

IBA/IFA 34TH ANNUAL JOINT CONFERENCE

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A NEW ERA IN INTERNATIONAL FRANCHISING

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**ADVOCATING TO PROTECT THE FRANCHISE BUSINESS MODEL –
STORIES FROM THE TRENCHES ON THE JOINT EMPLOYER ISSUE**

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1. Introduction

The current “joint employer” saga in the United States started in July 2014, when the National Labor Relations Board’s Office of General Counsel charged McDonald’s for unfair labor practices involving workers at franchisee-owned and operated restaurants. This laid bare the fact that the independence of the franchisee and franchisor, a separation accepted and welcome by both franchisors and franchisees, and the central premise upon which franchising is based, is by no means universally accepted or even understood.

This issue doesn’t stop at the borders of the United States of America. In fact, in a number of jurisdictions around the world, the concept of “joint employer” already exists, in most cases long before it became a “hot button” issue in the United States. In virtually all these countries, the underlying legal doctrine that leads to a “joint employer” finding is roughly similar to what the franchisors and franchisees face in the United States – that is, actions (or the right to take actions) of a franchisor that go beyond what is deemed necessary to achieve brand protection could lead to the combination (instead of separation) of the franchisor and the franchisee for employment law purposes when it comes to the franchisee’s employees. It remains true that in many countries, the possibility for a finding of “joint employer” in the franchising context still remains remote. However, despite (or perhaps because of) the lack of such findings, and the policy and legal debate in the United States (which is still the largest franchising market by far) on this issue, there are an increasing number of legislative and regulatory proposals around the world that would blur the boundaries between the franchisors and franchisees on employment related issues.

As an example, as part of its otherwise business-friendly labor reform, France in August 2016 adopted a law that provides for the possibility to implement a "join social committee" within a franchise system, if the franchisor and the franchisees in France combined have a minimum number of employees. There is an obligation to negotiate with trade unions if it is requested by trade unions. The role of this committee is to be informed of the franchisor's decisions which may impact the volume and structure of the workforce, working time, hiring and working terms and vocational training of the franchisees' employees. The forum is also informed of the undertakings entering and leaving the network. In addition, the forum formulates, upon its initiative, and examine, upon the request of the franchisor or the franchisees' representatives, any proposal aiming at improving the work conditions and collective complementary welfare guarantees of the franchise network employees. After much pushback from the business community, in March 2018, this law was withdrawn (and the constitutionality of the withdrawal was confirmed by the French Supreme Constitutional Court (*Conseil Constitutionnel*)).

In response to such attack on the separation of the franchisors and the franchisees on employment matters, the franchising industry in the United States (led by the International Franchise Association) and around the world have responded with unprecedented efforts to educate the lawmakers and regulators in the relevant jurisdictions, and to advocate for this central principle that has greatly contributed to the success of this business model over the last few decades. This paper will examine the recent episodes in Australia, Canada and the United States, and offer an overview of the resources that are available to franchise advocates around the world who are engaged in such efforts.

2. United States of America

2.1 The Changed Joint Employer Standard

On August 27, 2015, the NLRB issued a decision in a case known as Browning-Ferris Industries (BFI). Despite the Board’s assurance that it had merely “refined” its standard for determining joint employment under the NLRA by applying “long-established principles,” employers knew that the

decision represented a significant policy change with potentially serious economic consequences. In replacing the time-tested “direct and immediate control” standard with a sweeping and vague test based on “indirect” and “potential” control over fundamental terms and conditions of employment, the NLRB had suddenly exposed a broad range of businesses to liability for workplaces they don’t control and workers they don’t employ.

The Board’s decision only reinforced the anxiety created by the NLRB’s General Counsel, Richard Griffin, who several months prior had filed unfair labor practice charges against McDonald’s as a joint employer with several McDonald’s franchise owners. These charges were based on complaints filed by Service Employees International Union (SEIU)- funded worker centers as part of the union’s campaign to organize fast food restaurants.

The NLRB’s actions, alarming enough on their own, raised additional fears within the business community that other regulatory agencies would start applying expansive standards to find joint employment status under their respective statutes. Those fears have proved well founded, as both the Occupational Safety and Health Administration (OSHA) and the Wage and Hour Division (WHD) at the U.S. Department of Labor (DOL) have indicated their intentions to heavily scrutinize situations that may give rise to joint employer liability. Moreover, several state and local governments have picked up on the concept and begun to apply their own expansive views of joint employment.

