional costs and changes
- 3 (2%) indicated little or no cost



**Q. What do you estimate the total dollar cost of these actions to be over the first twelve months?**

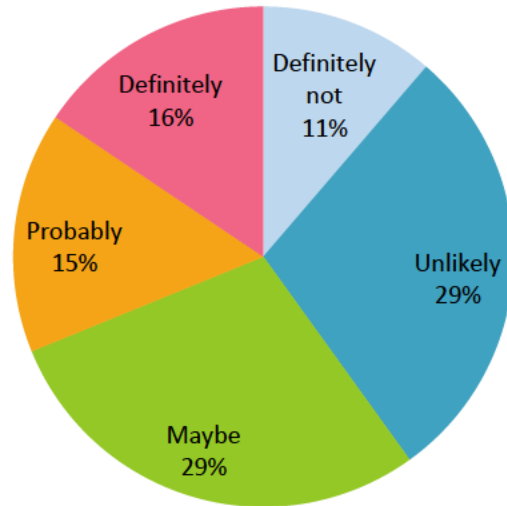


Responses: 160

Financial costs exceeding \$20,000 were anticipated by 114 (71.3%) of respondents. Minimum financial costs of \$50,000 were projected by 54 (33.8%) of total respondents with 15 (9.4%) expecting first year costs to exceed \$250,000.

Financial Cost Year One	Percentage	Respondents
\$0 - \$5,000	9.4%	15
\$5,001 - \$20,000	19.4%	31
\$20,001 - \$50,000	28.1%	45
\$50,001 - \$100,000	21.3%	34
\$100,001 - \$250,000	12.5%	20
\$250,000 plus	9.4%	15
Total number of respondents		160

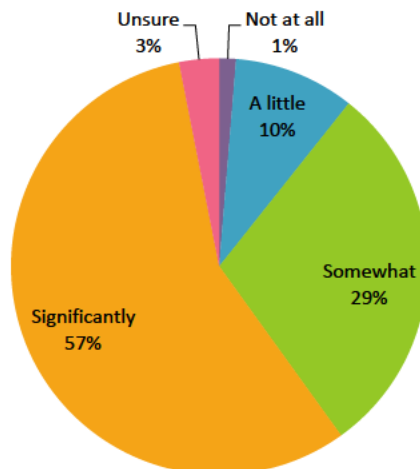
**Q. If franchising is singled out in legislation such that franchisors will be potentially liable for workplace law breaches by franchisees, will you re-consider using franchising as a business method?**



Responses: 160

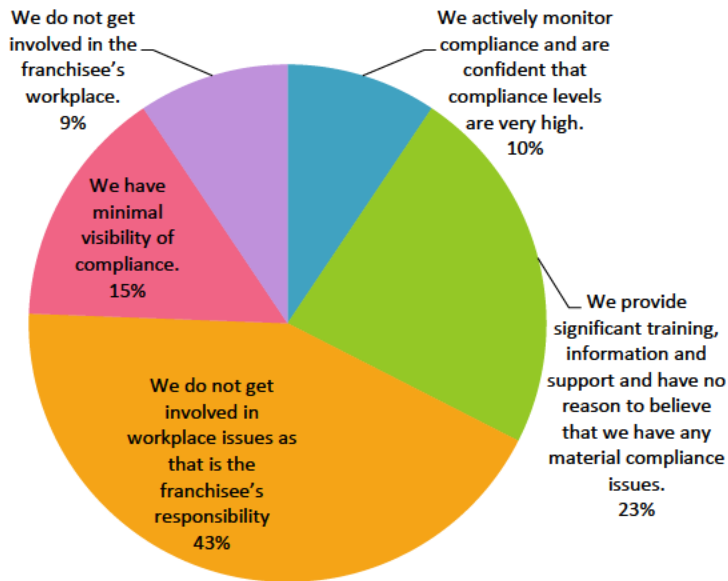
The use of franchising as a business model (following the introduction of the proposed legislation) will come under review based on the survey findings with 25 (16% of respondents) indicating they would definitely re-consider and a further 15% indicating they would probably re-consider. A further 46 (29%) respondents suggested they may re-consider and 64 (40%) were unlikely or would not re-consider.

