"Getting ahead of the curve on franchise regulation"
Opening remarks - Keynote Panel Session, National Franchise Convention 2016
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Introduction

Good morning everyone. Thank you for inviting me to speak to you today.

I would like to begin by acknowledging the Ngunnawal people who are the Traditional Custodians of the Land upon which we meet. I would also like to pay respect to the Elders both past and present of the Ngunnawal and extend that respect to other Indigenous Australians who are present.

Joint employer liability in the strict sense, is a concept about which academics and lawyers like to contemplate. But it lives firmly in the land of conjecture in Australia.

In Australia, workplace rights and obligations are confined to the direct relationship between an employer and employee. And yet, here we are, a few months out from an election campaign in which all of the major Australian political parties committed to change to the law to address workplace compliance within franchise networks.

This follows extensive media coverage of systemic and exploitative non-compliance in one of Australia's most well-known and successful franchise systems, 7-Eleven. In the wake of 7-Eleven, I took questions from Senators asking whether there was a systemic problem with franchises in Australia. Concerns have been raised about others franchise systems – including United Petroleum and Pizza Hut, to name a few.

Today I want to explore ideas of responsibility, the law and expectations, and how you can stay ahead of the curve and ensure you are meeting all three.

The law today – accessorial liability

Like all good lawyers, I like to start with the law.

Employers are responsible for ensuring that their employees receive their entitlements. But even under the current framework it's not as simple as that. The Fair Work Act already extends responsibility beyond the employer for breaches of workplace laws. It extends the available remedies and penalties to a person who is 'involved' in a breach.

The accessorial liability provisions have been well utilised by the Fair Work Ombudsman**.** Ninety-two per cent 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.

Take for example, the case of Yogurberry, a franchise that sells self-serve frozen yoghurt out of fourteen outlets across Australia.

We allege that Yogurberry's World Square outlet underpaid their employees and failed to keep records and issue payslips. We have joined Yogurberry Australia's head company and another Yogurberry Group company to the matter, which was involved in administering the payroll of the outlet. And we are seeking some novel orders from the Court.

In addition to penalties, we've asked the Court to place some strong obligations on the head company – requiring a professional external audit of all of the stores throughout the entire retail chain. We expect the Court to give its decision in the near future. We have pressed for these orders because we want to ensure that all Yogurberry outlets are compliant.

What we find in practice, within supply chains and networks like franchising systems, is that there is often someone at the top or the centre of the network who – while not the employer – controls key settings, including how much money is being paid down the line. It is our standard practice to ask who is the ultimate beneficiary of exploited labour and what role have they played in what has occurred.

Recent cases confirm that an accessory can be liable for the unpaid wages of workers they did not directly employ.[1] Could this happen to you? How do you stay ahead of the curve and make sure it doesn't?

Community expectations – today and into the future

So, that's the law – for the moment. But outside of what the law requires, what does the community actually expect?

[1] For example, in *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd and Another*, for the first time the FWO obtained an order for a director of a security company, found to an accessory, to back-pay an employee. Prior to this, the FWO took the view that only an employer – in most cases, the company - could be ordered to back-pay employees, with accessories only facing penalties.

7-Eleven isn't where it is today because it has been found to break any laws. Our extensive Inquiry found systemic exploitation of its mostly international student workforce throughout its network – for almost a decade. Yet key personnel within the franchise head office at that time, including former executives, all expressed complete surprise as to what had been going on.

Yet 7-Eleven has paid for the actions of its franchisees – literally. Last week, the company's wage repayment program website reported it had paid over $35 million to nearly 1000 workers. None of whom were directly employed by the company. This eclipses the penalties available under the Fair Work Act by a significant margin.

And they have of course paid in their reputation. An assertion that the franchise has 'no control' over franchisees, that are 'separate businesses' draws an incredulous response from the public when things go wrong.

If a franchise can ensure that the hamburger I purchase at Melbourne Central is identical to the one I purchase in Townsville in look and taste; or that I get the same friendly service from the gardener I hire in Canberra as in Adelaide – if the franchising system can deliver such uniformity of product and service throughout all outlets, then claims that it cannot also ensure that its workforce is properly paid, do not stack up.

This may be why we see all major parties proposing to move towards extending liability to franchises in certain cases when there has been a failure to comply with workplace laws.

What does the future hold? Don't wait to get ahead of the curve

So what's the best way to get in front of this new regulation, whatever form it may take? Or get ahead of a scandal, like the one at 7-Eleven?

