Submission in response to consultation document "Addressing Temporary Migrant Worker Exploitation"

26 November 2019

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Submission by the Franchise Association of New Zealand Inc (FANZ) in response to Proposal One of the consultation document "Addressing Temporary Migrant Worker Exploitation"

Introduction and Executive Summary

1. FANZ is responding only to Proposal One of the consultation document, being the proposal to potentially introduce into New Zealand law a statutory regime modelled on the 'joint employer liability' regulation in Australia and which can impose liability upon franchisors for franchisees' breaches of employment law.

2. The reason for commenting only on Proposal One is that we do not have expertise relevant to the other proposals.

3. FANZ regards breaches by any employer of employment standards as abhorrent. FANZ fundamentally supports the need to protect vulnerable migrant workers – and indeed all workers – from exploitation. However we have serious concerns regarding the feasibility, effectiveness and consequences of the current proposals. The proposed changes could have a highly detrimental impact while not actually solving the problem. This is due to a range of factors including:

   (a) The proposals do not target the real issue underlying serious employment law breaches observed both here and overseas.

   (b) The proposals appear to greatly over-estimate the degree to which franchisors are actually able to detect breaches by their franchisees of employment law.

   (c) The proposals also appear to assume that franchisors have tools with which to enforce franchisee compliance – in fact the only truly coercive tool available to franchisors (i.e. termination of the franchise) would have serious detrimental effects upon employees.

   (d) The proposals would disadvantage responsible franchisors as against irresponsible franchisors and also increase barriers to effective market competition.

   (e) The proposal wrongly assumes that regulation would impose little cost on responsible franchisors – whereas observations of experience in Australia reveal that the compliance cost will be very significant and prohibitive for many.

(f) The resources needed for additional compliance are more than many systems could sustain and divert resources from areas of the business that benefit franchisees, employees and consumers.

(g) The proposal could disrupt and confuse employment relationships and conceivably encourage other detrimental behaviours from bad franchisee employers.

(h) The proposal is contrary to long-established and central principles of business law.

4. FANZ therefore opposes the proposed regulation.

5. FANZ submits that if legislation were to be introduced, the regulator would need to give considerable guidance to the franchise sector, to reduce uncertainty and the associated compliance cost for franchisors – hopefully reducing the main detrimental consequences identified below. We have suggestions to help address perceived problems and ensure any regulation is 'fit for purpose'. We would be happy to provide details. However we reiterate that any such regulation and the surrounding guidance for industry would need considerable further work and the full effect of such regulation is still to be realised, even overseas. FANZ's concerns about the regulatory risk, described below, explain our current position that the perceived benefits of such regulation do not outweigh the detriment it is likely to cause. FANZ supports greater resourcing of the Labour Inspectorate and increased use of the tools already available to the regulator – and improving those tools where necessary.

6. We would like to meet with the Ministry to discuss these issues further.

Answer to Question 1A

Do you agree that people with significant control or influence over an employer should be responsible for that employer's breaches of minimum employment standards?

7. No, for the variety of reasons set out below.

Franchisees are genuinely independent parties and the premise (that they are not) is not valid.

8. Franchisees are about being in your own business but not on your own – they are not subsidiaries. If you start treating them as subsidiaries – as MBIE appears to be proposing – then franchisors may as well set up their own stores. But this is not something most franchisors are able to resource – certainly not on a wide scale – so would seriously limit new venture, competition and employment creation.

9. If we draw an analogy that has the franchisor as parent and the franchisees as children, and decide that it is somehow a fair solution to go to the parents whenever something goes wrong with the children, this risks discarding the principle that each act independently. This

independence is a very important principle and foundation of commercial law and business. If we confuse that, we risk getting all sorts of unforeseen and confused issues down the track.

Proposal one does not address the real issue.

10. The real issue in migrant exploitation is rogue operators who are willing to breach the law. No honest business will exploit its workers and no honest franchisor will knowingly allow this to happen, even without joint employer liability. We do not express a view on why rogue operators deliberately exploit migrant workers. However, Senior MBIE officials have been quoted as stating that:

> *"The Labour Inspectorate says a "culturally integrated business model" is at play.*
>
> *Senior MBIE officials believe any sector of the economy that becomes dominated, or 'captured', by a single ethnic group becomes a risk because rogue operators will exploit their compatriots."* [1]

We do not see how Proposal One and the massive compliance burden described below will solve this issue.