**Q. If you are potentially liable for workplace relations breaches by your franchisees, to what extent will you need to review your current processes in relation to workplace law compliance by your franchisees?**



Responses: 160

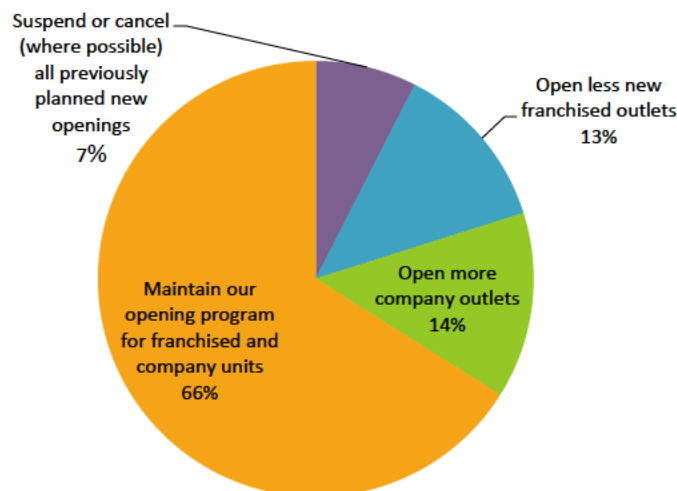
**Q. Which statement best describes your visibility and knowledge of workplace law compliance by franchisees in your network?**



Responses: 160

Whilst franchisors provide some training and general guidance on workplace matters, the responsibility for workplace issues and compliance typically rests with franchisees.

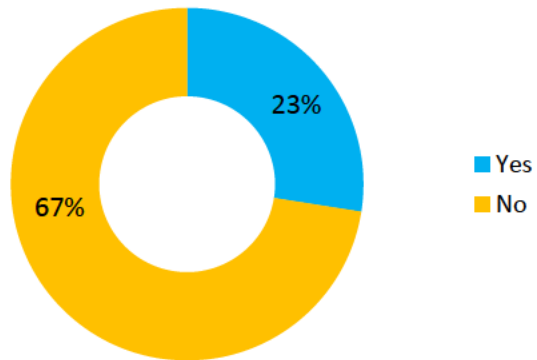
**Q. As a result of the proposed amendments we intend to:**



Responses: 160

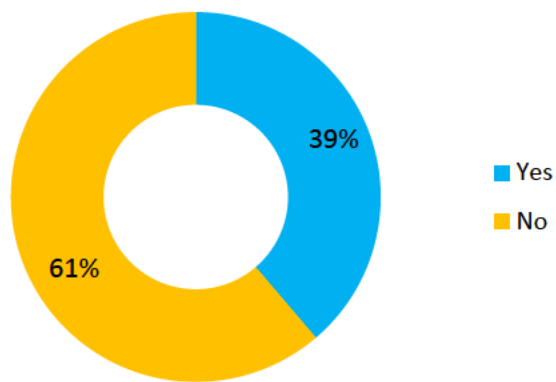
While 105 (66%) of survey franchise systems indicated they would maintain their opening program for franchised and company units, 41 (25.8%) indicated they would either open less franchised units or more company units with a 13 (8.25) of respondents claiming they would suspend or cancel previously planned new openings.

Q. Does your franchise have an “in-house” Legal function?



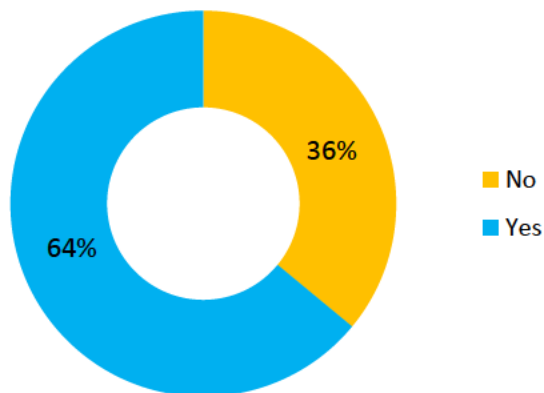
Responses: 160

Q. Does your franchise have an “in-house” Human Resource function?



Responses: 160

Q. Would you consider being involved in further representation or focus groups on these issues?



Responses: 136



For more than 25 years, FRANdata has been the industry leader in the strategic analysis, forecasting and measuring of franchise performance and operations. Leveraging the largest database of franchise information in the industry, FRANdata helps any business that touches franchising by providing the objective information and analytical expertise they need to make smarter and better business decisions. FRANdata, headquartered in Arlington, Virginia in the United States, is often cited as a franchise expert in such leading media as The New York Times, The Wall Street Journal, Forbes Magazine and The Washington Post.

