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Analysis of
Vulnerable Workers Bill
Why the Bill should be passed in the Senate substantially unchanged
12 May 2017

Summary

The current wording of the Vulnerable Workers Bill has the practical effect of requiring franchisors to exercise their responsibility to franchisees.

The wording of the Bill desired by the Franchise Council of Australia would enable franchisors to avoid their responsibility to franchisees.

This FCA version would 'dump' all responsibility onto franchisees and remove franchisors from responsibility. It would weaken the Australian franchise system because it weakens the support that franchisors are supposed to supply to franchisees.

The FCA's version is harmful not only to the 79,000 small business franchisees in Australia but to their thousands of workers as well.

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1. Background

1.1 The underpayment scandal

The fraudulent 'underpayment of workers' scandal in the franchise sector continues to expand across the sector. It started with the exposure by 4Corners/Fairfax in August 2015 of 7Eleven underpaying workers on a wide scale. Pizza Hut, Domino's Pizza, Caltex and United Petroleum have since been caught out. And there's more to come. The Chair of the peak franchise lobbying body, the Franchise Council of Australia, was the also the Chair of 7Eleven. He resigned both positions after the 7Eleven fraud scandal broke.

1.2 The Federal Government's response

The Federal Government has responded with new legislation, the Vulnerable Workers Bill. It has yet to pass the Senate. In essence, the Bill will impose obligations on franchisors to ensure that franchisees pay workers their legal entitlements.

1.3 Senate Committee Inquiry

The Bill has passed the Lower House of Parliament and is waiting approval in the Senate. A Senate Inquiry has released a report. The report gives a summary of the positions that parties have taken on the Bill, which we have summarised below.

The Bill is likely to be debated in the Senate in the weeks of 13&19 of June 2017.

2. Arguments against the Bill

The Franchise Council of Australia has been conducting an intense lobby campaign in Parliament and in the media to try and block the Bill or at least to water it down. The FCA claims the Bill:

- Will harm small business.
- Is unnecessary because existing law works.
- Is heavy-handed regulation.
- Threatens franchising in Australia.

According to the Senate Committee report, several other groups representing employers and franchisors have either indicated support for the position of the FCA, or raised similar or related concerns. These groups include:

Ai Group	Australia Post
Housing Industry Association	Franchise Advisory Centre
Australian Fleet Lessors Association	National Retail Association

Australian Chamber of Commerce and Industry
Federal Chamber of Automotive Industries
Asia-Pacific Centre for Franchising Excellence
Australian Lottery and Newsagents Association
Australasian Convenience and Petroleum Marketers Association

3. Arguments for the Bill

We, Independent Contractors Australia (ICA), say that the arguments of the FCA are wrong on all counts. Further, that the Bill should be passed substantially as it is. We say the Bill will:

- Improve business certainty for the 79,000 franchisee operators in Australia the vast majority of whom are small business people.
- Substantially close a loophole in existing law that enables some franchisors to argue that they are not responsible.
- Is quite light-handed regulation.
- Will improve the community standing of franchising in Australia, thus strengthening franchising by demonstrating ethical compliance with minimum wages laws.

Again, based on the Senate Committee report, we find ourselves arguing for the Bill along with:

Academics Dr Hardy and Dr Tham	Maurice Blackburn Lawyers
Australian Council of Trade Unions	JobWatch
Uniting Church in Australia	WEstjustice

However we disagree with these groups where they argue for an increase in the scope of the Bill, for example to capture supply chains.

4. Senate Committee Recommendations

The Senate Committee report says that the Bill should be passed but makes four recommendations, two of which are central to our analysis in this paper. The recommendations are that the government considers amending:

- proposed paragraph 558A(2)(b) of the bill to clarify that the term 'affairs' be specifically associated with workplace relations matters.
- the bill to ensure that its reach and intent, as articulated in the Explanatory Memorandum and second reading speech, is clarified.

Essentially these recommendations go to the core issue of whether the new law actually and adequately brings franchisors into the responsibility loop. How this core issue is resolved by the Senate, will determine whether the law is:

a) effective at addressing franchise worker underpayment; or
b) a law that pretends to do something but in fact does nothing.

5. The legislative words

To state the obvious, in legislation it's words that matter—a lot! Get the words wrong and the meaning of a law changes dramatically. The words that are most important in this Bill are the words that the Franchise Council of Australia says in its submission it wants to change. These include the following two clauses:

5.1 FCA clause change one

> **558A Meaning of *franchisee entity* and *responsible franchisor entity***
> (2) A person is a ***responsible franchisor entity*** for a franchisee entity of a franchise if:
> (a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and
> (b) the person has a significant degree of influence or control over the franchisee entity's affairs.

The FCA want to

a. replace "significant" with "substantial";
b. delete "of influence";
c. replace "affairs" with "workplace terms and conditions"

The clause would then read

> 558A(2)(b) the person has a substantial degree of control over the franchisee entity's workplace terms and conditions.