11. We cannot think of any franchised business that is set up in the knowledge it could lead to worker exploitation. We think it is wrong to impose significant costs onto franchise systems and incur regulatory risk when the real issue is a relatively small number of rogue people who are deliberately breaking the law. As we say later, we expect the regulatory benefit of Proposal One would be far exceeded by the cost.

Franchisors have limited control over franchisees in practice.

12. The proposals incorrectly assume that franchisors have control over their franchisees' affairs. While it is true that franchisors can impose many and detailed obligations upon their franchisees, one must look beyond the mere fact of the obligations to how they can be enforced in practice.

13. Until very recently, New Zealand law did not support the imposition of penalties for breach of contract. As a result, franchisors do not have penalty provisions (fines, etc) in their franchise agreements. This state of affairs can be expected to continue for many years, due to the time it takes current agreements to expire and due to a general reluctance by lawyers to craft provisions while there is no body of case law to help define what is and is not lawful under the new regime.

14. Without being able to impose – and cost-effectively enforce – penalties for breach of contract, a franchisor must either expend limited resources to try to persuade a franchisee to comply (which ultimately requires the cooperation of the franchisee) or terminate the franchise.

15. Many franchisors do not have the resources to take over and operate outlets of terminated franchisees – or the resources to pay for the outlet until it can be sold. Finding suitable new

[1] Stuff 6 October 2019: https://www.stuff.co.nz/business/116300102/how-the-liquor-store-industry-is-riddled-with-worker-exploitation

franchisees to take over terminated outlets is also a persistent problem for most franchisors. Therefore the result of terminating a franchise is very often the closure of that business. This causes financial and brand damage to the franchisor (and, indirectly, to other innocent franchisees) – and many years of lost income. Furthermore, closing a business puts all the employees out of work – the opposite of what this legislation is looking to do.

16. For the above reasons the requirement for franchisors to take responsibility to ensure their franchisees comply with employment law faces some inherent difficulties. All many franchisors will be able to do to prevent ongoing non-compliance is terminate a franchisee – with the likely result that all employees will be made redundant.

17. It would be unjust to penalise franchisors for non-compliance by their franchisees when franchisors have such limited ability to enforce compliance and the only option available to them has such significant consequences (including for the employees).

18. Of course, allowing a franchisee to continue breaching employment obligations is also an unacceptable outcome – and not one that, in our view, any decent franchisor would knowingly allow to continue. However it is our view that compliance is best enforced by the regulator, who has a wider array of investigative and punitive powers at its disposal so is better able to compel compliance without also ending the employment of all the employees concerned.

Franchisors have limited ability to detect non-compliance

19. The proposals also appear to rely upon an incorrect assumption that franchisors can readily detect either accidental or intentional non-compliance by franchisees. The example given in Annexure D of the consultation document notes that the franchisor has a contractual ability to audit franchisees and states that "*it is likely the audits would require…*". This makes an invalid assumption that franchisors are regularly conducting audits.

20. Due to the resourcing audits require, audits are highly infrequent – occurring only when a franchisor already has good reason to suspect that a particular franchisee is non-compliant. Therefore they are not a tool that detects non-compliance. They serve only to confirm the existence (or otherwise) of something already suspected.

21. In most franchises, it is expected that the franchisee will typically assume responsibility for all day-to-day operational matters, such as employing staff and managing those employment relationships, with the franchisor taking responsibility for developing branding, systems, bulk purchasing, national marketing and franchise system support. The parties do not work side by side, in the same office, or even in a similar geographical location, so the franchisor has no way of regularly having "eyes on" any conduct by a franchisee in connection with an employment relationship.

Lack of contractual powers to discharge obligations

22. If legislation is enacted, franchisors will not be able to fully comply unless they have sufficient contractual powers of investigation and access to employees of the franchisees. The only source of those powers is the franchise agreement. Where those powers do not already exist, franchisors could find themselves in the invidious position of being subject to statutory obligations where they lack the necessary contractual powers to discharge.

23. It is important to draw a distinction between the extent to which a franchisor has any *actual* control over the franchisee's workplace and the extent to which they have *potential* control. Most franchise agreements would give a franchisor the ability to exercise some generic level of control over franchisee workplace compliance (common provisions include the requirement for franchisees to comply with employment laws), but we suggest it is a significant stretch to expect franchisors to essentially monitor and manage the detail of workplace compliance using those general provisions, having regard to the expectations of the franchisor and the franchisee when they entered into the franchise agreement. We also point to the comments made earlier with regard to franchisors' very limited ability to impose consequences for breach (paragraphs 12 to 14).