Powered by the FRANdata databases, the US and Australian Franchise Registries provide every franchisor the opportunity to make financing easier and better for their franchisees. Conventional and emerging lenders visit the site every month to find and learn about the franchise brands to whom they are considering lending. Besides publicly validating that a franchise is viable and thriving, the sites allow franchisors to take advantage of a range of financing tools that help lenders understand and underwrite the franchise brand.

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[www.thefranchiseregistry.com.au](http://www.thefranchiseregistry.com.au)



## **APPENDIX A**

# **Reaction and Impacts Survey on the Australian Franchise Sector following the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.**

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\* Denotes mandatory question

**1) How would you rate the level of awareness of your franchise system in relation to this amendment? \***

- Not previously aware
- Somewhat aware
- High level of awareness and related implications

**2) How would you rate your level of concern in relation to these changes?\***

- Not concerned
- Low level of concern
- Somewhat concerned
- Concerned
- Extremely concerned

**3) How would you describe your readiness to deal with this change?\***

- We have not given any consideration yet as to what what may need to be done.
- We are investigating what needs to be done.
- We have an action plan in place and are working through it.
- We believe we fully understand the implications and are ready.

**4) What types of support do you provide franchisees in relation to employing staff and meeting minimum wages and conditions? (Please tick all relevant boxes) \***

- Information in operations manual
- Ongoing training and updates
- Advice about relevant pay rates
- Provision of HR/IR policies, procedures or templates
- Recruitment of staff
- Facilitating access to external HR/IR advice and support
- Internal checks or audits
- Centralised payroll services
- Other support
- Not applicable (no support provided)

**5) In your franchise network which statement most accurately describes how workplace issues are currently addressed:\***

- Franchisees take full responsibility for all workplace issues.
- We provide some training and general guidance and information, but franchisees manage workplace issues.
- We provide strong guidance to franchisees and actively police compliance.
- We take joint responsibility with franchisees.
- We are extensively involved, including providing payroll and other workplace services for franchisees.
- We manage all workplace issues.

**6) Are you aware that the Franchise Council of Australia has a free HR help desk in place for members and their franchisees?\***

- Yes
- No



**7) Are you in favour of amending the Franchising Code of Conduct to allow a franchisor to immediately terminate a franchise agreement where there are reasonable grounds for believing that serious contraventions of the Fair Work Act have occurred?\***

- Yes, in all cases.
- Yes, where the breach is intentional or reckless.
- Yes, where the franchisor purchases the business of the franchisee for fair market value.
- No, unless the breach has not been remedied after 30 days' notice or is repeated.
- No, not in any circumstances.
- Don't know / no opinion.

**8) Which of the following activities would you expect to undertake if the legislation is introduced? (Please tick all planned activities)\***

- Independent Assessment of whether the company is caught by the legislation
- A risk assessment and exposure to FWA obligations, including the identification of risk indicators, identification of high risk exposures assessment of previous and current complaints, interviews with field managers
- Risk framework including inherent risk assessment, identification of risk control or mitigation plans, assessment of residual risk and control testing schedules
- Risk based assessment and audit program
- Compliance rectification plans including assessment of training program, field support, franchisee profitability, communications processes to franchisee network, and any network escalation processes
- Implementation of an ongoing compliance program to detect and address franchisee work place non-compliance.
- None of the above
- Not sure

**9) We would expect to include the following components in any implemented compliance program (Please tick all expected components) \***

- Enhanced initial and ongoing training
- Increased communications re work place compliance
- Specific work place compliance field support programs
- Annual certification by franchisees
- External certification of high risk franchisees
- Risk based audit and inspection program
- Increased due diligence as part of the franchisee recruitment program
- All of the above

**10) If changes are introduced to make franchisors directly or jointly liable for the workplace relations breaches by franchisees, which of the following impacts best describe the impact on your business: -\***

- Little or no material cost or process impact
- Minor additional cost and changes to business processes
- Substantial additional cost and changes to business processes
- Fundamental review of whether we would continue with a franchise model
- Cessation of involvement in franchising

**11) What do you estimate the total dollar cost of these actions to be over the first twelve months?\***

- \$0 - \$5,000
- \$5,001 - \$20,000
- \$20,001 - \$50,000
- \$50,001 - \$100,000
- \$100,001 - \$250,000
- \$250,000 plus