5.2 ICA rejects the FCA changes

ICA strongly recommends that the Senate reject these verbal changes. The FCA's proposed changes would considerably dilute the ability of the legislation to require compliance by franchisors.

If there were future underpayment of franchise workers, the FCA changes would enable franchisors to argue in court that they:

- Did not have 'substantial' control over the 'workplace terms and conditions' of the franchisee, which would mean that the franchisor did not have responsibility or liability.

These FCA changes would essentially retain the status quo, where franchisors could deliberately seek not to exercise any influence over workplace terms and conditions and therefore avoid any responsibility for worker underpayment.

In a practical sense the proposed FCA changes would largely neuter the intention of the Bill to require franchisors to ensure in their franchise business systems that compliance with minimum worker pay was part of the system.

6. ICA supports the Bill's current wording. Discussion

In comparison the current wording in the Bill stating that where;

> "… the person has a significant degree of influence or control over the franchisee entity's affairs"

will require that person (a franchisor) to give guidance to franchisees on pay rates and to demonstrate that they have at least checked or audited that franchisees are paying correctly This will be the practical effect of this clause. It will ensure that franchisors exercise a level of responsibility toward wages in the franchise business system that they have created and operate, and from which they seek to profit.

Profit is good. However, in a society governed by the rule of law, profit is achieved where opportunity is balanced against risk. It is natural for persons conducting business to want to reduce their risk. But risk can only legitimately be reduced within the framework of the law. In this instance the FCA is seeking to reduce franchisors' risk by ensuring that risk under workplace relations law is only apportioned to franchisees. This is illegitimate. The franchise business systems are the property of the franchisors. Those systems must comply with the law. The franchisors have responsibilities to ensure that their business systems comply with, for example, work safety, food safety, competition, financial and all other laws. It is illegitimate for the FCA to ask Parliament to absolve, reduce or limit franchisors' risk in one area of the law—namely, workplace relations.

As a point of discussion it is possible to argue that franchisors, in owning and operating franchise business systems should have the primary responsibility for compliance with workplace relations laws. Perhaps this Bill is not strong enough in requiring franchisors to exercise workplace relation responsibilities? For example, the Bill only requires franchisors to exercise responsibility where it is 'reasonable' for them to do so. The Bill states:

> **558B Responsibility of responsible franchisor entities and holding companies for certain contraventions**
>
> *Responsible franchisor entities*
>
> (1) A person contravenes this subsection if:
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> (i) the responsible franchisor entity or an officer (within the meaning of the *Corporations Act 2001*) of the responsible franchisor entity knew or could reasonably be expected to have known that the contravention by the franchisee entity would occur; or
>
> (ii) at the time of the contravention by the franchisee entity, the responsible franchisor entity or an officer (within the meaning of the *Corporations Act 2001*) of the responsible franchisor entity knew or could reasonably be expected to have known that a contravention by the franchisee entity of the same or a similar character was likely to occur.
>
> (3) A person does not contravene subsection (1) or (2) if, as at the time of the contravention referred to in paragraph (1)(a) or (2)(b), the person had taken reasonable steps to prevent a contravention by the franchisee entity or subsidiary of the same or a similar character.

The word 'reasonable' is an important legal moderator in the application of responsibilities under law. There are long established legal principles and

understanding around how the courts interpret 'reasonable'. The legal question rotates around what a court would consider a 'reasonable person would do in the circumstances'. A legitimate question is, should the word 'reasonable' be retained in the Bill? Should 'reasonable' be deleted? Deleting 'reasonable' would require franchisors to have an absolute level of responsibility with little or any sensible defence.

ICA, however, says 'no'—keep the word 'reasonable.' With the word 'reasonable' in place the Bill is appropriately balanced. There is no need to extend the franchisors' responsibilities beyond those as currently drafted. This is because the Bill:

- Identifies the franchisor as a person/entity that owns and controls a business system. (That is what the words 'the person has a significant degree of influence or control over the franchisee entity's affairs' are intended to achieve and do achieve.)
- Only requires franchisors to exercise responsibilities to the extent that it is reasonable for them to do so.

However, to accede to the FCA's substantial lobbying to water down the Bill would be for Parliament to turn a moderate, balanced Bill into a legislative sham. That is, the legislation would give the appearance of doing something to prevent franchise wage fraud but do essentially nothing to achieve that aim. Parliament would have been conned into conning Australians.

7. What are the practical applications of the Bill for franchisors as currently drafted?

The FCA says that there are some 1,100 franchisors across Australia. The FCA argues that the Bill will create high compliance costs. ICA rejects that FCA assertion.

Remember that franchisors create, own and control a business system. Whatever that system is, the franchisors:

- create, own and control a private-sector compliance, (red tape) bureaucratic business system. They require franchisees to comply with strict marketing, product, pricing, shop design, purchasing, supply chain and many other imposed private sector regulations. The franchisors monitor and audit franchisees to ensure compliance. Franchisors apply sanctions against franchisees for breaching those standards.
- must comply with government-imposed (red tape) regulations such as food safety, workplace safety, competition laws, zoning regulations, financial regulations and more. Franchisors must ensure that franchisees comply with these many government regulations otherwise the franchisors will be in breach. If a franchisee worker is injured, or a customer suffers food poisoning, the franchisor risks prosecution along with the franchisee.

