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

Dear Committee Secretariat,

Questions on Notice – Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

Thank you for inviting representatives of the Franchise Council of Australia (FCA) to appear before the Senate Standing Committee on Education and Employment regarding our submission relating to the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

We have reviewed the Hansard draft transcript of our testimony to the Committee and note the following issues as matters where either the Committee has requested further information, or matters require clarification.

Coverage of the legislation

Moving the definition from that contained in the Franchising Code of Conduct to the Corporations Act creates unnecessary uncertainty and is totally inappropriate. It appears this was a unilateral decision taken by Department officers that was not subject to the consultation process in which we were involved. The initial draft of the legislation we were shown under embargo had the Franchising Code definition, and no reason has been provided for the change.

Examples of unintended consequences

We noted that the definition of "responsible franchisor entity" is too broad since it applies to franchisors with "influence or control" over the franchisee's "affairs". Every franchisor would have influence or control over affairs, but it is not appropriate for every franchisor to come within the ambit of the legislation. Particularly as the "reasonable steps" defence is so uncertain.

Australia Post and Tattersalls represent almost 10% of all the 79,000 Australian franchised outlets. They would both be caught, as they influence or control "affairs" such as how their brands are used, how the products are sold and what systems are to be used. But they do not have any material oversight over the other aspects of the businesses operated by many of their franchisees. Their valid concern is that they will be large corporations and under any 'reasonable steps" assessment much more will be expected of them.

To further explain this point, in the case of Australia Post over two thirds of their franchisees operate post office activities as part of a broader business that includes a newsagency, tatts agency, general store, hardware store or even a winery or a hotel. Often employees will be involved in all activities, not just postal activities, and Australia Post has no workplace or operational oversight at all. For all practical purposes it would be impossible for Australia Post to undertake any compliance obligations, but even if it could the compliance costs would render many franchisee businesses unviable.

There are many other franchise systems – indeed probably the majority, including most smaller franchise systems - that would be in the same situation as Australia Post and Tatts, who are provided by way of illustration. Therefore the legislation should not apply to the broad definition of "affairs" of a franchisee, but more specifically to "workplace law compliance".

Substantial as opposed to Significant:

The FCA Submission at recommendation 2 requests that the Committee consider the following amendments:

"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"."*

During the FCA evidence in relation to this recommendation a question on notice was asked relating to the difference between "significant" and "substantial".

To be clear, we are particularly concerned when "significant" is combined with "influence", and "affairs". If the section were to be amended in accordance with our recommendation so as it only referred to "control" in relation to "workplace terms and conditions" the FCA is much more comfortable. Although we do regard the distinction between "significant" and "substantial" as important, it is in our view far more important to make the changes noted above by deleting "influence" and changing "affairs" to "workplace terms and conditions".

Turning to the specific query, the FCA submission identifies that this clause relates to the definition of "responsible franchisor" and defines the circumstances when a franchise would be deemed to be caught by the amendments.

With regards to substantial in this context of this provision we submit that it relates to *something of real control and importance to the franchise, of considerable value to the franchise model, where control is real and actual, rather than the subject of perception*

The current use of the term "significant" fails to adequately discriminate between the franchise models who should be deemed "responsible franchisors" and those franchise systems who may exercise some level of control in relation to marketing and yet have no line of sight or ability to influence work place relations practices within the franchise system.

The definition of *significant* is a lessor test where according to the Morrison Webster dictionary is defined as:

- having or likely to have influence or effect
- probably caused by something other than mere chance

It is our submission that the clause *558A (2)* requires a more stringent and defined threshold than currently drafted, due to the consequences of being deemed a "responsible franchisor", which include:

- increase compliance costs across the franchise network
- associated risk management treatments required to sufficiently mitigate the inherent risks, and
- the pecuniary nature of the penalties for breaches.

Joint Liability

During our presentation, it was put to us that an academic had expressed the view to the Committee that the FCA 's expressed concerns in relation to "joint liability" were unfounded.

With respect to the academic, who is not known to us and does not appear from our research to have had any experience in franchising or any detailed subject matter knowledge, the arguments he raised are at best semantic, and at worst misleading.

It could be argued academically that the proposed Australian legislation may not on a very technical assessment create "joint employer" liability as that concept is understood in the US and elsewhere. However, it certainly does so as that term is understood in common usage – that both franchisee and franchisor could be liable for a breach of the law by a franchisee. Indeed, the proposed legislation goes beyond joint liability and creates a far more direct liability – a franchisor can be sued or prosecuted directly and without there needing to be any action taken against a franchisee.

In the US, there has been an orchestrated campaign to expand the concept of joint liability, which currently largely mirrors for practical purposes our accessorial liability provisions. Some Regulators have indicated their intention to expand their interpretation of current laws to make franchisors, labour hire companies and others liable for the breaches of employers under the concept of joint employment. Australian courts have consistently rejected the concept of additional joint liability in the past, but the concept has less relevance here given the accessorial liability provisions.