**12) If franchising is singled out in legislation such that franchisors will be potentially liable for workplace law breaches by franchisees, will you re-consider using franchising as a business method?\***

- Definitely not
- Unlikely
- Maybe
- Probably
- Definitely

**13) If you are potentially liable for workplace relations breaches by your franchisees, to what extent will you need to review your current processes in relation to workplace law compliance by your franchisees? \***

- Not at all
- A little
- Somewhat
- Significantly
- Unsure

**14) Which statement best describes your visibility and knowledge of workplace law compliance by franchisees in your network? \***

- We control compliance and take direct responsibility for compliance in the franchisee's workplace.
- We actively monitor compliance and are confident that compliance levels are very high.
- We provide significant training, information and support and have no reason to believe that we have any material compliance issues.
- We do not get involved in workplace issues as that is the franchisee's responsibility. However, we require full compliance and will act swiftly in the event of a breach.
- We have minimal visibility of compliance.
- We do not get involved in the franchisee's workplace.

**15) As a result of the proposed amendments we intend to: \***

- Suspend or cancel (where possible) all previously planned new openings
- Open less new franchised outlets
- Open more company outlets
- Maintain our opening program for franchised and company units

**16) In what product or service does this franchise brand predominantly deal? \***

- Retail trade
- Accommodation and food services (includes food retail, fast food, coffee shops etc)
- Administration and support services (includes travel agencies, office
- services, domestic and industrial cleaning, gardening services, lawn mowing etc)
- Other services (incl. personal services, pet services, auto and IT repairs and servicing etc)
- Education and training
- Rental, hire and real estate services
- Arts and recreation services
- Financial and insurance services
- Professional, scientific and technical
- Construction
- Transport, postal and warehousing
- Information media and telecommunications
- Health care and social assistance
- Wholesale trade
- Manufacturing
- Electricity, gas, water and waste services
- Other industry

**17) In what year did this brand commence franchising?**

- |   |                               |                               |
|---|-------------------------------|-------------------------------|
| <input type="checkbox"/> 1950 or before | <input type="checkbox"/> 1971 | <input type="checkbox"/> 1997 |
| <input type="checkbox"/> 1951           | <input type="checkbox"/> 1972 | <input type="checkbox"/> 1998 |
| <input type="checkbox"/> 1952           | <input type="checkbox"/> 1973 | <input type="checkbox"/> 1999 |
| <input type="checkbox"/> 1953           | <input type="checkbox"/> 1974 | <input type="checkbox"/> 2000 |
| <input type="checkbox"/> 1954           | <input type="checkbox"/> 1975 | <input type="checkbox"/> 2001 |
| <input type="checkbox"/> 1955           | <input type="checkbox"/> 1976 | <input type="checkbox"/> 2002 |
| <input type="checkbox"/> 1956           | <input type="checkbox"/> 1977 | <input type="checkbox"/> 2003 |
| <input type="checkbox"/> 1957           | <input type="checkbox"/> 1978 | <input type="checkbox"/> 2004 |
| <input type="checkbox"/> 1958           | <input type="checkbox"/> 1979 | <input type="checkbox"/> 2005 |
| <input type="checkbox"/> 1959           | <input type="checkbox"/> 1980 | <input type="checkbox"/> 2006 |
| <input type="checkbox"/> 1960           | <input type="checkbox"/> 1986 | <input type="checkbox"/> 2007 |
| <input type="checkbox"/> 1961           | <input type="checkbox"/> 1987 | <input type="checkbox"/> 2008 |
| <input type="checkbox"/> 1962           | <input type="checkbox"/> 1988 | <input type="checkbox"/> 2009 |
| <input type="checkbox"/> 1963           | <input type="checkbox"/> 1989 | <input type="checkbox"/> 2010 |
| <input type="checkbox"/> 1964           | <input type="checkbox"/> 1990 | <input type="checkbox"/> 2011 |
| <input type="checkbox"/> 1965           | <input type="checkbox"/> 1991 | <input type="checkbox"/> 2012 |
| <input type="checkbox"/> 1966           | <input type="checkbox"/> 1992 | <input type="checkbox"/> 2013 |
| <input type="checkbox"/> 1967           | <input type="checkbox"/> 1993 | <input type="checkbox"/> 2014 |
| <input type="checkbox"/> 1968           | <input type="checkbox"/> 1994 | <input type="checkbox"/> 2015 |
| <input type="checkbox"/> 1969           | <input type="checkbox"/> 1995 | <input type="checkbox"/> 2016 |
| <input type="checkbox"/> 1970           | <input type="checkbox"/> 1996 | <input type="checkbox"/> 2017 |