24. In order to be able to conduct a detailed monitoring of franchisee compliance in regard to employment standards, franchisors would need to ensure they have the necessary investigative powers to do so under their franchise agreement. Franchise agreements will generally contain provisions enabling franchisors to conduct an audit. However, as discussed above, the audit power is rarely used due to the financial and time commitment involved and is therefore ineffective as a way of detecting non-compliance.

25. Whilst in theory it would be possible to put extensive powers of investigation into a franchise agreement following a renewal of the franchise, even with these powers there is very little a franchisor can do when a franchisee simply refuses to comply. Where the relationship has become tense, it is common for franchisees to simply refuse access to documentation or to deliberately conceal the truth about the information that does exist. If a franchisee already knows they are in breach of employment standards, they are hardly going to cooperate in providing information which confirms that breach to the franchisor. Indeed, they are more likely to deliberately conceal it. This appears to significantly hinder the practicality of the proposed regulation. This is quite different from a body such as the Labour Inspectorate who can compel the provision of relevant information.

Rogue franchisors unlikely to be caught by Proposal One

26. We expect that franchisors that are likely to be recklessly in business with rogue franchisee employers are likely to be cut price groups that operate with few rules and little involvement with their franchisees, at the bottom end of the market. Those franchisors may not have the sufficient degree of control to be subject to the new laws. Hence those most needing to be covered by the regulation, may not be.

Answer to Question 1B

What would be the advantages of making people with significant control or influence over an employer, responsible for that employer's breaches of minimum employment standards?

27. In the franchising context:

    (a) A perception that it will be easier to make franchisors liable for franchisee breaches of employment law.

    (b) Potential deterrent effect.

    (c) Responsible franchisors will put considerable effort into ensuring compliance throughout their franchise system. However:

        (i) Responsible franchisors will already be taking steps to ensure compliance, to the extent they can.

        (ii) Irresponsible franchisors (being those who the regulations would really be targeting) may pay little attention to the regulation or may structure their business to avoid having sufficient control as to fall under the regulation.

Answer to Question 1C

What would be the disadvantages of making people with significant control or influence over an employer, responsible for that employer's breaches of minimum employment standards?

Diversion of resources that would otherwise support employers

28. Anecdotally, as this is all that has been possible in the limited time for submissions, FANZ is hearing reports that franchisors in Australia are diverting a very significant proportion (up to 50%) of investment they previously put into supporting franchisees, into "reasonable steps" to monitor for and prevent non-compliance with applicable laws.

29. This compliance focus – driven by regulation - diverts enormous resources away from productive activities that support franchisee (employer) profitability and resilience and increase the market competitiveness of the entire franchise network, into mostly unproductive activities (ie monitoring for non-compliance when, on the whole, there isn't any).

30. We discuss the financial impact of such regulation further below. In that discussion, it must be remembered that money spent on ensuring compliance is money that cannot be spent on supporting franchisee employers to grow their businesses or developing and improving the franchise system so as to increase its overall competitiveness in the market and to improve the products and services it offers to consumers.

Disadvantaging responsible franchisors / Reducing competition

31. The practical outcome is also that the most responsible franchisors, who invest heavily to ensure franchisee compliance with a wide array of regulatory responsibilities, are unfairly disadvantaged compared with less responsible franchisors who invest less and are therefore able to compete for potential franchisees and customers by charging less. Similarly, start-up franchisors attempting to bring more competition to a market are disadvantaged, as they have fewer resources than larger incumbent systems.

32. Although the Australian regulations to some extent allow a Court to recognise the resource differential between franchisors, what the regulations actually require in practice is sufficiently uncertain that the investment franchisors make to try to ensure compliance is disproportionate to the actual benefit achieved (particularly when considering the consequent reduction in support available to all franchisees/employers in the network).

Confusing the employment relationship

33. Introducing joint liability legislation could also have unintended consequences for employees. An employee of a franchisee does not report to or have any employment responsibility to a franchisor. This legislation could create the potential for confusion in the employment relationship where an employee is caught between the competing demands of their employer and those of the (joint employer) franchisor.