Some franchise systems are already stepping up and taking this responsibility in both hands. The Fair Work Ombudsman has had a productive relationship with one such franchise, McDonald's Australia, for a number of years now, reinforced by a formal partnership. 85% of McDonald's' workers are under the age of 22. We know that people starting out in the workforce can be unaware of the rules and less likely to challenge the boss if they think something isn't right.

However, McDonald's has put a number of systems in place to ensure its very young workforce is being paid correctly and can raise issues about their work. In the two years ending at 30 June 2016, my agency received 33 requests for assistance from McDonald's' employees out of a total of some

100,000 employees. Of those 33, only 10 resulted in a finding that the worker needed to be back-paid – which they were, promptly, once the issue was referred to McDonald's.

It's worth noting that in contrast to what we've seen from McDonalds, young people are generally over-represented in the Fair Work Ombudsman's complaints. One in every four requests for assistance we receive comes from a person under the age of 25. So, given what you might expect from such a young workforce, it's an extraordinarily low number of McDonald's employees who are raising concerns.

McDonald's has put a range of steps in place – auditing of its franchises, an employee hotline, state of the art time recording to ensure that workers get paid for every hour they work. McDonald's didn't wait for workplace compliance issues to blow up in their face – they were proactive in their engagement with us and are way ahead of the curve on these new laws.

This approach is to be commended.

We also have compliance partnerships with a number of other franchises including La Porchetta, Dominos, JB Hifi and the Coffee Club.

One-size does not fit all

However, I appreciate that franchising is a diverse sector. McDonald's is a big, well-resourced, sophisticated outfit. It has been doing what it does for decades and its systems and governance arrangements match the size and complexity of its network.

If you are an emerging franchise with just a few outlets that you personally know, you may feel confident that people are being paid appropriately and that your system is compliant. Formal systems or arrangements with the Regulator may seem overly bureaucratic or too resource intensive.

Perhaps – but are you growing?

If you can envisage a time when you won't have close personal relationships with every outlet in your system, maybe you need to plan for systems that will replace your own personal judgement and direct oversight of the operations that make up your business, brand and reputation.

For my agency, the canary in the coalmine is when we find that there is no monitoring of workplace compliance in a network, and employee concerns are referred straight to the regulator rather than acted on by the business. So we are encouraged when we see franchises taking steps to support

compliance throughout their operations. Some of you may have chosen to do this by signing up to the Workplace Transparency Standard for franchises set up by FranData, the organisation that has established the Australian Franchise Registry, which supports franchises.

This is a good start, though we note that signing up doesn't assure that there will be monitoring of outlets. But where a franchise system publicly commits to compliance and takes steps to support this, it indicates to us that the franchise is taking its responsibilities seriously. Not only will they have better visibility of their networks, they're more likely to be able to assist our investigations.

You might want to consider how you ensure the standard you sign up to is met in practice – in our experience, good intentions are not always sufficient.

We are in discussions with a number of large franchisors about arrangements to improve their systems to encourage compliance. My Executive Director of Dispute Resolution and Compliance, Steve Ronson, spoke with Franchise Council of Australia members in NSW recently expressing some of the frustration we've been feeling about working with some major franchise brands.

I'm glad to say that the response to Steve's speech was very positive and that clearly franchisors' view of the extent of their workplace relations responsibilities is shifting. Those franchisors will be ahead of the curve when the Government legislates its policy commitments.

So act now – and here's how

But I am conscious that formal arrangements with the regulator isn't a choice every business wants to make. So if you're not in that territory yet, I suggest you consider three basic things that you could do to stay ahead of the curve:

1. **Make it clear you expect your system to comply with workplace laws** and what the consequences are if they persistently breach the law. Ensure you have the levers in place to take appropriate action.

2. **Support them to comply by getting them the right advice about pay and conditions,** such as encouraging them to sign up to our Online MyAccount service.

3. **Encourage employees with concerns to come to you about it** – this is vital intelligence about what's going on in your network.

These ideas can be adopted in their most basic form, or scaled up with more support and investment for bigger operations when the time is right. There is no one silver bullet. Our Compliance Partnerships have a number of options that you could take a look at and tailor to your own business.

For our part, the Fair Work Ombudsman too is looking at what support we can offer to assist franchises to get ahead of the curve. We are talking with the FCA about the sort of support and resources that would assist you to meet your obligations under the law – now and into the future – as well as the community's expectations.

I'd also like to hear about anything that you've tried that has worked, or the kinds of resources you need to get things right.