**18) How many franchised units are currently operating in Australia?\***

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**19) How many company operated units are currently operating in Australia?\***

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**20) What is the estimated total annual sales turnover for all units in Australia ?**

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**21) How many staff are employed in the franchisor head office?**

- |                             |                             |                             |                             |                             |   |
|-----------------------------|-----------------------------|-----------------------------|-----------------------------|-----------------------------|---|
| <input type="checkbox"/> 1  | <input type="checkbox"/> 18 | <input type="checkbox"/> 35 | <input type="checkbox"/> 52 | <input type="checkbox"/> 69 | <input type="checkbox"/> 86             |
| <input type="checkbox"/> 2  | <input type="checkbox"/> 19 | <input type="checkbox"/> 36 | <input type="checkbox"/> 53 | <input type="checkbox"/> 70 | <input type="checkbox"/> 87             |
| <input type="checkbox"/> 3  | <input type="checkbox"/> 20 | <input type="checkbox"/> 37 | <input type="checkbox"/> 54 | <input type="checkbox"/> 71 | <input type="checkbox"/> 88             |
| <input type="checkbox"/> 4  | <input type="checkbox"/> 21 | <input type="checkbox"/> 38 | <input type="checkbox"/> 55 | <input type="checkbox"/> 72 | <input type="checkbox"/> 89             |
| <input type="checkbox"/> 5  | <input type="checkbox"/> 22 | <input type="checkbox"/> 39 | <input type="checkbox"/> 56 | <input type="checkbox"/> 73 | <input type="checkbox"/> 90             |
| <input type="checkbox"/> 6  | <input type="checkbox"/> 23 | <input type="checkbox"/> 40 | <input type="checkbox"/> 57 | <input type="checkbox"/> 74 | <input type="checkbox"/> 91             |
| <input type="checkbox"/> 7  | <input type="checkbox"/> 24 | <input type="checkbox"/> 41 | <input type="checkbox"/> 58 | <input type="checkbox"/> 75 | <input type="checkbox"/> 92             |
| <input type="checkbox"/> 8  | <input type="checkbox"/> 25 | <input type="checkbox"/> 42 | <input type="checkbox"/> 59 | <input type="checkbox"/> 76 | <input type="checkbox"/> 93             |
| <input type="checkbox"/> 9  | <input type="checkbox"/> 26 | <input type="checkbox"/> 43 | <input type="checkbox"/> 60 | <input type="checkbox"/> 77 | <input type="checkbox"/> 94             |
| <input type="checkbox"/> 10 | <input type="checkbox"/> 27 | <input type="checkbox"/> 44 | <input type="checkbox"/> 61 | <input type="checkbox"/> 78 | <input type="checkbox"/> 95             |
| <input type="checkbox"/> 11 | <input type="checkbox"/> 28 | <input type="checkbox"/> 45 | <input type="checkbox"/> 62 | <input type="checkbox"/> 79 | <input type="checkbox"/> 96             |
| <input type="checkbox"/> 12 | <input type="checkbox"/> 29 | <input type="checkbox"/> 46 | <input type="checkbox"/> 63 | <input type="checkbox"/> 80 | <input type="checkbox"/> 97             |
| <input type="checkbox"/> 13 | <input type="checkbox"/> 30 | <input type="checkbox"/> 47 | <input type="checkbox"/> 64 | <input type="checkbox"/> 81 | <input type="checkbox"/> 98             |
| <input type="checkbox"/> 14 | <input type="checkbox"/> 31 | <input type="checkbox"/> 48 | <input type="checkbox"/> 65 | <input type="checkbox"/> 82 | <input type="checkbox"/> 99             |
| <input type="checkbox"/> 15 | <input type="checkbox"/> 32 | <input type="checkbox"/> 49 | <input type="checkbox"/> 66 | <input type="checkbox"/> 83 | <input type="checkbox"/> 100 or<br>more |
| <input type="checkbox"/> 16 | <input type="checkbox"/> 33 | <input type="checkbox"/> 50 | <input type="checkbox"/> 67 | <input type="checkbox"/> 84 |   |
| <input type="checkbox"/> 17 | <input type="checkbox"/> 34 | <input type="checkbox"/> 51 | <input type="checkbox"/> 68 | <input type="checkbox"/> 85 |   |