34. Employees of the franchisee are recruited directly by the franchisee and the franchisor has virtually no involvement with staff of the franchisee. This aspect of operating a franchise is regarded as being within the domain and control of the franchisee. The franchisor does not give individual direction to franchisee's staff and nor are they legally able to do so. The franchisor does not dictate to the franchisee how it should manage its staff or deal with issues of performance. The franchisor does not interfere in employment relationships between the franchisee and its employees, just as it wouldn't interfere with other contracts such as lease agreements that the franchisee may have entered into. Those aspects are part and parcel of what the franchisee assumes responsibility for in the relationship.

35. If franchisors were exposed to legal liability for breaches of employment standards including (for example) breaches by franchisees of section 4 of the Employment Relations Act, this will inevitably lead to interference by the franchisor in the contractual relationship between franchisee and employee. If there is to be joint liability for breach of employment standards then the franchisor must rightfully have the ability to step into the shoes of the employer when dealing with the franchisee's employees. This will put employees in the vulnerable, difficult and uncertain position of having to potentially answer to two employers, one being the employer who employs them and the other being the franchisor who "could" potentially be jointly liable under that employment contract, but who has had nothing to do with employing them or dealing with them on a day-to-day basis. It also raises the question of privacy. Many employees of franchisees do not want to have any direct involvement with the franchisor; they prefer to deal only with the person they perceive as their employer. Some would not even feel comfortable about their employment agreements being provided to the franchisor, much less other information about them which is personal information under the Privacy Act.

36. We suggest this will introduce a very messy and complicated level of uncertainty into the employment relationship. In particular, for the employee. How is the employee meant to know whether the franchisor is a "responsible franchisor" who should "reasonably have known" that the employer was likely to breach the law and has taken "reasonable steps" to prevent that? (These references being to key aspects of the Australian regulation.) Potentially employees could bring personal grievances against franchisors who, quite fairly and understandably, had nothing to do with the alleged breach. We would expect an increase in the number of personal grievances claims, if the Australian position is adopted allowing employees to bring civil claims against franchisors. We are already aware of employment advocates and lawyers who work on a no-win no-fee basis bringing dubious claims against employers in the knowledge that it will be cheaper for the employer to settle the claim than to fight it. This is directly contrary to the interests of justice but is already a common feature of the employment environment. It will be perceived that franchisors have deep pockets and are concerned to settle claims to keep their brand out of the news.

Potential abuse by franchisees

37. Under a joint employer liability regime, franchisees could in theory cease paying their staff in the hope that in insolvency situation, ultimately employees will have the ability to bring wages claims against their franchisors. The joint employer regime could indirectly encourage insolvent trading by franchisees.

38. A further issue is that the directors and proprietors of many franchisee entities are generally also employed under employment contracts. It is not uncommon for franchisee entities to also employ family members. It doesn't seem at all fair that in cases where there are disputes between franchisee and franchisor, the franchisee entity could cease paying the wages of employees closely related to the franchisee/employer such that they may be able to bring claims or complaints against the franchisor (and hence increase the errant franchisee's leverage against the franchisor). Again, we believe this is an area which could be open to abuse.

Interference with foundational principles of law

39. The proposal involves fundamental changes to law that should be widely consulted. Any such regulation would cut across long standing laws such as the doctrine of separate legal personality, limited liability of companies and a range of other laws. Because setting such a precedent could have far wider effects than just affecting workers' rights under employment law, it should be open to much wider consultation than a proposal to protect migrant workers.

Answer to Question 1D

What would be the costs of making people with significant control or influence over an employer, responsible for that employer's minimum breaches of employment standards?

Franchisors are small businesses with limited resources

40. The vast majority of franchisors are small businesses (employing less than 20 people). It is not the case in New Zealand that franchisors are primarily big businesses – as is sometimes suggested.

41. The small size of most participants is an important dynamic of franchising in New Zealand, which in itself is a small and geographically dispersed market. As such, franchisors and franchisees, like any other small business, are particularly vulnerable to regulatory overreach and compliance cost. Most will not have sufficient resources – or income - to take on responsibility for ensuring franchisee compliance with employment standards. Few franchisors will even have specialist HR resource. This is because they typically have small numbers of employees, and are small businesses.

42. We estimate that franchisors will, in order to ensure they are compliant with any new legislation, not only incur cost in ensuring their existing systems are compliant but will also need to employ additional employment resource to ensure that ongoing compliance is monitored. We understand this has been the experience overseas. The impact of this regulation will therefore be significant and ongoing.

