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

Dear Sir/Madam

Please accept this submission to the inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

I submit this proposal as Director of the Asia-Pacific Centre for Franchising Excellence ('Franchising Centre') at Griffith University. The Franchising Centre was established in 2008 to drive franchise sector best practice through practical, independent research and education. Griffith University offers Australia's only formal educational qualification in franchising. The Centre has conducted the biennial *Franchising Australia* surveys since 1998, providing reliable longitudinal data about the franchise sector.

This submission argues against the implementation of the proposed Fair Work Amendment. I am willing to be contacted if any further clarification is required.

Yours sincerely

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Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

Franchising sector in Australia: relevant facts

There are 1120 business format franchisors in Australia operating 79 000 franchise units¹, representing approximately 4 percent of small businesses in Australia². Some 80 percent of franchisors are themselves small businesses³. Australian franchise brands hold a median of 27 franchise units. Two-thirds of franchisors have small to medium franchise systems (holding less than 50 franchise units). Thus, only one third of franchisors have more than 50 franchise units in their systems. Whilst franchising appears to be dominated by a handful of large retail brands, the majority of the sector comprises small brands. Some 55 percent of franchisors operate in the service sector.

Despite its relatively small footprint, Australian franchising contributes sales revenue of \$146 billion to the Australian economy.⁴ Due to the country's small population, opportunities for growth are limited. Strategies such as international expansion and acquiring multiple franchise brands are adopted by some organisations to grow their holdings. Recruiting suitable franchisee applicants remains a constant challenge for franchisors, restricting their ability to expand. Some 18 percent of franchisors across a wide range of industries are actively recruiting migrants as franchisees, predominantly from India and China, as a means of expanding their pool of franchisee talent.

Proposed Fair Work Amendment

I believe it is highly undesirable to extend accessorial liability of franchisors under the Fair Work Act for the reasons outlined below.

Franchising should not be singled out. The proposed amendments appear to have evolved as a reaction to recent media involving the underpayment of employees by franchisees in some high-profile franchise brands. However, it is disingenuous and patently unfair to target franchise organisations as the problem has also been observed in non-franchise organisations such as Coles and Woolworths. Indeed, the George Calombaris restaurant group has admitted underpaying more than 160 current and former employees a total of \$2.6 million. As this is a universal problem the franchising sector should not be singled out.

Legal status of franchising arrangement. Franchisors and their franchisees operate as separate legal entities and it is this separation of legal responsibilities that drives the franchise business model. Customers are generally unaware of the operating status of franchise units - they may be company owned or they may be franchised. However, although they may appear to be the same from a customer's perspective, there is a legal distinction between the franchisor and franchisee. Currently, franchisees are fully responsible for their own compliance with workplace laws. Franchisors may have an ethical responsibility to ensure that franchisees are aware of their legal obligations, but they do not enter a contractual relationship with the franchisee's employees and therefore should not be legally responsible for them.

Increased monitoring costs. Amending the current law to make franchisors jointly responsible with franchisees for workplace compliance will increase the monitoring and operating costs of the franchisor, potentially making this type of business arrangement unattractive to entrepreneurs seeking to use franchising as a means of business

¹ Frazer, L., Weaven, S., Grace, A. & Selvanathan, S. (2016). *Franchising Australia 2016*, Griffith University.

² Australian Bureau of Statistics (2016). *Selected Characteristics of Australian Businesses, 2014-2015 and Counts of Australian Businesses, Including Entries and Exits, June 2011 to June 2015*, Catalogue 8165.0.

³ Adopting the ABS definition of small business being businesses that employ fewer than 20 people.

⁴ Total sales revenue of business format franchises was estimated at \$55.5 billion, motor vehicle sales were \$43.4 billion and fuel retail was \$36 billion in 2016.

expansion. Current franchisors may also seek to move out of franchising to avoid falling under the proposed legislation.

In the *Franchising Australia 2016* survey we canvassed respondents' appetite for amending workplace laws to impose additional or joint responsibility on franchisors for compliance with workplace laws and employer obligations in franchisee businesses. The majority of franchisors (64 percent) were not in favour of introducing joint responsibility amendments. A further 20 percent were unsure of the implications. Only 16 percent of franchisors were in favour of the proposal. This outcome signals strong resistance from the franchising sector for a move towards joint employment responsibility.

In support of these attitudes some 92 percent of franchisors indicated they were confident that their franchisees were fully compliant with workplace laws and their obligations as individual businesses. Similarly, 96 percent of franchisors indicated they were confident that their franchisees provide equal, fair and safe work opportunities for their employees.