**22) How many staff are employed across franchised units?\***

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**23) How many staff are employed across company units?\***

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**24) Does your franchise system have an "in-house" legal function?**

Yes

No

**25) Does your franchise system have an "in-house" Human Resource function?\***

Yes

No

**26) Please advise the brand or franchise group you represent**

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**27) Please advise your position**

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**28) Would you consider being involved in further representation or focus groups around this issue? (Optional response)**

Yes

No

**29) Please provide any further comment or input you would like to make around this issue. (Optional response).**

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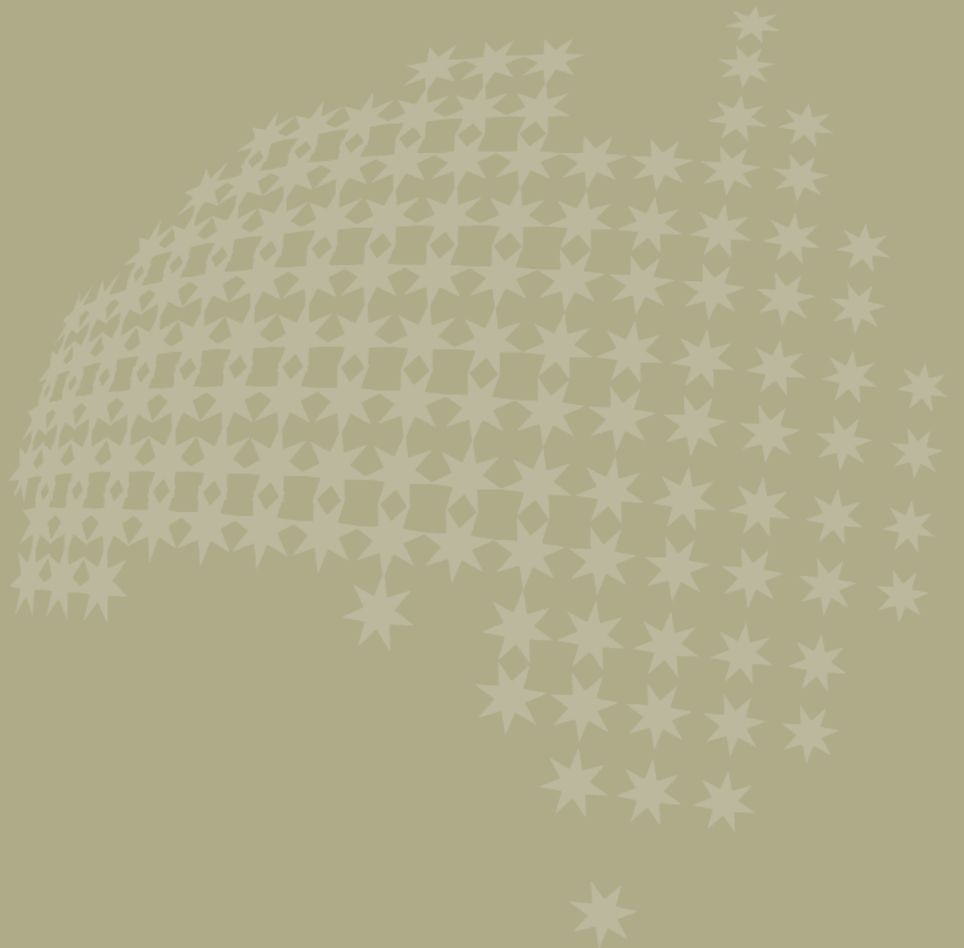
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**End of survey.**



# A3

## Appendix 3 WFC Declaration



World Franchise Council Joint Declaration of London, UK  
March, 14, 2017



## **Global franchise community urges Australian sector collaboration to avoid regulatory over-reach**

The World Franchise Council, representing the franchise sector associations of 44 participating countries, notes with concern the unprecedented legislative proposal in Australia to extend the liability for franchisee workplace contraventions to franchisors.

While no-one in the world franchise community wants to see the employees of franchisees treated in a manner contrary to their domestic workplace laws, the franchisee is the responsible employer for the proper treatment and payment of employees - not the franchisor which may have no visibility or control over franchisee workplaces arrangements.

