From: [redacted]
To: Education, Employment and Small Business Committee
Subject: RE: Questions on Notice from EESBC"s public hearing - Inquiry into Wage Theft in Queensland (16 August 2018)
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Dear Erin

Ai Group's responses to these questions are below. I have also attached for information our submission to the Federal Parliamentary inquiry into the Franchising Code of Conduct. [redacted]

Regards

Shane

Shane Rodgers
Head - Queensland

AiGroup

202 Boundary Street, Spring Hill QLD 4004
T: [redacted]
F: 07 3244 1799
M: [redacted]
E: [redacted]
www.aigroup.com.au

Mrs STUCKEY: Do you have any alternative proposals for increasing employer compliance and best practice regarding workers' entitlements and pay? It has also been said by some submitters that better education is required.

Response:

Ai Group distributes a great deal of information to our members to assist them with their obligations regarding workers' entitlements and pay. In addition to the written information that we distribute, and the extensive amount of information available on our website, we have a Workplace Advice line that takes thousands of calls each year from employers seeking advice about their obligations regarding workers' entitlements. Further, we conduct a variety of training courses for employers.

In addition to the services provided by industry groups like Ai Group, the Fair Work Ombudsman distributes an extensive amount of information to employers.

Of course, it is important to always strive to improve education, but it needs to be acknowledged that some good work is being done in this area.

Mrs STUCKY: Having also acknowledged that some small businesses have hundreds of regulations and licences to pay and that it is difficult to keep up with all of those, how can that also be improved?

Response:

Australia's workplace relations system is much too complicated. For example, awards need to be a lot simpler and over time the number of awards needs to be reduced.

One current major problem relating to licensing in Queensland is the labour hire licensing legislation. The concept of "labour hire" in the Queensland legislation is excessively broad and uncertain, and is disturbing countless contracting arrangements that are not legitimately regarded as "labour hire". Also, the legislation imposes an excessive

regulatory burden on employers. Major changes to the legislation are needed.

Mrs WILSON: Do you collect or do you have any data about queries that you get from business owners in relation to assisting them with any wage issues regarding employee entitlements and pay? We will place that on notice, if that is okay, Chair.

Response:

In 2017/18, Ai Group's Workplace Advice Line took about 25,000 calls from employers. 70% of these related to wage and entitlement topics such wages, award classifications, overtime, award interpretation, leave entitlements, shift work, hours of work, termination of employment, redundancy entitlements, and payment of wages. The other 30% of calls related to other matters such as, enterprise bargaining, general HR issues, performance management, EEO, WHS and workers compensation.

Ai GROUP SUBMISSION

Parliamentary Joint Committee on Corporations and Financial Services

Inquiry into the operation and effectiveness of the Franchising Code of Conduct

2 May 2018

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, retail and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

Australian Industry Group contact for this submission

Stephen Smith, Head of National Workplace Relations Policy
Telephone: 0418 461183 or 02 9466 5521
Email: Stephen.smith@aigroup.com.au

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct (**Franchising Code**). The Franchising Code is a mandatory industry code under the *Competition and Consumer Act 2010*.

Ai Group has amongst its membership a significant number of franchisors in the fast food, retail, telecommunications, business equipment, IT, automotive, and other industries, including a number of major franchisors which each have a large number of franchisees.

Franchising is growing rapidly in Australia. This business model enables thousands of people to establish their own small businesses, and employ many thousands of other Australians. The laws and codes that apply to franchising arrangements need to be fair and balanced, both for franchisors and franchisees.

It is important to keep in mind that many franchisors are small and medium-sized businesses. The perception of some in the community that franchisors are big corporations with excessive power, and that franchisees are small businesses with little power, is not true in a substantial proportion of cases.

It is essential that any changes that are made to the Franchising Code do not lead to an even greater imbalance between the rights of franchisors and those of franchisees under the Code. If the Code become more imbalanced in favour of franchisees, the potential adverse effects would include:

- Major international franchise operators being discouraged from making new investments in Australia;
- Franchisors restructuring their businesses and terminating their relationships with franchisees; and
- Franchisors incurring additional compliance costs which would be passed on to franchisees, and could affect the viability of the businesses of some franchisees.

Ill-conceived changes to the Franchising Code could put a hand-break on business and employment growth.

This submission focusses on the following issue amongst the Terms of Reference for the Inquiry:

> *(e) the adequacy and operation of termination provisions in the Franchising Code of Conduct and the Oil Code of Conduct;*

The termination provisions of the Franchising Code need to be amended to restore fairness to franchisors given the passage of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (**Vulnerable Workers Act**) through Parliament.