43. As part of a regulatory impact assessment, we would have thought the goal would be to identify the cause of the issue and then tailor responses to address the cause in a way that does not cause substantial cost. Here the costs must outweigh the benefits as a lot of honest businesses will be saddled with considerable costs and responsibility to try to address what seems to be a narrow issue. The proposal appears to reflect highly unrealistic assumptions about both the resources available to New Zealand franchisors, and the economic effect of such regulation. We hope that a regulatory impact assessment will consider these matters.

Difficulties obtaining appropriate staff

44. Franchisors often provide some form of in-field business support to their franchisees. The nature and level of support varies greatly between systems and is inextricably linked to the operational and financial structure upon which the entire franchise system is based. This means that the scope of support (and monitoring) the franchisor is able to provide cannot be easily expanded. Furthermore, franchisors who do provide significant support often do so through one or more 'field support representatives'. Finding suitable field support representatives is difficult for most franchise systems. The nature of the role requires a broad range of highly specialised skills. The types of people who are best suited to such roles are in demand as senior managers and are also likely to be attracted to owning their own business. Recuiting and retaining such people in field support roles is highly beneficial to franchisees but is difficult for franchisors. It is made increasingly difficult as extra areas of responsibility and expertise are added to the role. If new

regulation required field support representatives (or for that matter anyone else in the franchisor's head office) to be more deeply involved in monitoring franchisee compliance with employment law, it will add another layer of complexity to postitions that are already hard to fill. Arguably, franchisors would be better to have one person with specialist employment law and investigative skills to deal with the whole network – but very few franchisors could afford to fund that position. Even in those few that could, the person's time would be spread so thinly that there would continue to be a risk of undetected non-compliance. Even conducting limited audits on a subset of franchisees (presumably selected by a risk factor assessment) would be prohibitively expensive for a great many franchisors and they would risk being accused of discriminatory profiling (noting MBIE's comments in 10 above).

Prohibitive costs

45. The introduction of joint employer liability in the franchising sector will involve for many franchise systems a prohibitive level of compliance cost. It goes without saying that the cost of compliance is a significant deterrent to the growth of business.

46. As well as the significant business disruption cost, and based on anecdotal accounts, there will be costs of:

    (a) ensuring that all systems are compliant and that there is a full compliance system. Estimated one-off cost up to $200,000 depending on the size of the system (including internal and external costs).

    (b) ensuring that systems are in place with additional employment resource being brought on board to monitor compliance. Estimated cost $50,000-$200,000 per annum, depending on the size of the system.

Costs cannot necessarily be passed on

47. The discussion paper states that "*costs could be passed on to those employers and consumers*" and "*businesses that already have good practices would likely experience <u>no additional costs</u>*" [emphasis added]. Both of these statements are, with respect, startlingly misinformed.

48. The technological tools and staffing needed to effectively monitor franchisee compliance are expensive. The more areas a franchisor needs to monitor, the greater the investment required. Yet there is a very definite limit to what franchisee employers and consumers are prepared to pay for the products and services provided to them (particularly where the 'service' is entirely compliance focussed).

49. A significant number of franchised businesses have very low fees and therefore minimal capacity for the franchisor to resource overseeing compliance. If a franchisor in such a system is required to oversee compliance with franchisee employment standards, this will not be possible unless there is an increase in fees. In turn, that will not be possible unless there is a contractual entitlement to increase fees. Typically, the franchisor does not have a unilateral right to increase fees.

Answer to Question 1E

If you run a business, what steps does your business take to identify and mitigate the risk of exploitation occurring in your supply chain?

50. Not applicable to FANZ. Due to the limited time available for submissions, we have also been unable to survey our members as to what they do to encourage compliance throughout supply chains. However we do note that not all businesses (including not all franchise systems) have the luxury of being able to easily change suppliers or accept increased wholesale pricing, in which event their ability to exert leverage over the supply chain and demand compliance, is very limited. Although many large companies do now audit their supply chains and ensure compliance, and that is to be welcomed, there are relatively few in the privileged position of being realistically able to do that to any great degree. Franchisors arguably have even less freedom than others, as they need to also consider the expectations and needs of their franchisee network. So for example, a franchisor may be inclined towards a more expensive supplier with better labour practices, but accepting increased costs may be contrary to the wishes of the franchisee network and puts further pressure on franchisees' own margins (an issue which MBIE has identified as possibly contributing to franchisee breaches of employment law).

Answer to Question 1F

Do you have any other comments, suggestions or information on this issue?