In any event the proposed amendments to the Fair Work Act leapfrogs past case law to create a new statutory liability that renders past case law irrelevant.

What is interesting and relevant from US and other international experience in the context of the current Australian legislation is that even those advocates of joint liability constrain their arguments to situations where a party controls terms and conditions of employment. (see http://www.workplacelawandstrategy.com.au/2015/10/will-the-joint-employment-concept-take-hold-in-australia/). While the FCA acknowledges that the Australian situation is somewhat different, the facts remain that according to the US definition of joint employer, there are concerning parallels:

> *"simply having the right to control terms and conditions (even if that right is not actually exercised) will be enough to create the joint employer relationship."*

The FCA submits that the proposed amendments create a liability not only conceptually the same as, but in fact beyond, the concept of joint liability as that term is used in other jurisdictions. Any suggestion to the contrary is inaccurate and misleading in the context of the current debate, as the substance, core elements and consequences are the same.

The FCA and the opinion of the broader legal community supports the use of the term 'joint employer liability' to characterise the new obligations the legislation seeks to impose.

The intent of the legislation to see the franchisor business liable to 'stand in' for the actual employer being the franchisee business for contraventions or unmet obligations regarding employees of the franchise has long been captured as 'joint employment' of some form.

The Queensland Law Society submission to this inquiry notes:

" ... there is concern, on the part of some of our members about making franchisors and holding companies liable for entitlements, ***as if they were the employer (or joint employer)*** *of the franchisee's employees. The concern is that this is counter to the whole franchising model of independent businesses".*

By way of further example, lawyers Holman Webb published a September 16 ,2015 article posing the question *"Is Joint Employer Liability about to hit Australia franchising?'*

The article opens with reference to a (then) new bill proposed by The Greens *"which potentially means Australian franchisors could be jointly liable for the breaches of employment awards and laws by their franchisees. But is there already potential liability for franchisors if their franchisees don't pay their staff their proper entitlements?"*

The article's authors, Corrine Attard and Rachael Sutton, added: *"In the US there has been a lot of discussion about joint employment and the issue of franchisors bearing some responsibility as* ***a joint employer*** *of the franchisee's staff."*

http://www.holmanwebb.com.au/blog/is-joint-employer-liability-about-to-hit-australian-franchising

The item was republished on the Mondaq on-line information service.

The March 13, 2017 McInnes Wilson Lawyers article authored by Andrea Hetherington and published on Lexology.com included the statement:

"This type of ***'joint employer' obligation*** *is bad news in the franchising context as it significantly increases a Franchisor's responsibility for the independent businesses operating in its network. It also creates further compliance costs in a business environment that is already highly regulated."*

http://www.lexology.com/library/detail.aspx?g=86ce6ecf-5796-4568-b748-d85e6946c8e3

In submissions to the Productivity Commission inquiry into the Workplace Relations Act, the Western Community Legal Centre submission (third submission October 2015) expressly called for the embrace of 'joint employment' doctrine, creation of 'joint employment' obligations and liabilities and even suggested legislative definitions and provisions.

http://www.pc.gov.au/__data/assets/pdf_file/0006/194298/subdr0372-workplace-relations.pdf (pps 14-20 refers)

Ads mentioned during our evidence, the concept of "joint employer" has more recently received wider attention due to several labour relations issues in the United States.

The concept of "responsible franchisors" clearly identifies that the ability to exercise significant control, is sufficient to attract the potential liability. – Where a responsible

franchisor has not exercised enough care or diligence, to ensure that reasonable steps were taken to guard against breaches of the Fair Work Act, liability for any underpayment and for potential penalty, arises.

The FCA submits that the proposed amendments, create a joint employer liability in circumstances where the franchisor is deemed to be a "responsible franchisor." That liability exists and is contingent upon a breach by a franchisee, and where the responsible franchisor has failed to take "reasonable steps".

FCA Representation of the franchise sector

The success of the Australian franchise sector has been built on collaboration between franchisors and franchisees, rather than an adversarial relationship of franchisor versus franchisee. Therefore, the level of disputation in franchising is extremely low, with the Franchising Australia Surveys by Griffith University consistently reporting that only at 1.7% of franchisees being in a material dispute with their franchisor, and 75% of franchisors having no disputes at all within their franchise system. The regulatory framework gives effect to the importance of collaboration by providing extensive protections for franchisees, and incorporating a mediation based dispute resolution system that has achieved a stunning 80% success rate. So not only are there very few disputes, but the vast majority are resolved quickly and inexpensively to the satisfaction of both parties by mediation. This outcome is envied around the world.

It is true that most financial members of the FCA are franchisors, but franchisees enjoy benefits under our Network membership category that in most cases are seen by them as obviating the need for them to take out separate membership. And to be frank they have little interest attending networking events or educational activities – they are too busy running their businesses, and see the franchisor as having the industry oversight role. However franchisees are highly involved in our franchise sector awards program, and of course many supplier members are franchisee oriented. Occasionally we run franchisee oriented events, but they tend to be poorly supported by franchisees, who are either too busy or see more relevance in attending events within their own franchise network. This is clearly logical behaviour.

