Unfair Dismissal in Franchise Networks: A Regulatory Blind Spot?

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Abstract

The unfair dismissal provisions of the *Fair Work Act 2009* (Cth) provide a critical safeguard against arbitrary termination of employment. While the federal unfair dismissal regime has been in place for more than three decades, there has been little consideration of how these protections apply in the context of franchise networks. Franchises defy easy legal classification given that they blur entrenched distinctions between responsibility and control, markets and hierarchies, and small and large business. Our analysis of the case law in this domain reveals that many franchise workers are left without proper protection from unfair dismissal. We argue that these regulatory blind spots cannot be readily justified or sustained. In conclusion, we advance some possible paths to reform, which seek to take a more nuanced approach to the hybrid features of, and unique regulatory challenges presented by, franchise networks.

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I Introduction

The COVID-19 pandemic has revealed how a lack of secure employment can produce perverse outcomes for workers, and lead to dire consequences for the community more generally.[1] To promote job security, it is necessary not just to tighten regulation of casual employment or temporary work arrangements,[2] but also to ensure that workers are protected from arbitrary termination. The absence of protection from capricious dismissal can compromise the entire safety net of minimum employment standards. Workers may be less willing to enforce their legal entitlements, or seek to improve their working conditions, if they fear that doing so may lead to job loss.[3] At their core, statutory provisions that prohibit the unfair dismissal of employees are designed to shore up security of employment. In addition, such laws may also have other important regulatory effects, including playing an educative function and providing an essential check on managerial prerogative.[4]

The scope and application of the federal unfair dismissal regime, which was first introduced in 1994, has evolved over the past three decades. However, an enduring feature of the regime is that it is largely premised on the existence of a binary employment relationship between a single employer and a single employee. This conventional conception of employment does not graft neatly onto work in franchises, which typically involves at least three parties: an employee; the franchisee; and the franchisor. The differential treatment of small and big business — another attribute of the unfair dismissal regime — is difficult to apply to franchises, which are often a 'combination of both organisational types'.[5] Indeed, this unique multi-party arrangement raises a host of distinct regulatory challenges about 'who controls what, why and how'.[6]

In this article, we grapple with some of the most urgent and complex questions concerned with unfair dismissal in franchise networks.[7] For example, should franchisees be permitted to enjoy the benefit of more generous exemptions

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1 Alex Turner-Cohen, '"Insecure Work is No Good": Dan Andrews Blames Casual Jobs for Victoria's Second Wave', *News.com.au* (26 July 2020) <https://www.news.com.au/finance/work/at-work/insecure-work-is-no-good-dan-andrews-blames-casual-jobs-for-victorias-second-wave/news-story/fe58e2da479cac7fb7f7d328a2561fb2>.

2 The recent *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) deals with casual employment. However, there was little in the preceding Bill addressing unfair dismissal or security of employment more generally.

3 Richard Johnstone, Shae McCrystal, Igor Nossar, Michael Quinlan, Michael Rawling and Joellen Riley, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012) 119.

4 Joanna Howe, Laurie Berg and Bassina Farbenblum, 'Unfair Dismissal Law and Temporary Migrant Labour in Australia' (2018) 46(1) *Federal Law Review* 19, 20.

5 Ashlea Kellner, 'Determinants of Human Resource Management Strategy in a Franchise' in Tony Dundon and Adrian Wilkinson (eds), *Case Studies in Work, Employment and Human Resource Management* (Edward Elgar, 2020) 32, 37.