This fundamental independence between the franchisor and franchisee is the bedrock of the success of franchising as a model of enterprise. Franchisees are separate and distinct businesses which are granted the rights to use the brand and business systems developed and supported by the franchisor under a commercial arrangement.

To assert that this commercial arrangement is a kind of employer-employee or 'joint employer' relationship is to misunderstand the franchise model, and risks undermining the strength, vitality and contribution of franchising to the Australian economy and community.

Australia is a global franchising powerhouse. To legislate a new kind of franchisor liability for pay and other workplace contraventions in a franchisee's business risks harming investment, growth and opportunities for enterprising women and men to get into a franchise business of their own.

Faced with extended liabilities for workplace contravention in franchisee businesses, it is likely that franchising opportunities will be diminished as brands turn to 'corporate' outlets and 'in house' service models to increase operational control and manage workplace risks.

Where franchise opportunities continue to be offered, greater supervision and monitoring to mitigate the extended liability will increase operating costs to the detriment of small business franchisees. The increased risk will encourage franchisee 'termination' at the first sign of any workplace irregularities, to the detriment of small business owners and their employees.

Legislation that promotes early termination runs contrary to one of the strengths of the franchising model. Avoiding sanctions will override the 'shared purpose' of making know-how, education and training and system improvements available by the franchisor to support the franchisee with their business success and compliance.

The World Franchise Council believes that the franchising community of Australia has demonstrated by its actions a commitment to working collaboratively with regulators and franchise systems to lift standards and compliance with workplace and pay requirements across the sector.

In this spirit, the World Franchise Council respectfully calls upon the Australian Government and legislators to:

- work collaboratively with the Franchise Council of Australia to guard against harmful, unjustified and unnecessary regulation;
- amend proposed legislation to ensure the actual employer of the harmed employees and those directly involved in actions causing harm to employees, arising from workplace law contraventions, are properly held to account and penalised;
- allow the measures recommended by the Franchise Council of Australia, being increased resources to the regulator, stiffer penalties for breaches and stronger investigative powers, to take effect before concluding that current laws are inadequate and regulators require unprecedented additional laws; and
- support industry-led workplace compliance and assurance programs, developed in partnership with the workplace regulator and calibrated to work effectively and efficiently in the widely varying franchise systems, to promote workplace obligation compliance and the early identification and rectification of workplace irregularities.

The World Franchise Council believes that the collaborative approach outlined above will ensure that the stated policy intention of better protecting vulnerable workers is advanced without the risk of a regulatory over-reach. Regulatory misadventure risks unjustifiably harming the reputation and appeal of franchising, the Australian economy, thousands of franchisee small businesses and tens of thousands of livelihoods that depend on these businesses.

A poor legislative outcome represents an existential threat to franchising as a viable and successful business model, driving growth, innovation and opportunity in Australia.

The World Franchise Council has seen no evidence that workplace requirements are more likely to be breached in a franchise system than in any other workplace or under other forms of commercial arrangement between separate entities. We are bewildered as to why franchising has been singled out and targeted.

The World Franchise Council can attest to how the global franchising community has looked to Australia for many years for examples of better practice regulation, public policy insight, franchise system innovation and brand creativity.

Sadly, we now look with concern at Australia's unprecedented step to consider legislating to introduce new 'joint employer' liabilities not seen anywhere in the world.

The World Franchise Council believes embracing the collaborative approach outlined in this declaration and being pursued by the Franchise Council of Australia, will ensure that Australia continues to be 'a beacon of better franchise practice and opportunity' for years to come.

### **About the World Franchise Council**

The World Franchise Council is an international entity that unites the franchise associations of 44 countries. The World Franchise Council, through its principles of ethics, supports the development and protection of franchising and promotes a collective understanding of best practices in fair and ethical franchising worldwide.

*This declaration unanimously approved by the World Franchise Council national and supra-regional members in attendance at the London meeting as follows:*

1. Argentina
2. Asia-Pacific Franchise Confederation
3. Australia
4. Belgium
5. Brazil
6. Britain
7. Canada
8. China
9. Columbia
10. Croatia
11. Egypt
12. European Franchise Federation
13. Finland
14. France
15. Greece
16. Hungary
17. Indonesia
18. Italy
19. Korea
20. Lebanon
21. Malaysia
22. Netherlands
23. New Zealand
24. Philippines
25. Portugal
26. Russia
27. Singapore
28. South Africa
29. Spain
30. Switzerland
31. Taiwan
32. Turkey
33. United States of America

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