Specific amendments are proposed to clause 29 (Termination – Special Circumstances) of the Franchising Code and clause 36 (Termination by Supplier – Special Circumstances) of the *Competition and Consumer (Industry Codes—Oil) Regulations 2017* (**Oil Code**).

Termination provisions of the Franchising Code

An important amendment needs to be made to the Franchising Code given the enactment of the Vulnerable Workers Act. The Vulnerable Workers Act amended the *Fair Work Act 2009* (**FW Act**) to:

- Give franchisors and holding companies more responsibility for breaches of workplace relations laws and instruments by franchisees and subsidiaries;
- Introduce a new "serious contravention" penalty of up to $630,000 per breach for a company (10 times the previous current maximum penalty);
- Increase penalties for pay slip and record keeping offences – up to $63,000 per contravention (double the previous maximum penalty) and up to $630,000 for a serious contravention (20 times the previous maximum penalty);
- Reverse the onus of proof for underpayment claims against employers who have failed to keep relevant employee records and pay slips; and
- Grant the Fair Work Ombudsman compulsory interview powers, similar to the powers of the Australian Building and Construction Commission.

The Vulnerable Workers amendments to the FW Act impose obligations upon *"responsible franchisor entities"* for breaches of workplace relations laws and instruments by franchisees and subsidiaries in many circumstances. A person (including a business) is a *"responsible franchisor entity"* if:

- the person is a franchisor; and
- the person has a significant degree of influence or control over the franchisee's affairs.

"Responsible franchisor entities" may be held responsible for contraventions by franchisees of the provisions in the FW Act dealing with the entitlements of employees under awards, enterprise agreements, the National Employment Standards (**NES**) and other specified provisions of the Act, if the franchisor knew or could reasonably be expected to have known that the contravention would occur. The legislation includes a defence for a franchisor that can demonstrate that it took reasonable steps to prevent the contravention by the franchisee.

The legislative amendments relating to *"responsible franchisor entities"* came into operation on 27 October 2017.

It is unfair for franchisors to be liable for their franchisees' breaches of workplace laws and instruments when franchisors do not currently have an adequate ability to terminate contracts with franchisees who knowingly and systematically breach workplace relations laws and instruments.

At present, the Franchising Code severely limits the ability of a franchisor to terminate a contract with a franchisee, even in circumstances where a franchisee deliberately and systematically breaches workplace laws and instruments.

This problem can be readily addressed with the following amendments to clause 29 of the Franchising Code:

29 Termination—special circumstances

(1) Despite clauses 27 and 28, a franchisor may terminate a franchise agreement without complying with either clause ~~if the agreement gives the franchisor the right to terminate the agreement~~ should the franchisee:

(a) no longer hold a licence that the franchisee must hold to carry on the franchised business; or

(b) become bankrupt, insolvent under administration or an externally-administered body corporate; or

(c) in the case of a franchisee that is a company—become deregistered by the Australian Securities and Investments Commission; or

(d) voluntarily abandon the franchised business or the franchise relationship; or

(e) be convicted of a serious offence; or

(f) operate the franchised business in a way that endangers public health or safety; or

(g) act fraudulently in connection with the operation of the franchised business;

(h) commit a serious contravention of a civil remedy provision in sections 44(1), 45, 50, 280, 293, 305, 323, 325, 328, 357, 358, 359, 535 or 536 of the Fair Work Act 2009 in connection with the operation of the franchised business.

Note: Under section 557A of the Fair Work Act 2009, a contravention of a civil remedy provision by a person is a 'serious contravention' if: (a) the person knowingly contravened the provision; and (b) the person's conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons.

(2) Despite clauses 27 and 28, a franchisor may terminate a franchise agreement without complying with either clause if, at the time of termination, the franchisor and the franchisee mutually agree to the agreement's termination.

~~Note: This clause does not give rise to a right of termination; such a right must be in the franchise agreement itself.~~

The proposed amendments would give franchisors the ability to terminate an agreement with a franchisee if the franchisee commits a *"serious contravention"* of the provisions of the FW Act relating to the wages and entitlements of employees. Under s.557A of the Act, a contravention of the Act is only a *"serious contravention*" if:

(a) the person knowingly contravened the provision; and

(b) the person's conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons.

An isolated or inadvertent contravention of the Act is not a *"serious contravention"* and such a contravention would not give a franchisor the right to terminate an agreement with a franchisee.