Further context

51. A brief explanation of franchising may help give further context to these issues.

52. Franchising, or business format franchising as it is also called, is a method of doing business in which a business methodology (or system) is developed by a franchisor. The franchisor then grants individual franchisees the right to use that methodology, including relevant intellectual property controlled by the franchisor, for the purposes of operating a franchised business for that franchise system.

53. Franchisees are generally granted the right to use the franchise system in a particular geographical territory and for a period of time. Franchisees are free to operate their franchised businesses as they see fit but must comply with the business format and methodologies that are laid down by the franchisor in order to achieve consistency across areas of the business considered important by the franchisor.

54. Franchisees pay ongoing fees to the franchisor, and the franchisor has an ongoing obligation to update and develop its system.

55. There is no such thing as one generic franchising model that is capable of precise definition. Each franchise system has a unique business structure, upon which the entire business is built.

Therefore the extent to which a franchisor mandates business procedures and systems, and the extent to which franchisors are involved with or can influence their franchisees' businesses, varies considerably between systems. However, all franchise systems are built on the premise that they are separate businesses run by different owners – franchising (for franchisees) is about being in your own business but not on your own.

56. In some franchises, franchisors will wield a considerable degree of actual power and control over franchisee's day-to-day operations. Conversely, in other franchises, franchisors wield very little power and control over the day-to-day operations of the franchisees. Whilst it is usual to see a clause in the franchise agreement that requires franchisees to comply with all relevant New Zealand employment laws, the franchisor will typically have limited practical ability to ascertain whether in fact there has been a breach of any employment standards (even in a relatively high-control system).

57. In some franchises, the franchisor may not even have any particular business systems or even any theoretical control over any aspect of the franchisee's business. Examples include cooperatives, buying or group marketing groups and branded product distribution agreements.

58. Thus, whilst the term "franchising" appears, at first glance, generic and therefore potentially capable of blanket regulation, there are in fact numerous different forms of franchising and franchise models. In part, this reflects the fact that franchising operates across many different industry sectors, such as retail, food, convenience, motor vehicle, home services, real estate, transport, financial services and so on. Franchising is a methodology of doing business but it is not a homogenous industry sector in and of itself.

59. Franchising brings numerous benefits to New Zealand, not just in its monetary contribution to GDP as we have explained above, but also in social and community benefits associated with empowering and enabling average New Zealanders to own their own business. The benefits to franchisees who purchase a franchise include the ability to operate a business without having to invest as much time, money and risk in setting up that business. The business methodology is provided to them by way of the operations manuals and training by the franchisor, in return for which they pay franchise and training fees. Franchisees also receive ongoing support and guidance of their franchisor, although the breadth and extent of such support will vary by franchise network. The benefits to franchisors include the ability to grow their brand and the franchise network, take advantage of bulk purchasing power and compete more effectively and more broadly than they could alone. Franchising has enabled the growth of many New Zealand brands, some of which have subsequently exported overseas.

60. In the context of Annexure D, we think it is important to remember that New Zealand franchisors – and New Zealand master franchisees of Australian and other international franchise systems – are small businesses. The scenario in Annexure D of the consultation paper is not reflective of a typical New Zealand franchise system.

Significant transitional period required

61. We believe that if the Australian law is introduced, franchise agreements will need to be significantly modified to give franchisors far more detailed powers of investigation, such as the ability to enter onto the franchisee's premises to retrieve documents and information if necessary, as well as being able to have confidential access to staff of the franchisee. We suggest that the process of modifying franchise agreements would require a significant delay or transitional period before any legislation comes into effect. That is because franchise agreements cannot be changed without the approval of the franchisee. As this is a significant contractual power, it would not be appropriate to include it in an operations manual and so the consent and agreement of franchisees would be required. As such, the appropriate time to amend the agreement will be on expiry. Most franchise agreements are of the terms of around six years although some extend to 20 years.

More should be made of existing regulatory tools

62. We consider that the ability to sheet home liability to accessorial parties under s142W and s135 of the Employment Relations Act 2000 provides an adequate liability pathway to ensure that orders can be obtained against persons who are either turning a blind eye or knowingly collaborating with breaches of employment standards. Where it is perceived that the existing provisions are inadequate, we suggest the existing law could be amended to provide an expanded definition of "knowingly concerned", to catch the situation where a person "was, or ought reasonably to have been aware, of a breach and could reasonably have prevented the breach". Even a change such as this would require considerable further thought and some industry guidance to help reduce the compliance burden associated with legislative uncertainty.