6 Alan Felstead, *The Corporate Paradox: Power and Control in the Business Franchise* (Routledge, 1993) 2.

7 While the regulation of unfair dismissal intersects with other provisions in the *Fair Work Act 2009* (Cth) ('*FW Act*'), such as those dealing with unlawful termination, adverse action and bullying, this broader set of provisions go beyond the scope of this article.

and defences in relation to unfair dismissal claims afforded to small business?[8] In considering whether the termination is 'harsh, unjust or unreasonable', should the Fair Work Commission take into account the size of the franchise network and whether the franchisee has access to human resources ('HR') support and services via the franchisor? And if the franchisor has effectively made the decision to dismiss the employee, should they be named as party or otherwise held responsible for compensation that is ultimately granted? More generally, we examine the extent to which the current unfair dismissal regime, and the Commission's application of this statutory scheme, is justified on policy grounds and consistent with other reforms directed at promoting decent work in franchising.[9]

We begin by providing an overview of franchising in Australia, before setting out recent regulatory developments designed to address systemic non-compliance with wage and hour regulation in franchise networks. Next, we outline the background to the federal unfair dismissal regime, its key provisions and the underlying rationale for some of its features, especially its treatment of small business employers. We then consider the way in which the Fair Work Commission has applied these provisions to unfair dismissal applications brought in the franchising context. In Part IV, we analyse some of the novel issues presented by franchise networks and other forms of fissured work arrangements. Our analysis reveals that the current approach of Parliament and the Commission leaves many franchise workers without adequate protection from unfair dismissal. We argue that these deficiencies cannot be easily justified. In conclusion, we advance some possible paths to reform, including: a possible extension of liability to franchisors in certain circumstances; a more considered definition of 'small business employer'; an expansion of the factors that the Commission considers in determining when a dismissal is unfair; and requiring the Commission to weigh up opportunities for redeployment in the broader franchise network in cases of genuine redundancy.

II Work and Franchising: An Overview of Key Challenges and Developments

A *Regulatory Challenges Posed by Franchise Networks*

In Australia, it is estimated that the franchise sector has around 1,344 networks, over 98,000 individual franchised outlets and employs more than 598,000 people.[10] Approximately 4% of all small businesses in Australia operate as part of a broader

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[8] A recent review of the Small Business Fair Dismissal Code recommended an expansion of this exemption: Australian Small Business and Family Enterprise Ombudsman (Cth) ('ASBFEO'), *Review of the Small Business Fair Dismissal Code* (August 2019), Annexure A.

[9] Linda Dickens, 'Introduction — Making Employment Rights Effective: Issues of Enforcement and Compliance' in Linda Dickens (ed) *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart, 2012) 1.

[10] It is extremely difficult to obtain accurate data on the size of the franchise sector in Australia as available data on franchise type and employment status is limited. The data shown here is drawn from the Franchise Council of Australia: *About the FCA* (Web Page, 2022) <https://www.franchise.org.au/about/>. See also Lorelle Frazer, Scott Weaven, Anthony Grace and Selva Selvanathan, *Franchising Australia 2016* (Griffith University, 2016); FRANdata Australia, *Report for Australian Franchisee Survey* (2021).

franchise network.[11] Franchising may take a variety of different forms and may be delivered through a range of different modes.[12] However, the most well-known is that of 'business format franchising' whereby a franchisor who owns the intellectual property rights to an established business concept provides franchisees with a licence to use the franchisor's concept, brand and know-how for a fee and a share of the profits.[13] Use of the business format by the franchisee — who is often a first-time business owner[14] — is subject to strict controls and oversight by the franchisor. In particular, the franchisee ordinarily needs to: trade under the franchisor's brand name; sell only those products that fall within the franchisor's selected range; and adopt the franchisor's management and operations systems and methods.[15]

Franchising is a prominent form of 'fissured work',[16] but it is arguably unique among contracting arrangements in that its economic dynamism means it 'can function alternatively either like a centralised organisation or as a constellation of independent businesses'.[17] Instead of vertical integration, formal property ownership and direct employment, franchisors have 'pioneered a new path to bigness'.[18] Rather than owning and operating its business operations directly, franchisors have relied on restrictive contracts to control franchisees to do so.[19] The franchising model essentially provides the franchisor with an opportunity to shed direct employment, minimise management costs, generate upfront capital and reduce the risks associated with liability and business failure. At the same time, franchisors are rapidly able to build a brand by distributing uniform products and services via independent and dispersed franchisee units.[20] Collins explains that franchise networks present a paradox given that

> no single entity exists through which to consolidate risk, to channel responsibility, and to which every participant owes its loyalty. Nevertheless, this many-headed hydra, this multilateral construction of bilateral contracts, which obliges the parties to co-operate intensively whilst remaining individually responsible for their actions, functions in many respects like a single business association.[21]

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11 Frazer et al (n 10) 6.