2.2 The Writings of David Weil

A significant contributor to the philosophical underpinnings of expanded joint employment is David Weil, previously a professor at Boston University and the Administrator of the WHD. In 2010, while still a professor, Weil wrote an enforcement manual for the WHD that emphasized the term “fissured workplace”. In that manual, Weil claimed:

The relationship between worker and employer has become more and more complex as employers have contracted out, outsourced, subcontracted, and devolved many functions that once were done in house. Like rocks weakened and split apart by the passage of time, employment relationships have become deeply “fissured” in many sectors that employ large numbers of vulnerable workers.

According to Weil, this so-called “fissuring” is responsible for increased violations of labor and employment laws and higher levels of economic inequality. Weil’s solution is to go after the employer with the deepest pockets by linking that business to the employer alleged to have actually committed the violation:

WHD should pursue strategies that focus at the top of industry structures, on the companies that affect how markets operate and many of the incentives that ultimately affect compliance. This starts with having a clear “map” of how priority industries operate and how that results in employer behavior. It then requires putting in place coordinated investigation procedures built around related business entities rather than individual workplaces and using those regulatory tools (from persuasion and education to the use of penalties, hot goods provisions, and other legal tools) to craft comprehensive agreements.

Weil reinforced this theory in a 2011 article advocating enforcement targeted at “higher-level, seemingly more removed business entities.” In 2014, he authored his most comprehensive work on the issue, a book entitled: “The Fissured Workplace: Why Work Became so Bad for so Many and What Can be Done to Improve It.”

“The Fissured Workplace” calls for targeting certain industries, such as franchising, hospitality, and construction. Weil considers these industries the predominant drivers of the alleged abuses featured in

his book (although he gives little credit to franchising and subcontracting for the jobs, economic growth and entrepreneurial opportunities those business models create). “The Fissured Workplace” suggests that dramatic and radical changes to the law are needed to increase liability for employers. Weil states that, “[I]nnovative solutions could be created by reestablishing that lead companies have some shared responsibility for the conditions arising in the network of workplaces they influence through their activities.”

It should come as no surprise that Weil’s suggested solution for the alleged problems associated with “fissured workplaces” are almost identical to those used to justify an expanded joint employer standard. Indeed, some in the labor and employment law community have called Weil the “Godfather” of the campaign against franchising in the U.S. and around the world.

While Administrator Weil looked at business models like franchising and subcontracting from an academic and enforcement perspective, organized labor had a much more outcome-based approach to the joint employer issue. As observers of U.S. labor policy know, membership in labor unions has been in a steady decline for 60 years. Union membership peaked in 1955, when 35 percent of the workforce was unionized, but in 2015 just 11.1 percent of workers belonged to unions. Moreover, according to the Bureau of Labor Statistics (BLS) only 6.7 percent of the private sector workforce is unionized. This seemingly inexorable decline is a major challenge to union leaders.

2.3 Why Did Labor Unions Target Franchises?

The SEIU is one of the largest and most aggressive unions in the country. In recent years, it has embarked on a highly ambitious campaign to unionize the fast food industry. This would appear to be a lucrative target. BLS data reveal that in the broadly-defined “food services and drinking places” category, which employs 8.5 million individuals and includes many franchise restaurants, only 1.5 percent of workers belong to unions. Thus, there is vast, untapped potential amongst this pool of employees. An impediment to unionizing many of these workers, however, is the franchise system.

Franchising has been a way of providing products and services to customers in the United States since the mid-19th century, when Isaac Singer invented the sewing machine and created franchises to distribute them. A franchisee is typically a small business owner who operates one or more local businesses under the brand name of the franchisor. The franchisor, by contrast, is a larger enterprise that focuses on product development, brand management and marketing.

The major advantage of operating a franchise is the ability to utilize the franchisor’s established brand name, which reduces the need for a small business owner to spend resources establishing their own market identity, something that is especially helpful in highly competitive industries. For the franchisor, the financial benefit comes from the trademark, royalties, and service fees paid by the franchisee. The key is that the franchisor and its franchisees are legally separate businesses.

As unions have found over the years, organizing in the fast food industry is challenging. First, many workers view their employment in that industry as temporary, so the idea of union representation and paying dues may be of little interest. Second, turnover in the industry is high, in some cases as high as 75% annually. What this means for unions is that an organizing campaign at an individual location must be in almost perpetual operation, a potentially expensive proposition, as by the time a majority of a workplace has been convinced to vote for representation (already a difficult task for the first reason mentioned above), most of those recruits are likely to have moved on to other employers and the process must start again.

However, these challenges are compounded by the franchise model. First, even if a union does manage to win an election at a franchised fast food restaurant, it will have made no inroads into businesses operating under the same banner as they themselves are independently owned and operated establishments. Second, because the franchisor does not own or manage franchisees, there is no obligation for the brand name company to come to the bargaining table. Thus, the union will have spent a great deal of time and money for a handful of employees, and seemingly reached a dead end.