That is, the business of franchisors is to specialize in the running of their own private- and government-created regulations. That is their expertise.

Yet when it comes to the realm of worker wage rates the FCA seems to want franchisors to avoid any exercise of that very expertise. ICA disagrees.

The extra compliance requirements that flow from this Bill as currently worded are straightforward and should easily be accommodated in the normal practices of a franchisor. Quite simply, a franchisor would:

- Check the minimum award pay rates that a franchisee should pay workers.
- Keep franchisees informed and up-to-date on those minimum required pay rates.
- Make franchisee compliance with minimum award pay rates a contractual requirement under their franchise agreements.
- Audit to check that franchisees are paying their workers correctly.

These sorts of requirements are consistent with the normal requirements that franchisors impose on franchisees in ensuring compliance with their own private sector-imposed and government-imposed regulations. For example, Franchisors spend large amounts of time, effort and money ensuring the market image of their franchised brand is protected. Clearly they have systems and capabilities to manage their franchise network. It is unconvincing for the franchisors to say there is too much work and effort required to monitor other compliances.

If franchisors put in place these simple, normal requirements, and if a franchisee were then to lie and cheat and underpay workers without the franchisor's knowledge, the franchisor would be able to demonstrate that it had done everything that could reasonably be expected of it to ensure that there was no wage fraud. The franchisee would demonstrably be entirely responsible.

8. The small business perspective

The FCA has been lobbying and asserting that the Bill as currently drafted will damage small business.

8.1 Small business franchisors?

The FCA claims that there are some 1,100 franchisors across Australia with 95 per cent of those being small businesses. The FCA's definition of a small business franchisor is one that has fewer than 25 franchises and an average of seven employees at head office. The FCA's definition of 'small' is a twist on the usual idea of small business. The FCA's definition more accurately describes medium-sized businesses. A franchise business of, say, 20 franchisees is in fact a reasonably substantial business.

Nonetheless, whatever definition of 'small' the FCA chooses to use as discussed above, the business expertise of a franchisor lies in the running of a private (and government required) regulated business system. Business system management is franchisors' 'business' and 'reasonable' oversight of franchisee worker pay rates should be a normal part of that expertise and undertaking.

8.2 Small business franchisees

What is more relevant and urgent to consider are the 79,000 (FCA figures) franchisees. The vast bulk of these would fit the normal idea of small business people. These are the family business people who have taken loans and mortgages to pay for a franchise in the entrepreneurial hope of improving their family circumstances. These are the early 'retirees' who have taken their severance package or superannuation payouts, investing in a franchise and their own hard work. These are the migrants

who, having worked hard and long hours in low-paid jobs, have taken a plunge into their future in a franchise. These are the 79,000 small businesses that should be the focus of this Bill.

If properly worded, this Bill is as much about protecting and supporting these 79,000 small business franchisees as it is in protecting the franchisee workers from illegal underpayment.

The concept of a franchise is excellent. It combines the benefits of big business operations with those of small business flexibility and closeness to customers. An aspiring small businessperson who takes up a franchise opportunity is buying into a business system that they hope will, with their hard work, make them successful. The franchise business system is supposed to provide the franchisee with business processes that will enable them to operate effectively and importantly focus on product and service delivery to customers. This includes advice, processes and information that enable the franchisee to comply with government regulations. This is or should be a core function provided by franchisors to franchisees.

In fact, such advice and compliance processes represent a 'protection' that a franchisor provides to franchisees. It 'protects' the franchisee from making mistakes in regulatory compliance. It is, in truth, a responsibility of franchisors to franchisees.

9. Conclusion

The current wording of the Bill has the practical effect of requiring franchisors to exercise their responsibility to franchisees. The current wording reads.

> **558A Meaning of *franchisee entity* and *responsible franchisor entity***
>
> (2) A person is a ***responsible franchisor entity*** for a franchisee entity of a franchise if:
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> (a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and
>
> (b) the person has a significant degree of influence or control over the franchisee entity's affairs.

The wording of the Bill desired by the FCA would enable franchisors to avoid their responsibility to franchisees, thereby exposing franchisees to errors and mistakes in worker wage rates. The FCA's desired version of the Bill would read:

> **558A Meaning of *franchisee entity* and *responsible franchisor entity***
>
> (2) A person is a ***responsible franchisor entity*** for a franchisee entity of a franchise if:
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> (a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and
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> (b) the person has a substantial degree of control over the franchisee entity's workplace terms and conditions.

This FCA version would 'dump' all responsibility onto franchisees and remove franchisors from responsibility. It weakens the Australian franchise system because it weakens the support that franchisors are supposed to supply to franchisees. The FCA's version is harmful not only to the 79,000 small business franchisees in Australia but to their thousands of workers as well.