12 Department of Jobs and Small Business (Cth), Supplementary Submission 20.2 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct* (4 May 2018) 2.

13 Hugh Collins, 'Introduction to Networks as Connected Contracts' in Gunther Teubner, *Networks as Connected Contracts*, tr Michelle Everson, ed Hugh Collins (Bloomsbury, 2011) 1, 9.

14 Andrew Elmore and Kati L Griffith, 'Franchisor Power as Employment Control' (2021) 109(4) *California Law Review* 1317, 1339.

15 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct* (Final Report, March 2019) 10 [2.7] ('*Fairness in Franchising Report*').

16 David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

17 Collins (n 13) 67.

18 Brian Callaci, 'Control without Responsibility: The Legal Creation of Franchising, 1960–1980' (2021) 22(1) *Enterprise and Society* 156, 156.

19 Ibid.

20 Andrew Elmore, 'Franchise Regulation for the Fissured Economy' (2018) 86(4) *George Washington Law Review* 907, 909.

21 Collins (n 13) 10–11.

Spencer has described the franchising model as 'federated' in that it 'combines the advantages of small- and large-scale enterprise; it is personal and accessible, while at the same time it achieves important economies of scale and international brand recognition'.[22] However, others have pointed to the more sinister effects of the apparent disaggregation of responsibilities in the franchising model. While franchisees are attracted to the idea that they can 'be their own boss', in reality, there is little franchisee discretion in how tasks and functions are performed. Instead, '[t]he franchisee is working in its own business within parameters mandated by the franchisor.'[23] Franchisors are under no legal obligation to consult franchisees about decisions that may affect the viability and profitability of the franchisee's business. Moreover, there are very few grounds on which franchisees may challenge the franchisor's contractual rights to vary the business model, corporate strategy, franchise territory, store layout or the price of key products, even if the exercise of these discretionary powers is to the detriment of the franchisees (either individually or as a collective).[24]

The franchisor's overarching control of the franchisee can have important implications for work quality in franchise networks. In particular, Elmore has argued that 'it is impossible to separate employment practices from other business requirements required of franchisees to operate within the franchisor's required operational standards'.[25] Given this, many measures put in place by franchisors to protect the brand can cause harm to franchise store employees. For example, it is common for franchisors to make recommendations and suggestions in relation to personnel requirements given that franchise store employees represent the brand to the consumer, such as hiring and appearance standards. Franchisors often encourage or impose business tools, such as payroll software, which incorporate relevant pay policies and job functions.[26] There is also evidence to suggest that in some sectors that are heavily franchised, such as fast food, staff turnover is high. While some of this employee turnover may be voluntary, it has been argued that 'a high turnover model invites arbitrary and unfair treatment of workers',[27] which can have a chilling effect on the willingness of existing employees to speak up about poor working conditions.[28]

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22 Elizabeth Crawford Spencer, *The Regulation of Franchising in the New Global Economy* (Edward Elgar, 2010) 9.

23 Jenny Buchan, *Franchisees as Consumers: Benchmarks, Perspectives and Consequences* (Springer, 2013) 56.

24 For general discussion of these issues, see *Fairness in Franchising Report* (n 15).

25 Elmore (n 20) 927.

26 Ibid.

27 Center for Popular Democracy, Fast Food Justice, the National Employment Law Project and 32BJ, *Fired on a Whim: The Precarious Existence of NYC Fast-Food Workers* (Research Report, February 2019) 4. Evidence relating to the turnover of franchise workers is more limited in Australia, but see, National Occupational Health and Safety Commission, 'Occupational Health and Safety Issues for Young Workers in the Fast-Food Industry' (Research Report, March 2000) 42.