To make the proposition more viable, what the SEIU needs is a way to break down the legal separation between a brand name company and its franchise owners. In other words, it needs a way to make them joint employers under the NLRA. Once joint employment is established, organizing even one restaurant at one location becomes a pathway to other restaurants and, more importantly, the means to force the brand name company to the bargaining table. As part of contract negotiations, the SEIU can then ratchet up pressure on the brand name and seek a nationwide agreement on organizing concessions, such as allowing franchisees to be organized by card check. With concessions in hand, the SEIU could rapidly pick off restaurants around the country, giving it leverage for even more concessions. These might include a region-wide organizing agreement, under which an employer essentially surrenders facilities in a given region to a union in exchange for the union refraining from organizing in other regions.

While in past years, such a scheme stood little chance of success, the SEIU found a willing co-conspirator in the NLRB and other government agencies during the Obama administration. The fallout from basing broad-reaching policy decisions on the narrow interests of one union will extend far beyond fast food. Put simply, what may have started as a labor issue has become a local small business and jobs issue.

2.4 The Changing of the Joint Employer Standard

Until 2015, the NLRB found two separate and independent business entities to be “joint employers” only if they were to “share or codetermine those matters governing the essential terms and conditions of employment.” In practice, the Board examined whether a putative joint employer exercised “direct and immediate” control over the employees at issue. This direct control was generally understood to include the ability to hire, fire, discipline, supervise and direct. So, for example, a franchisor would be considered the “joint employer” of its franchisees workers if the franchisor participated in the hiring, firing and discipline of the franchisees workers, and directed and supervised the work to be performed. While the test was very fact-intensive with no one factor being more compelling or persuasive than another, it was generally easy for businesses to follow.

This test, which the Board applied for over 30 years, and which had been endorsed by reviewing federal courts of appeal, made perfect sense. It ensured that a putative joint employer was actually involved in matters that fell within the Board’s purview, to wit, the employment relationship. It also ensured that such companies would not be improperly embroiled in labor negotiations or disputes involving employees and workplaces over which they had little or no control.

In August 2015, the NLRB issued a decision in *Browning-Ferris*, ruling that it was a joint employer of Leadpoint employees and had an obligation to participate in collective bargaining over a contract for those workers. In so doing, the Board overturned long-standing precedent. Discarding the clear, bright-line joint employer test described above, which focused on direct and immediate control, BFI adopted an amorphous, ill-defined test that will find joint employment status based on indirect or potential control over the terms and conditions of employment of another company’s workers. Moreover, the Board expanded its definition of “control.” In addition to the traditional indicators — e.g. hiring, firing, and supervising, the Board announced it would also look to include factors such as specifying the

number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance.

The expansive new standard articulated in BFI is simply unmoored from the realities of the modern workplace. Indeed, the very nature of a contractual relationship presupposes at least some control over the services, results or product agreed to. For example, surely a company that contracts with a food service business to provide cafeteria services will retain a modicum of indirect control to ensure that the food quality, prices and speed of delivery are what it bargained for in the contract. Likewise, a business that brings a subcontractor onto its property will likely retain ultimate control over which of the subcontractor's employees are actually allowed on the worksite so that it may deny access, for example, to someone carrying guns, selling drugs, or drinking on the job.

These types of contractual relationships are myriad and commonplace. As noted in the dissent to BFI, "the number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited." Of course, what remains unanswered in BFI is just how much reserved or indirect control is needed for the Board to consider an entity a joint employer.

Indeed, the open-ended and multi-factor test articulated in BFI provides absolutely no guidance to employers on how to structure their relationships so as to limit joint employer liability. The new test sets a rather low bar for finding joint employer status and, as the dissent stated, may "subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have."

The NLRB claims that the application of BFI is limited in scope — that it is to be applied on a case-by-case basis and "does not govern joint-employer determinations" under other labor and employment statutes. But this is mere lip service to an employer community that finds itself at the mercy of one of the most controversial and politically-motivated Boards in history. Indeed, by changing its joint employer standard in BFI, the Board has opened up a Pandora's Box of problems that may entangle almost any employer who enters into a contract for services with another business. And while the impetus behind changing the joint employer standard may have been to help one union organize the fast food industry, the collateral damage will spread much further, significantly expanding the universe of employers who can be targeted by the NLRB and the plaintiffs' bar.