The proposed amendments would preserve strong protections for franchisees, while giving franchisors the ability to take action against a franchisee that deliberately and systematically underpays its employees. This is fair and appropriate, particularly given that franchisors now have significant responsibilities for breaches of workplace laws and instruments by franchisees and endure significant brand damage and potential costs when franchisees underpay their employees.

The amendments would provide a greater incentive for franchisees to pay their employees correctly which, in turn, would increase protection for workers.

We urge the Committee to recommend that the above amendment be made to the Franchising Code.

The inadequacy of clause 29(1)(e) of the Franchising Code regarding serious offences

Clause 29(1)(e) of the Franchising Code gives franchisors a limited ability to terminate a franchise agreement should the franchisee *"be convicted of a serious offence".*

Clause 29(1)(e) of the Code is not applicable to breaches of civil remedy provisions of the FW Act because the following s.549 of the FW Act clarifies that breaches of civil remedy provisions are not *"offences"*:

> ***549 Contravening a civil remedy provision is not an offence***
>
> *A contravention of a civil remedy provision is not an offence.*

The penalties for breaching the provisions of the FW Act relating to the entitlements of employees under awards, enterprise agreements and the NES are civil remedy provisions and, therefore, clause 29(1)(e) does not provide a mechanism for a franchisor to terminate an agreement with a franchisee that deliberately and systematically breaches workplace laws and instruments.

The inadequacy of clause 29(1)(f) of the Franchising Code regarding fraudulent actions

Clause 29(1)(f) of the Franchising Code gives a franchisor the right to terminate a franchise agreement should the franchisee *"act fraudulently in connection with the operation of the franchised business"*.

It is extremely difficult to prove, to the required standard of proof, that fraudulent behavior has occurred. As stated by Dixon J of the High Court of Australia in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (at 362–363): *"It is often said that such an issue as fraud must be proved 'clearly', 'unequivocally', 'strictly' or 'with certainty'…."*. Dixon J's judgment is often cited in cases dealing with fraud allegations.

The difficulties faced by a franchisor in establishing a right to terminate under clause 29(1)(f) of the Franchising Code are highlighted by the experiences of 7-Eleven in terminating the franchise agreement with Chahal Group Pty Ltd (**Chahal**), the operator of the McGrath Hill 7-Eleven.

7-Eleven served a Termination Notice on Chahal on 6 October 2016 after an internal review identified that the franchisee had engaged in fraudulent behavior. The franchisee had paid the relevant employees their wages each week in cash but had instructed the employees to return a portion of their wages to the franchisee each week in cash, resulting in the employees being paid less than the award rate.

Chahal took action in the New South Wales Supreme Court seeking a declaration that the Termination Notice was unlawful and seeking specific performance or damages. The matter was heard over three days in April 2017. On 4 May 2017, Sackar J handed down a decision[1] in favour of 7-Eleven.

Chahal pursued an appeal against Sackar J's decision in the New South Wales Court of Appeal. On 27 March 2018, the Court of Appeal handed down a decision[2] in favour of 7-Eleven.

The Court of Appeal's decision was handed down 18 months after the Termination Notice was served on Chahal. The legal costs incurred by 7-Eleven in defending the initial Supreme Court case and in defending the Court of Appeal proceedings no doubt extended to hundreds of thousands of dollars, and would have crippled a smaller franchiser.

Mr Clayton Ford, General Manager, Corporate Affairs of 7-Eleven, made the following pertinent comments to the media following the handing down of the Court of Appeal decision:

> *"This one termination has taken 18 months through the NSW Supreme Court and NSW Court of Appeal, during which 7-Eleven incurred significant costs that may not necessarily be recovered or fully recovered. The original hearing subjected two former employees of the Franchisee (both international students), to the trauma and anxiety of having to attend and appear as witnesses in the Supreme Court, a factor which was commented upon by the primary judge in the Court's finding.*
>
> *"The extensive resources and requirements involved in securing such a termination may well be beyond small to medium sized franchisors which make up two-thirds of Australia's franchising sector. To help ensure the integrity of the sector, the codes urgently need to be amended to provide for the right to terminate a franchise agreement in the case of serious non-compliance with Commonwealth Workplace Laws or Fair Work Instruments, such as deliberate wage underpayment."*[3]

[1] *Chahal Group Pty Ltd & Anor v 7-Eleven Stores Pty Ltd* [2017] NSWSC 532.

[2] *Chahal Group Pty Ltd v 7-Eleven Stores Pty Ltd* [2018] NSWCA 58.

[3] Convenience and Impulse Retailing, *Court dismisses 7-Eleven franchisee appeal*, 5 April 2018.