63. In addition, increasing the fines and penalties under the existing legislation would provide a stronger deterrent to non-compliance.

64. FANZ also supports increased funding for the enforcement arm of the regulator, since our view is that this is the entity best able to investigate and deal with alleged breaches of the law, in a way that is most likely to protect both vulnerable employees and the legitimate interests of others in the franchise network (who are themselves also employers).

Suggestions to reduce legal uncertainty and regulatory risk

65. We believe it is a significant deficiency and source of frustration for franchisees in the Australian legislation that there is no specific definition around what comprises "reasonable steps to prevent a contravention of the same or a similar character". It is the legal uncertainty around what that means in practice, that primarily gives rise to the excessive compliance costs that detract from positive investment in franchisees' businesses.

66. We expect that lawmakers considering introducing such a significant change to the law must already have a reasonable idea of the types of actions that will pass as "reasonable steps," and take account of the different relevant franchise system situations (e.g., age, size, business complexity etc). If that is the case, then lawmakers should be able to – and should – provide comprehensive guidance to assist franchisors with compliance while also helping define the limits

of what is required, so as to reduce legislative uncertainty and the associated compliance costs. We note the ACCC in Australia currently provides a similar resource. Such material would need to be carefully constructed, given the enormous range and variety of franchise systems.

67. Of course the exact nature of what:

(a) can reasonably be expected of franchisors (or other entities having sufficient control over an employer) so as to avoid the detrimental consequences described above; and

(b) would provide meaningful support to MBIE's efforts to protect vulnerable workers

would require much careful and collaborative consideration by those having knowledge of both franchising and employment law compliance. That is something we could assist with.

68. Building on the above suggestion, we suggest that a franchisor who discovers or ought reasonably to suspect that a franchisee is breaching employment law, should be required to report that franchisee to the Labour Inspectorate and should (if that is done) have no further liability in respect of that franchisee's breach. The test for whether a franchisor ought reasonably to suspect a breach must require no more than the practical and limited steps clearly defined in Ministry guidelines discussed at paragraph 66.

Problematic regulatory definitions

69. If there was a reason to single out franchises or franchisors in any regulation, then the legislation may need to include a definition of "franchise" or "franchisor" (noting that the Australian Fair Work Act does include a definition of "responsible franchisor"). In that regard, we note there is no commonly accepted legal definition of a "franchise", worldwide, and even in Australia statutory definitions vary. We raise this issue simply to illustrate the difficulties that can arise and would need to be overcome if any regulation were to refer specifically to franchises.

The significance of FANZ and Franchising

70. FANZ is the peak body representing the franchising community at government and other industry forums. FANZ is also a member and active participant of the Asia Pacific Franchise Confederation and the World Franchise Council.

71. Founded in 1996, FANZ was established to bring members of the franchise community together to set standards, promote good practice in franchising, assist franchisors to share information and experiences and generally encourage the growth of franchising in New Zealand.

72. FANZ has over 140 franchisor members, covering a substantial percentage of active franchise systems in New Zealand. FANZ's total members include franchisors, franchisees and approximately 70 affiliate members such as trading banks, law firms, accounting firms, business consulting firms and specialist franchise consulting firms. Members of FANZ are committed to observe the best practice in franchising through adherence to a Code of Practice, Code of Ethics and the Rules of the Association.

73. Franchising makes a significant and growing contribution to the New Zealand economy. A 2017 Survey of New Zealand franchising, conducted by Massey University and Griffith University in conjunction with FANZ, found that:

(a) There were 631 business format franchise systems in operation in New Zealand;

(b) Those franchise systems account for 37,000 operating units, the majority operated by franchisees;

(c) Business format franchise systems are a major employer, providing employment to more than 124,200 workers; and

(d) Business format franchise system sector turnover was estimated $27.6 billion, being equivalent to 11% of New Zealand's GDP. These figures are exclusive of the significant additional turnover provided by both fuel retail and vehicle sale sector franchise systems.

Thank you

74. Thank you for the opportunity to comment on these proposals. We are very willing to work with Government and share information that may assist the drafters of any proposed legislation to achieve a balance that helps ensure employment law breaches are detected and dealt with by the appropriate authority while protecting the contribution franchising can make to the economy and to individual New Zealanders. We would like to meet with the Ministry to discuss these issues further.