2.5 The Ongoing Uncertainty of the McDonald's Case

In July 2014, the NLRB's General Counsel, Richard Griffin, announced the authorization of complaints against McDonald's USA, LLC for the employment decisions of individually owned-and-operated franchise restaurants. The underlying ULPs were filed by worker centers backed by the SEIU and alleged that McDonald's workers' rights were violated when they were disciplined for participating in minimum wage protests orchestrated by those same worker centers. While the charges were filed against the individually-owned McDonald's franchisees, they also named McDonald's USA, LLC as a joint employer. The decision to authorize the complaints represented a dramatic change in the way the NLRB viewed franchising.

The case against McDonald's involves 61 ULPs against McDonald's USA, LLC and 30 of its franchisees spread across six NLRB regions. What is particularly concerning about the McDonald's case is that the NLRB has traditionally not looked at franchisors as joint employers. Moreover, General Counsel Griffin acknowledged that well-established Board law allows franchisors a certain amount of control over operations of franchisees in order to preserve the integrity of their brands without subjecting themselves to joint employer liability. Or at least, it used to.

2.6 Joint Employer Legal Uncertainty beyond Collective Bargaining

Building off the BFI standard, federal circuit courts have created a confusing web of factors that are incredibly challenging for small businesses, including franchises, to follow. The most recent and expansive joint employer standard was recently adopted by the Fourth Circuit. See *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017). The Fourth Circuit’s decision moves the analysis away from actual, direct and immediate control on employees’ essential terms and conditions of employment to focus extensively on the relationship between the two businesses.

The court found that a joint employment relationship exists when “two or more persons or entities are ‘not completely disassociated’ with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine – formally or informally, directly or indirectly – the essential terms and conditions of the worker’s employment.” Under this standard, the courts have complete discretion in deciding whether a joint employer relationship exists. The *Salinas* case requires an examination of the indirect business relationship in every case, even if one of the businesses exercises absolutely no direct control over the employees of the other business.

2.7 IFA Fights Back to Preserve the Franchise Business Model

A year before the NLRB decision in BFI, IFA launched the Coalition to Save Local Businesses. The CSLB, led by franchise owners and more than 23 trade associations representing franchising and other businesses impacted by the joint employer standard, was launched to lobby the U.S. Congress to pass a legislative change to codify the pre-BFI direct control standard.

Since 2015, local business owners have engaged their elected representatives in an effort to raise awareness of the problems associated with joint employer in myriad ways:

- 28 CSLB witnesses have testified before Congress telling their small business stories and explaining how joint employer is hurting their businesses and employees.
- 100+ in-district meetings have been held with members of Congress and their local business communities to discuss joint employer.
- 120,000+ letters have been sent to Congress expressing confusion in the aftermath of the expanded rule, asking for clarity, and urging Congressional action.
- Think tanks representing both ends of the political spectrum have endorsed a return to the prior joint employer standard, such as the U.S. Hispanic Chamber of Commerce, Progressive Policy Institute, National Gay & Lesbian Chamber of Commerce, Southern Christian Leadership Council, Third Way, Competitive Enterprise Institute, and many others.

To stop the continued harm to local businesses, Members of Congress introduced the bipartisan Save Local Business Act (HR 3441), legislation that would clarify many of the confusing regulations within the expanded joint employer rule, providing certainty for small business owners while strengthening protections for American workers.

HR 3441 would update the National Labor Relations Act and Fair Labor Standards Act to provide clarity for local businesses on what it means to be a “joint employer.” Under this bipartisan legislation, an employer may be considered a joint employer of a worker only if it “directly, actually, and immediately” exercises significant control over the primary elements of employment, such as hiring, firing, determining

pay, or supervising employees on a routine basis. This commonsense solution addresses uncertainty experienced by local businesses and workers under the expanded joint employer standard.

The House of Representatives passed HR 3441 in November with strong bipartisan support and now await attention in the U.S. Senate. Meanwhile, 19 states have passed laws that codify the traditional joint employment definition and recognize a franchisor is not the employer of a franchisee's employees.

3. Australia

3.1 Legislative Background

A little more than 12 months ago Australia was an interested observer in the global debate concerning joint employment in franchising, content in the knowledge that Australian courts had consistently resisted the concept of joint liability. No political party had shown any desire to alter the status quo, the trade union movement was silent on the topic and even in the academic world there was little interest in the concept. Then, with little warning, the Australian franchise sector encountered the perfect storm.

7-Eleven had encountered what it thought were small scale workplace abuses by a small number of franchisees, and had referred those matters for investigation by the Fair Work Ombudsman. The FWO had made little progress, and while 7-Eleven and the FWO were collaborating the complainants were difficult to pin down and the offending franchisees denied any wrongdoing. Minimal actual progress was occurring in the investigations, with the FWO subsequently claiming this was due to lack of resources and inadequate investigative powers under the Fair Work Act.