28 Center for Popular Democracy, Fast Food Justice, the National Employment Law Project and 32BJ (n 27) 3–4.

B *Key Provisions of the* Fair Work Act 2009 (Cth) *relating to Franchise Networks*

The novelty of the franchising model, and the tension between and divergence of franchisor and franchisee interests, have prompted many countries to enact laws directed at the regulation of the franchising relationship.[29] While this is also true of Australia, analysis of franchise-specific regulation, such as the *Franchising Code of Conduct*, is beyond the scope of this article as it does not deal directly with the rights and obligations relating to franchise work.[30] Instead, we will focus on those provisions of the *Fair Work Act 2009* (Cth) ('*FW Act*') that are directed at regulating employment within franchise networks.

For the purposes of most provisions of the *FW Act*, there is a general definition of 'franchise' derived from the *Corporations Act 2001* (Cth) ('*Corporations Act*'), which provides that a 'franchise' means:

> 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. An arrangement is not a franchise if the person engages the owner of the right, or an associate of the owner, to exploit the right on the person's behalf.[31]

Somewhat confusingly, in the *FW Act* there are separate definitions of 'responsible franchisor entity'[32] and 'franchisee entity',[33] which do not rely on the general definition of 'franchise', but rather have specific and distinct meanings for the purposes of the extended liability provisions under s 558B of the *FW Act* (which will be discussed further below).

Prior to the enactment of s 558B, the *FW Act* contained only a small number of provisions explicitly dealing with franchises. For example, there are specific provisions relating to franchises in relation to modern enterprise awards[34] and multi-employer bargaining.[35] In addition, there are other more general provisions — such as the accessorial liability provisions set out in s 550 — that have also been used, somewhat sporadically, to tackle some of the work-related problems that arise in franchise networks.[36]

The challenges associated with curbing systemic 'wage theft' in franchise networks is now relatively well-known following the notorious underpayment case involving 7-Eleven convenience stores. But, as the Migrant Workers' Taskforce noted: '7-Eleven is unlikely to be alone in being associated with significant wage

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29 Crawford Spencer (n 22) 1.

30 For a review of recent developments in this space, see: Jenny Buchan and Rob Nicholls, 'The Challenge of Navigating the COVID-19 Pandemic for Australia's Franchise Sector' (2020) 48(2) *Australian Business Law Review* 126.

31 *Corporations Act 2001* (Cth) s 9 (definition of 'franchise') ('*Corporations Act*').

32 *FW Act* (n 7) s 558A(2).

33 Ibid s 558A(1).

34 Ibid ss 143A, 168A.

35 Ibid s 249(2).

36 See, eg, *Fair Work Ombudsman v Yogurberry World Square Pty Ltd* [2016] FCA 1290.

exploitation of its franchisee employers'.[37] Persistent concerns from the public, combined with a series of inquiries and investigations, prompted the Coalition Turnbull Government to introduce major law reform in late 2017.[38] While the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) was broadly directed at addressing 'deliberate and systematic exploitation of workers',[39] there were specific provisions targeting franchise networks. In particular, s 558B(1) of the *FW Act* makes a 'responsible franchisor entity' liable for prescribed contraventions[40] committed by a 'franchisee entity' in circumstances where they either knew, or should reasonably have been aware of the (actual or likely) contraventions, and could reasonably have taken action to prevent such contraventions from occurring.[41] In addition, s 558B(2) echoes this provision by extending liability to holding companies for prescribed contraventions committed by their subsidiaries. There are at least four critical features of these provisions that are relevant for the purposes of this article.[42]

First, these extended liability provisions only apply to contraventions of specific civil remedy provisions of the *FW Act* — that is, contraventions of modern awards, enterprise agreements, recordkeeping obligations and sham contracting prohibitions. Significantly, franchisors and parent companies cannot be held liable for contraventions of civil remedy provisions relating to adverse action. Moreover, these secondary liability provisions do not apply in the context of unfair dismissal given that such claims do not hinge on proving a 'contravention' of a civil remedy provision. Confining the extended liability provisions to certain claims, while excluding others, is a matter we will return to in Part V below.

