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27 October commencement for franchisor liability under "vulnerable worker" workplace laws – What can we learn from franchisor "joint employer" liability in the United States

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As is often the case in franchising, Australia is following the lead of the United States and introducing laws to make franchisors responsible where franchisees have contravened the employment laws. The new test commencing on 27 October 2017 introduces liability for contravention of employment laws where the franchisor knew *or reasonably should have known* about the franchisee's conduct, but did not take reasonable steps to prevent it.

Franchisors in the US have had similar responsibilities for over 30 years, albeit in 2015 a more onerous standard has applied.

Due to events in recent years in the US, this issue of joint responsibility was the topic of much debate at the International Franchise Association conference earlier this year.

Until 2015, the law in the US, referred to as the "joint employer" standard, was similar to the laws soon to commence in Australia. In order to be liable a franchisor would need to have some type of "direct and immediate" control over the franchisee's actions in relation to employees such as hiring, firing, supervision and direction.

In 2015 this all changed and franchisors in the US potentially face being liable for the actions of franchisees where control is direct, indirect or where the franchisor has a right to control, even if the franchisor has never exercised that right.

The reason for the change to a more onerous "joint employment" standard? It's not dissimilar to the reason for the new laws in Australia – to protect low wage and vulnerable employees.

Some are saying that the US standard is diametrically opposed to the franchise model, which relies on the franchisor providing franchisees with systems to follow, whilst at the same time the franchisee operates independently of the franchisor.

There is even talk of franchisors in the US scaling back the support they provide to franchisees as a result of the new standard. Also, a number of States in the US have and are introducing laws to combat the new standard.

Learning the lesson that the 2015 US changes may have overreached, the new laws in Australia –

- are more in line with the previous US standard, in that responsibility for franchisee conduct can arise where a franchisor has a "significant degree of influence or control" over a franchisee;
- will not impose liability on a franchisor where they have taken reasonable steps to prevent contravention.

There can be no doubt that the new laws increase risk and compliance costs for franchisors. Like their US counterparts, franchisors in Australia will be looking at ways to manage the risk of being fixed with liability for conduct of franchisees. Franchisors will need to look at –

- reviewing the systems and agreement terms which allow for control over franchisee affairs by the franchisor;
- reviewing processes for information flow and franchisor assessment of financial viability of franchise that complies

with ordinary workplace laws – this could involve assessment of systems and processes, including audit, training and reporting requirements for franchisees;
- assisting and educating the franchisees.

Canada is also in a state of change, with there being a real possibility that Canada will follow suit with the US.