A senior investigative journalist took it upon herself to investigate more thoroughly, and with the help of a self-styled crusader who gathered specific and damning evidence she was able to chronicle much more extensive and egregious workplace law abuses linked to immigration and visa fraud by holders of temporary work visas. Although the franchisee employers and the visa holding employees were both breaking the law, and there were current legislative remedies available, the journalist chose to position the story around the exploitation of "vulnerable workers" by a major brand. Aiding the media appeal of the story was the impressive profitability of the franchisor entity, and the personal profile and wealth of the owners.

The expose gained extensive traction, and exposed underpayments to workers that were large scale, endemic and linked to broader scandalous behavior by 7-Eleven franchisees. Allegations were made of 7-Eleven management "turning a blind eye" to the behavior, including rejecting offers of assistance by the self-styled crusader. Journalists, public advocates and politicians expressed outrage as they sought to demonstrate their public championing of "vulnerable workers" in the context of an impending knife-edge Federal election. There was no mention of the associated migration scams in which the franchisees and employees jointly participated, or the deliberate and fraudulent conduct by the franchisees that even in a sophisticated network such as 7-Eleven was difficult to detect. Blame was focused squarely on the brand owner, with even the regulator making glib statements that if the brand owner could control the quality of toppings on the pizza served by franchisees it could ensure workplace law compliance by the franchisees in its network. Importantly, the general public seemed to agree. This took the franchise sector by surprise, and is probably the major learning to be drawn from the Australian experience.

The media started examining other business, focusing on franchise networks because of the brand interest and notwithstanding the problems were clearly not franchising specific. It just made for a better

story. The extent of deliberate and often fraudulent conduct by franchisees took 7-Eleven, other franchise systems and probably the Fair Work Ombudsman by surprise.

Although not legally responsible, 7-Eleven accepted moral responsibility and among other things established a compensation fund for affected employees. 7-Eleven appointed Professor Allan Fels, a former regulator with a public interest reputation, to oversee the Fund in a decision that may have had short-term value, but proved problematic in the context of sensible administration of the Fund. Nevertheless the Fund has paid out over \$150 million in ex gratia payments to employees of franchisees.

If the decision to appoint Prof Fels was, with the benefit of hindsight, unwise, the disengagement with him in the midst of the Federal election campaign was a disaster. Not only did Prof Fels unleash a stinging attack on 7-Eleven, but he expressed the view that the problems he had observed were likely to be endemic throughout the franchise sector, and he campaigned for regulatory reform. Faced with a hostile media and a high profile campaigner focusing solely on franchising and advocating reform the political parties jumped into appeasement mode. First the Greens, and then the Labor opposition, announced policies to address the perceived deficiencies in the regulatory framework. The Government felt it had no option but to announce its own policy, which it did on the run and without consultation with industry stakeholders. To differentiate itself from the Labor opposition, and perhaps avoid offending its broader employer constituency, the Government targeted only franchisors and parent companies.

Ducking for cover the Fair Work Ombudsman argued the current legislation gave it inadequate investigative and enforcement powers, and it needed more resources. Detailed industry submissions that demonstrated that the existing legislation already provided adequate protection fell on deaf ears.

As the perfect storm clouds cleared after the Federal election all major political parties had committed on the run to a legislative solution during the election campaign. The media barrage continued, making opposition to legislation impossible. So the franchise sector was left fighting a rear-guard action to ensure the inevitable legislative solution was workable.

3.2 The FWA Amendment

Legislation was introduced into Federal Parliament to amend the Fair Work Act, and on September 5, 2017 The Fair Work Amendment (Protection of Vulnerable Workers) Act 2017 was passed. The legislation makes parent companies and franchisors liable for the workplace relations breaches of subsidiaries and franchisees in certain circumstances. A “responsible franchisor” entity will be liable for breaches by “a franchisee entity” where the franchisor, or an officer of the franchisor, “knew or could reasonably be expected to have known that the contravention by the franchisee entity would occur, or a contravention of the same or similar character was likely to occur”, subject to a defence that the responsible franchisor entity used reasonable steps to prevent the breach.

A “responsible franchisor entity” is a franchisor that has “a significant degree of influence or control over the franchisee entity’s affairs”. Most franchisors, including foreign based franchisors, would seem to come within the definition of a “responsible franchisor entity”, as the test is very broad. The Fair Work Act uses the definition of a franchise under the Corporations Act, not the Franchising Code of Conduct. Under the Corporations Act a franchise is defined as “an arrangement under which a person earns profits or income by exploiting a right, conferred by the owner of the right, to use a trade mark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services.” Unlike the Franchising Code definition of a franchise agreement, there is no requirement for there to be any form of system or marketing plan, or the payment of any amount by the franchisee to the franchisor. A “franchisee entity” is defined as a franchisee whose franchise “is substantially or materially associated with intellectual property relating to the franchise”. Although the legislation does not contain a

definition of “franchisor” one would assume that means the “owner of the right” in the franchise definition. Whether a court would see that interpretation of “franchisor” as being literal – as applying only to a brand owner, and not a broader type of franchisor – remains to be seen.