It is evident from the above that clause 29(1)(f) of the Franchising Code does not provide adequate protection to franchisors faced with a franchisee that willfully and systematically breaches workplace relations laws or instruments.

Franchisors need to have the right to terminate agreements in the special circumstances specified in clause 29 of the Franchising Code, regardless of whether the agreement gives the franchisor an express right to terminate

It is essential that clause 29 of the Franchising Code be amended to give a franchisor the right to terminate a franchise agreement in the special circumstances identified in clause 29, regardless of whether such a right is expressly included in the franchise agreement.

Franchisors cannot simply amend franchise agreements to include a right to terminate the agreement in special circumstances, because:

- Franchise agreements cannot be unilaterally varied by one of the parties;
- Franchise agreements commonly have terms between 10 and 15 years;
- Many franchise agreements have been in place for decades; and
- A franchisee is unlikely to agree to any amendment to a franchise agreement that would give the franchisor more rights to terminate the agreement.

Termination provisions of the Oil Code

For the same reasons that changes are needed to the termination provisions of the Franchising Code, changes need to be made to the termination provisions of the Oil Code.

The specific amendment that Ai Group proposes is:

36 Termination by supplier—special circumstances

(1) A supplier is not required to comply with clause 35 if the retailer:

(a) no longer holds a licence that the retailer must hold to carry on the fuel re-selling business; or

(b) becomes bankrupt, insolvent under administration or a Chapter 5 body corporate; or

(c) voluntarily abandons the fuel re-selling business; or

(d) is convicted of a serious offence; or

(e) operates the fuel re-selling business at a retail site, or an associated business conducted on the retail site, in a way that is fraudulent or that endangers public health, safety or the environment; or

(f) agrees to the termination of the fuel re-selling agreement; or

(g) breaches the fuel re-selling agreement, otherwise than by behaviour described in paragraphs (a) to (f), at least 3 times; or

(h) is likely, by continued occupation of a retail site to which the fuel re-selling agreement relates, to cause substantial damage to the business, property or reputation of the supplier; or

(i) if the fuel re-selling agreement is a commission agency—fails to bank the supplier's money under the commission agency.

(j) commits a serious contravention of a civil remedy provision in sections 44(1), 45, 50, 280, 293, 305, 323, 325, 328, 357, 358, 359, 535 or 536 of the Fair Work Act 2009 in connection with the operation of the franchised business.

Note: Under section 557A of the Fair Work Act 2009, a contravention of a civil remedy provision by a person is a 'serious contravention' if: (a) the person knowingly contravened the provision; and (b) the person's conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons.

(2) A supplier is not required to comply with clause 35 in relation to a fuel re-selling agreement relating to a particular retail site if:

(a) the whole or a substantial part of the site is to be acquired by, or by a public authority of, the Commonwealth, a State or a Territory under a law relating to the compulsory acquisition of land; or

(b) the sale of motor fuel at the site is prohibited by or under a law relating to the use of land.

Conclusion

The changes that Ai Group has proposed to the Franchising Code and the Oil Code have obvious and substantial merit.

We urge the Committee to recommend that the two Codes be amended in the manner set out above.

AUSTRALIAN INDUSTRY GROUP METROPOLITAN OFFICES
SYDNEY 51 Walker Street, North Sydney NSW 2060, PO Box 289, North Sydney NSW 2059
CANBERRA Ground Floor, 42 Macquarie St, Barton ACT 2600, PO Box 4986, Kingston ACT 2604
MELBOURNE Level 2, 441 St Kilda Road, Melbourne VIC 3004, PO Box 7622, Melbourne VIC 8004
BRISBANE 202 Boundary Street, Spring Hill QLD 4004, PO Box 128, Spring Hill QLD 4004
ADELAIDE Level 1, 45 Greenhill Road, Wayville SA 5034
PERTH Suite 1, Level 4, South Shore Centre, 85 South Perth Esplanade, South Perth WA 6151

REGIONAL OFFICES
ALBURY/WODONGA 560 David Street Albury NSW 2640
BALLARAT Suite 8, 106-110 Lydiard St South, Ballarat VIC 3350, PO Box 640, Ballarat VIC 3350
BENDIGO 87 Wills Street, Bendigo VIC 3550
NEWCASTLE Suite 1 "Nautilos", 265 Wharf Road, Newcastle 2300, PO Box 811, Newcastle NSW 2300
WOLLONGONG Level 1, 166 Keira Street, Wollongong NSW 2500, PO Box 891, Wollongong East NSW 2520

www.aigroup.com.au