Despite wide media scrutiny into workplace behaviours (particularly employee underpayments) only a few cases have been identified as problematic in franchising. However, these have been cases in large franchise systems where the ramifications have been serious. However, putting this into perspective, it is unlikely that the entire sector has experienced similar problems. Furthermore, similar cases have been revealed outside the franchising sector, indicating that the issue is not peculiar to franchising. Hence, targeting the franchising sector with the proposed Fair Work amendments is unjust.

Legislation for joint employment responsibility is likely to burden the operating costs of franchise brands, possibly affecting their economic value. If the franchisor is required to share statutory responsibilities with franchisees, the increased costs associated with mitigating their responsibility will be passed on to other franchisees in the system. As noted above, franchising makes a significant contribution to the Australian economy. However, the proposed legislation has potential to discourage entrepreneurs from franchising as it will be unattractive and too risky for franchisors. Furthermore, the shift of responsibility for workplace compliance from the franchisee to the franchisor has potential to encourage franchisees to become quite complacent about their legal responsibilities and may encourage them to free ride on the franchisor. Franchisees are likely to feel less responsible and may therefore be less diligent in their workplace compliance, safe in the knowledge that if they find themselves in trouble the franchisor will come to the rescue.

Statutory precedence. New legislation is unnecessary as current law has been used successfully by the courts to prosecute a franchisor for exploitation of workers as in the Yogurberry case⁵. This demonstrates that the current accessorial liability provisions are adequate and could be better utilised. The proposed amendment has potential to extend to other laws. If the proposed amendment is passed, a statutory precedent could exist so that franchisor obligations towards noncompliance by franchisees could also apply to other laws, such as breaches of consumer law or occupational health and safety laws. Until now, franchising has generally not been accepted as an agency relationship by the courts and is widely excluded in franchise agreements. The proposed amendments seek to make the principal (franchisor) responsible for the agent's (franchisee's) actions in a manner not contemplated by the relational and operational structure or a franchise arrangement.

Cultural diversity. Many of the reported issues in the franchise sector appear to have involved migrant franchisees exploiting vulnerable employees (often international students). Research has demonstrated that cultural diversity improves competitive

⁵ Fair Work Ombudsman v Yogurberry World Square Pty Ltd [2016] FCA 1290

advantage⁶, so there are benefits in actively recruiting migrants into franchise networks. Preliminary research undertaken by Griffith University's Franchising Centre has revealed that franchisors are targeting migrant franchisees because of what they perceive as their strong desire to succeed, their entrepreneurial spirit, capital availability and their commitment and strong work ethic. However, there is also a cultural gap in terms of needing to review and improve workplace induction (specifically to include wage entitlement) and training systems to accommodate language and cultural differences. The target countries from which these franchisees are being recruited often have a very laissez-faire attitude to paying salaries. Employers may be accustomed to paying workers what they will accept and there are minimal underpinning regulations as there are in Australia.⁷ Thus, it is important that education programs are put in place as this is an area that franchisors have traditionally avoided.

Alternative course of action

Rather than introduce an additional layer of legislation specific to the franchising sector, consideration should be given to allowing the sector to self-regulate. As a first step, the education of new and existing franchisors about the need to provide support and training for franchisees around workplace laws should be promoted. The Franchise Council of Australia and other franchising education providers would be best placed to carry this out, with support from the government. Secondly, greater due diligence needs to be undertaken by franchisors in structuring their franchise models to ensure they are economically viable for franchisees throughout the life of the franchise agreement. It appears that this is the process that 7-Eleven has undertaken to attempt to address franchisee profitability, resulting in changes to the business model.

In summary, the franchise sector does not need an extra legal layer of prescriptive conduct to govern franchising. Instead, franchisors and franchisees should continue to share their ethical, commercial and legal obligations. Although the proposed amendments are well intended in seeking to protect vulnerable employees, they are unnecessary and over reaching and could potentially undermine the foundations of franchising. The problems that the Fair Work Amendment is seeking to confront can better be addressed through education, not regulation.

⁶ Cox T & Blake S (1991). 'Managing cultural diversity: implications for organizational competitiveness', *Academy of Management Executive*, 5 (3): 45-56.

⁷ Roberts, R., Frazer, L., Weaven, S. & Wilkinson, A. (2016). 'Towards understanding cultural diversity in franchising', *International Society of Franchising conference*, Atlanta, Georgia, USA.