The legislation also contains increased penalties for breach, stronger enforcement powers for the Fair Work Ombudsman and a new offence of a “serious contravention” with even higher penalties.

3.3 Crossing the Rubicon

Although stopping short of creating joint employer liability, the legislation does create direct franchisor exposure to regulatory penalties and civil claims by employees. The liability arises in circumstances where the franchisor knew or ought to have known of the breach by a franchisee of workplace laws, and failed to take reasonable steps to prevent it.

The Government has been at pains to point out that the legislation does not impose joint liability, a concept that has been historically rejected by Australian courts, but rather extends the existing accessorial liability provisions of the Fair Work Act. The Government felt that the accessorial liability obligations (which currently make a party that is not the employer liable for workplace breaches where the party was knowingly involved in a breach) needed to extend to a situation where the franchisor or parent company turned a blind eye or was complicit. However the legislation would appear to have broader application, and the absence of clarity around what constitutes “reasonable steps” creates compliance cost and uncertainty for franchise systems.

There are significant drafting ambiguities in the legislation that make risk assessment and compliance challenging. Industry efforts to attempt to narrow the impact of the legislation, provide additional clarity and reduce compliance costs have been unsuccessful to date. Discussions between industry bodies and the regulator - The Fair Work Ombudsman – are continuing with a view to producing some form of guidance in relation to the regulator’s enforcement intentions. In the meantime franchisors are reviewing their compliance mechanisms, and considering how best to implement effective risk management processes.

Whilst legislative compliance is one thing, the media currently has a particularly aggressive focus on workplace compliance within franchise networks. Accordingly any compliance breach has the potential to create brand damage notwithstanding that a brand owner may meet the compliance expectations of a regulator. The media analysis is simplistic and often sensationalized, largely ignoring the obligations of the franchisee as employer and expressly or implicitly allocating responsibility for all workplace breaches to the brand owner.

It is too early to say whether this new legislation will see fewer brands choose to adopt a franchise model in Australia. However the legislation will certainly add compliance cost for most franchise systems, and franchise systems seeking to enter the Australian market will need to consider their workplace law exposure alongside other business and legal risks.

3.4 Lessons Learned

There are a few lessons from the Australian experience:-

1. Whilst franchisor / franchisee disputes will rarely be newsworthy, stories that involve workers being underpaid in a network of a major brand will be front page news and receive ongoing media attention;

2. The brand damage to franchise systems by concerted adverse media coverage can be profound, particularly if they are publicly traded entities;

3. The public, the media, workplace regulators and most politicians have higher expectations of brand owners than mere compliance with the law. On major issues they see the buck stopping with the brand owner irrespective of the legal structure;

4. The franchise sector needs to proactively identify matters of potential concern, and develop industry solutions. If regulators are left to “solve” a problem that exists in the franchise sector they will usually produce a sub-optimal outcome;

5. Politicians, regulators, bureaucrats, the media and the public have a very poor understanding of the competitive advantage derived from the separation of responsibilities between franchisor and franchisee; and

6. Journalists are no longer objective or independent. They usually will have a definitive position on an issue, and are often activists in the reform agenda. As a consequence it is very difficult to present a contrary view.

4. Canada

4.1 Background: Launch of Consultations & Release of Interim Report

In 2015, the Ontario Minister of Labour initiated the Changing Workplaces Review (“Review”) by appointing two Special Advisors to lead the largest review of Ontario's labor laws conducted within decades and report back to the Minister. The review was to consider issues brought about in part by the growth of ‘precarious employment’.

The Review’s first phase of public consultation involved 12 sessions held across Ontario that heard over 200 presentations and received over 300 written submissions; Canadian Franchise Association (“CFA”) actively participated in this phase.

An Interim Report was issued in July 2016 containing approximately 50 issues and over 225 options for further consultation. Of greatest concern to franchising was a joint-employer option put forward by the Special Advisors which consisted of the following possibilities:

1. Maintain the status quo;
2. Add a separate general provision, providing that the Ontario Labour Relations Board (“OLRB”) may declare two or more entities to be “joint-employers” and specify the criteria that should be applied (e.g., where there are associated or related activities between two businesses and where a declaration is required in order for collective bargaining to be effective, without imposing a requirement that there be common control and direction between the businesses);
3. Amend or expand the related employer provision by:
 - a. providing that the OLRB may make a related employer declaration where an entity has the power to carry on associated or related activities with another entity under common control or direction, even if that power is not actually exercised; and

b. stating which factors should be considered when determining whether a declaration should be made.