Second, the term 'responsible franchisor entity' has been given an expansive definition. Under s 558A(2)(b) of the *FW Act*, a franchisor will fall within the definition of 'responsible franchisor entity' if the franchisor 'has a significant degree of influence or control over the franchisee entity's affairs'.[43] While the term 'affairs' is not expressly defined, the Explanatory Memorandum states that the term is intended to be read broadly.[44] Rather than being limited to franchisors who have

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37 *Migrant Workers' Taskforce* (Cth), *Report of the Migrant Workers' Taskforce* (March 2019) 40.

38 For further discussion, see Tess Hardy, 'Shifting Risk and Shirking Responsibility? The Challenge of Upholding Employment Standards Regulation within Franchise Networks' (2019) 32(1) *Australian Journal of Labour Law* 62.

39 Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth), ii ('PVW Explanatory Memorandum'). The Amendment Act introduced a number of provisions that sought to strengthen the enforcement framework under the *FW Act* — for example, by allowing for higher maximum penalties to be imposed for 'serious contraventions' of prescribed workplace laws and shifting the onus of proof to employers where there has been a failure to keep or maintain employment records or issue payslips: *FW Act* (n 7) s 557A.

40 *FW Act* (n 7) s 558B(7).

41 'PVW Explanatory Memorandum' (n 39) 8 [54].

42 For more detailed discussion of these provisions, see Tess Hardy, 'Working for the Brand: The Regulation of Employment in Franchise Systems in Australia' (2020) 48(3) *Australian Business Law Review* 234.

43 *FW Act* (n 7) s 558A(2)(b).

44 'PVW Explanatory Memorandum' (n 39) 6 [39].

control over 'workplace relations matters' relating to the franchisee,[45] it is said to include situations where a franchisor has involvement in the franchisee's financial, operational and corporate affairs.[46]

Third, the introduction of s 558B was significant because it loosened the knowledge requirement beyond that which applied under the pre-existing provision relating to accessorial liability.[47] In particular, the Fair Work Ombudsman had encountered difficulties in pursuing third party entities beyond the direct employer because of the need to prove that the person had *actual knowledge* of the essential elements of the contravention.[48] In comparison, s 558B(1) enables the court to take into account not just actual knowledge (that is, what the franchisor or officer in fact knew), but constructive knowledge (that is, what they ought to have known).

Finally, even if a person who is a responsible franchisor entity is found to have the requisite knowledge of the relevant contraventions committed by the franchisee, they may successfully avoid liability if they can argue that they 'had taken reasonable steps to *prevent* a contravention by the franchisee entity or subsidiary of the same or similar character'.[49] In determining whether a person took such 'reasonable steps',[50] the court may have regard to all relevant matters, including:

> (a) the size and resources of the franchise …;
>
> (b) the extent to which the person had the ability to influence or control the contravening employer's conduct …;
>
> (c) any action the person took towards ensuring that the contravening employer had a reasonable knowledge and understanding of the requirements under the relevant [workplace laws and obligations];
>
> (d) the person's arrangements (if any) for assessing the contravening employer's compliance with the applicable [workplace obligations] ...[51]

Important aspects of this defence have been analysed elsewhere.[52] In the context of this article, it should be noted that, in having regard to the 'size and resources of the franchise', it is unclear whether the court should take into account the size and resources of the 'franchise system', an individual 'franchise unit' or the putative 'franchisor'.[53] While this terminology lacks clarity, it is significant that the

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45 This was the definition favoured by business groups when the provisions were put before Parliament: see, eg, Franchise Council of Australia, Supplementary Submission 9 to Senate Standing Committee on Education and Employment, Parliament of Australia, *Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (April 2017) 6.