The FCA is also set up deliberately to foster a collaborative approach, with the focus of the FCA being franchising itself, rather than the interests of franchisors or franchisees. From time to time issues arise that pose challenges given our different membership categories, but we steadfastly refuse to compromise on our principal obligation to represent the sector. The changes to the Franchising Code of Conduct, the recent introduction of legislation to prohibit unfair contract terms and now the current representation activities concerning the proposed amendments to the Fair Work Act are excellent examples of the FCA managing the responsibility to represent the interests of the sector very effectively. You could take any one of the numerous submissions the FCA has made over the years and see that most of the changes would be considered franchisee oriented, rather than franchisor oriented. That is because we consistently form the view that the protection of franchisees is important not just to franchisees, but to franchisors dependent on the credibility of the franchise sector.

The FCA collaborative mindset has proven to be effective and beneficial when compared to other areas of industrial relations that can be described as adversarial. We believe that our 20 year track record is a testament to this approach.

In relation to the specific questions concerning the FCA structure, the FCA is a non-listed public company limited by guarantee, and governed by a Board of 11 directors.

The objects of the FCA are identified in the company's constitution which identifies the following:

- To advance public knowledge and understanding of the franchise sector, the practices of public authorities regulating the franchise sector and the attitude of governments towards the franchise sector;
- To advance education in relation to franchising and the franchise sector;
- To encourage and facilitate the study of franchising and the franchise sector;
- To encourage research into the reform of any aspect of the franchise sector;
- To disseminate information concerning the work of the FCA

The FCA Membership rights and obligations are outlined in the Constitution and the following membership categories exist:

(a) Network Members;
(b) Franchisor Members;
(c) Master Franchisee Members;
(d) Franchisee Member (Corporate);
(e) Franchisee Member (Individual);
(f) Adviser Members (Corporate);
(g) Adviser Members (Individual);
(h) Supplier Members (Corporate);
(i) Supplier Members (Individual);
(j) Honorary Members;
(k) Associate Franchisee Member (Corporate);
(l) Associate Franchisee Member (Individual);
(m) Provisional Members (Corporate);
(n) Provisional Members (Individual);
(o) Industry Association; and
(p) Franchise Advisory Council Member who for purposes of the Constitution shall be deemed to be a body corporate.

The ability to vote at the FCA AGM is open to both the franchisee and franchisor member category.

Representation.

The FCA believes it's mission and purpose is to support sustainable franchise success by delivering relevant network opportunities, member services, education/professional development programs and representation and advocacy support that drives economic and entrepreneurial success for franchisees, franchisors and service suppliers.

The broad and inclusive range of stakeholder interests are reflected in the governance arrangements and FCA member representation via State Chapters and the FCA Board of Directors.

Eligible members in each State can nominate and be elected (by the State members) to the State Chapter Committee, which comprises 10 -15 representatives.

The State Chapter Committee composition reflects the following composition of members:

- 60% franchisors
- 30% corporate supplier, service provider members
- 10% franchisees

The State Chapter elects a President who, subject to the Boards consideration, should be a franchisor/franchisee member.

Each State Chapter President is then directly elected to the Board.

In addition, the membership directly elects from nominees, three franchisor/franchisee members who are appointed to the national board.

Pursuant to the Constitution, the Board can directly appoint a director and has exercised this provision to appoint an Executive Chairman.

During the committee testimony, a question was raised regarding the representation of employees of franchisees. This question was in relation to the accessibility of franchisee employees to be able to access the 13000FCAHR toll free service to resolve HR related questions and gain access to independent information.

In relation to the ready availability of independent and dependable information about workplace relations obligations and entitlements, franchisees and franchisee employees can access the 13000FCAHR toll free service made available as a partnership between the FCA and HRCentral.

The access to the service is as described, however this service does not advocate or represent the FCA or FCA members and is simply an independent information service provided to members as a benefit of FCA membership.

In addition, the professional development and career opportunities of franchise business employees is supported via on-line resources made available in collaboration with Griffith University and more formally through the FCA's Certified Franchise Executive program. Prospective franchise business investors have access to resources made available via the ACCC, other collaborative initiatives with regulators and information and guidance on the FCA website.

Conclusion

The FCA appreciates the opportunity to provide further clarification and responses in relation to our submission.

Let me once again commend to the Committee the FCA's recommended amendments to address the over-reach, unintended consequences and very significant compliance cost and regulatory burden evidenced by the independent survey finding that will result from the current legislative drafting.

We are working in accordance with our objectives 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. To that extent, we reiterate that:

- 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 in this submission to assist the Committee's deliberations and formulation of its report to the Senate

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 once again for accepting our submission, for hearing our evidence and for due consideration of the Fair Work (Protecting Vulnerable Workers) Bill 2017.

Yours sincerely,

Damian Paull
Chief Executive Officer
Franchise Council of Australia