4. Instead of a general joint-employer provision, enact specific joint-employer provisions such as the following:

a. regarding franchises, create a model for certification that applies specifically to franchisors and franchisees and introduce a new joint-employer provision whereby:

i. the franchisor and franchisee could be declared joint-employers for all those working in the franchisee's operations; or,

ii. the franchisor and franchisee could be declared joint-employers for all those working in the franchisee's operations only in certain industries or sectors where there are large numbers of vulnerable workers in precarious jobs.

The 'Interim Report' triggered phase 2 of the consultation, where stakeholders were invited to provide input into the options/feedback presented by the Special Advisors.

Similarly, in the Province of Alberta from March 13 to April 18, 2017, the government conducted an Employment Standards and Labour Relations Code review. And while they were clear that this review was narrower in scope than the one being done in Ontario and that joint-employer was not being considered, the relatively vague goals of the review left open a possibility that joint-employer would be considered in the Province.

All told, franchising was under attack.

4.2 CFA's Advocacy Approach

To ensure the voice of the franchise sector was heard in both Alberta and Ontario, CFA launched a robust, multi-pronged advocacy approach, which targeted both political and bureaucratic decision makers who may be able to influence the outcome of both reviews. CFA also sought to amplify the voice of the franchise sector and leverage our 'strength in numbers' competitive advantage. Our advocacy efforts consisted of the following activities:

1. Creation of CFA's 'Changing Workplaces Task Force'

Consisting of key CFA franchisor and legal members, the Changing Workplaces Task Force met weekly to triage the ongoing threat of joint-employer, develop strategic action plans and tactics, and help guide media relations. While originally formed to combat the threat of joint-employer in Ontario, the work of the group proved valuable in supporting CFA's engagement in Alberta as well.

2. Formation of Strategic Coalitions

CFA was actively involved in advocating for the business community with the Keep Ontario Working ("KOW") employer coalition. The KOW Coalition, co-founded by CFA, is a group of Ontario's leading employers and business industry associations that was a coordinated and strategic voice for business. The KOW provided a forum for business groups to discuss the review in totality, share resources, and speak with a unified voice to the media and government. In Alberta, CFA was also plugged-in with the Keep Alberta Working Coalition.

3. Creation of ‘Changing Workplaces Toolkit’

With the help of our Changing Workplaces Task Force, CFA created toolkits that provided members with information about the risk of joint-employer, key messages to share with their franchisees, and templates to communicate with government. These toolkits were widely distributed and available ‘on demand’ for franchisors and franchisees on CFA’s website.

4. Member ‘Email Your Member of Provincial Parliament (MPP) Campaign’

A critical component of the toolkit was an automated “email your MPP” campaign, which allowed CFA members the ability to enter their Postal Code and several pieces of information pertaining to their business (company name, number of employees, etc), and automatically populate a letter that would then be sent to their local elected official. The campaign produced hundreds of letters focusing on the negative impact joint-employer would have on the economy and reached every Member of Provincial Parliament in Ontario.

5. Meetings with the Changing Workplaces Review Special Advisors

CFA representatives met with the Special Advisors on several occasions expressing our concerns with the Changing Workplaces Review, particularly with the potential for a joint-employer designation of franchisees and franchisors.

6. Active Participation in Government Consultations

Throughout the process in both Alberta and Ontario, CFA was also an active participant in the formal consultation process, making detailed submissions and contributing to working group sessions held by Ministry staff.

7. Meetings with Key Government Officials

Throughout the consultation, CFA maintained close ties with the Alberta and Ontario Ministries of Labour, including participating in a roundtable business group that met regularly with senior political and bureaucratic officials. The meetings allowed for additional face-to-face dialogue and perhaps most importantly, the prioritizing of issues for each industry group; for franchising, joint-employer was communicated as far and above the most critical threat.

8. Franchise Awareness Days at the Legislative Assembly of Ontario and Legislative Assembly of Alberta

On March 28, 2017 CFA held a ‘Franchise Awareness Day’ at the Legislative Assembly of Ontario, where members were able to meet and interact with nearly 65 Members of Provincial Parliament, be recognized in the House during Question Period, and speak with additional staff and elected officials during our reception.

On May 16, 2017, CFA also held a ‘Franchise Awareness Day’ at the Legislative Assembly of Alberta. Although smaller in size than Ontario, the interaction with nearly 50 Members of the Legislative Assembly and recognition by the Minister of Labour during question period represented an important step in building strong relationships.

9. Meeting with the Premier of Ontario's Office

Perhaps as the capstone to CFA's efforts, a meeting was held with the Premier of Ontario's office where CFA staff, Board of Directors, and members provided a clear line in the sand for the Government to consider; if the government opted to bring forward a joint-employer designation, it would indicate an attack on the franchise model.

4.3 The 'Final Report': Joint-Employer Not Recommended by Special Advisors, but Legislation

On May 23, 2017, the Ontario Government's Special Advisors released their Final Report in the Changing Workplaces Review, in which they outlined 173 recommendations to amend the Employment Standards Act, 2000 ("ESA") and Labour Relations Act, 1995 ("LRA"). Notably, although the Report did put forward recommendations designed to make it easier to unionize franchisors and franchisees, it did not recommend automatic or deemed joint-employer status between a franchisor and franchisee.

Following the release of the 'Final Report', CFA reactivated its email your MPP campaign, where hundreds of additional letters poured in to the Premier, Ministers, and Members of Provincial Parliament ("MPP") to urge the government to reject joint-employer as well as the Special Advisors recommendations around unionization in their final legislation. CFA also actively met with the Offices of the Premier and Minister of Labour to ensure the voice of franchising was well understood.

4.4 The Legislation: Joint-Employer Not Included in Alberta or Ontario Legislation

On May 24, 2017, less than one day following the release of the Final Report in Ontario, Alberta tabled their own legislation making changes to the Labour Relations Code ("LRC") and Employment Standards Code ("ESC"); the Government of Alberta had made it quite clear to CFA that they would likely take their cues from Ontario's Final Report and/or legislation. Notably, Alberta's legislation did not include a joint-employer designation.

In Ontario, a mere 7 days following the release of the 'Final Report', the Government of Ontario announced significant proposed changes to the Employment Standards Act (ESA) and Labour Relations Act (LRA) on May 30, 2017. The proposed legislation also did not include joint-employer or provisions that specifically target the franchise industry or franchise business model.

The collective voice of our membership had clearly been heard through our Franchise Awareness Days, letter writing campaigns, and face-to-face meetings with government officials. CFA was pleased to see the Governments of Alberta and Ontario recognize the independent business relationship between franchisor and franchisee as well as the significant contribution the franchising sector makes to jobs and their economies.

4.5 The Joint-Employer Threat Continues

Although the joint-employer threat has been quelled for the time being in Alberta and Ontario, other provinces across the country are currently, or planning to, conduct full scale reviews of their labor relations and employment standards acts. Notably, the Province of British Columbia is actively engaged in consultation on the matter, and has been following the outcome of changes in Alberta and Ontario closely.

Using similar tactics, CFA's approach has been to pre-empt discussion about joint-employer in British Columbia by building strong relationships with the newly elected government. Through holding a

‘Franchise Awareness Day’ on November 7, 2017, ongoing meetings with key government officials, and active participation in government consultations, CFA is confident in our ability to continue to protect the franchise business model in Canada.

5. IFA International Advocacy

In line with its mission to protect, enhance and promote franchising, the International Franchise Association works to shape a favorable environment for franchising around the world. IFA advocates for free enterprise and rules based trade and investment for franchised business.

When IFA engages in advocacy outside the United States it does so within defined criteria and on a resource light basis. IFA works to multiply its deep experience in franchise government relations with the strengths of partners like World Franchise Council member franchise associations and the US government. IFA consistently spurs its partner associations in the World Franchise Council to be as proactive as possible in protecting the environment for franchising in their home countries. Collaboration agreements have been signed between IFA and a number of other franchise associations. An IFA produced government relations guide for franchise associations will be released at the May 2018 World Franchise Council meeting in Moscow.

IFA’s engagement in international advocacy includes:

1. World Franchise Council Member franchise associations
 - Sharing IFA’s research, messaging, strategic advice and best practices
 - MOU’s and partnerships on specific issues
 - IFA produced government relations guide
 - Monitoring the franchise ecosystem and working collaboratively when issues arise
2. US government
 - IFA is a strategic partner of the International Trade Administration
 - US Commerce and State Departments including relevant country desks, embassies and consulates
 - Office of the US Trade Representative
 - IFA’s VP, International Affairs serves on a US government trade advisory committee
3. Foreign governments
 - Meetings at embassies in Washington
 - Making formal written submissions
4. Chambers and other private sector engagement

- American Chambers of Commerce
- IFA's VP, International Affairs serves on the US Chamber of Commerce's International Policy Committee
- National chambers of commerce and other relevant business groups
- Attorneys, consultants, or lobbyists
- Speaking at international franchise events
- Hosting international delegations at IFA events