46 'PVW Explanatory Memorandum' (n 39) 8 [53]. See also *Fair Work Ombudsman v United Petroleum Pty Ltd* [2020] FCA 590; *85 Degrees Coffee Australia Pty Ltd v Fair Work Inspector Rodwell* (2020) 299 IR 280.

47 It should be noted that accessorial liability has never been a feature of the unfair dismissal jurisdiction, a point we will return to below in Part V.

48 *Fair Work Ombudsman v Hu (No 2)* (2018) 279 IR 162.

49 *FW Act* (n 7) s 558B(3) (emphasis added).

50 Ibid s 558B(4).

51 Ibid s 558B(4)(a)–(d).

52 Hardy (n 38) 79–80.

53 It appears that the Fair Work Ombudsman has assumed that the court will take into account the 'size and resources of the *franchisor* — that is, the larger and more resources the network has, the more it

statute has expressly identified the size and resources of 'the franchise' to be of relevance in assessing liability in the context of the *FW Act*.

III The Unfair Dismissal Regime

For most of the 20th century in Australia, there were 'no laws specifically dealing with unfair dismissal'[54] and individuals were not able to make unfair dismissal claims. The first federal statutory unfair dismissal regime came into force in 1994 with the passage of the *Industrial Relations Reform Act 1993* (Cth).

Over the 15 years that followed, the scope and scale of the unfair dismissal regime expanded and contracted in response to a series of legislative amendments. Under the conservative Howard Government, for example, the unfair dismissal legislation was significantly wound back. The *Work Choices* amendments,[55] in particular, introduced wide exemptions for 'small businesses', an increased 'qualifying period' for those employed by larger businesses and a bar on claims relating to any dismissal made for 'genuine operational reasons'. In 2009, with the introduction of the *FW Act*, the Rudd/Gillard Government retained the basic framework of the existing regime, but restored the unfair dismissal rights of many employees excluded by the *Work Choices* amendments.[56]

A *Overview of the Current Unfair Dismissal Provisions of the* Fair Work Act 2009 (Cth)

The unfair dismissal regime is now contained in pt 3-2 of the *FW Act*. It seeks to establish procedures which are 'quick, flexible and informal' and to provide remedies where a dismissal is unfair.[57] The 'procedures and remedies [established] and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned'.[58] If an employee is protected from unfair dismissal, and has been dismissed,[59] they may make an application to the Commission for a remedy within 21 days of the dismissal.[60] If the relevant employer is not a small business employer (discussed in further detail below), a person is protected from unfair dismissal if, at the time of the dismissal, they have completed a minimum period of employment of six months,[61] and a modern award covers the person or an enterprise bargaining agreement applies to the person's employment or the sum of the person's annual

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is expected to do': see Natalie James, 'Reasonable Steps: The Regulator's Perspective' (Speech, Franchise Management Forum, 13 June 2018) 2 (emphasis added).

54 Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 7th ed, 2021) 415 [17.11].

55 The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) amended the *Workplace Relations Act 1996* (Cth).

56 On some estimates, the regime under the *FW Act* brought 'an estimated 100,000 previously exempt businesses, employing between them around 3 million employees, back within the scope of the federal unfair dismissal system': Andrew Stewart, Anthony Forsyth and Mark Irving, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 773–4 [23.33].

57 *FW Act* (n 7) s 381(1)(b).

58 Ibid s 381(2).

59 Ibid ss 385(a), 386.

60 Ibid s 394(1)–(2).

61 Ibid s 383.

earnings is less than the high income threshold. A person has been 'dismissed' if their employment has been terminated on the employer's initiative or they have been forced to resign because of the employer's conduct (otherwise known as 'constructive dismissal').[62] This does not include, however, a person who, for example, was employed under a contract of employment for a specified period of time and the employment has been terminated at the end of that period. A person is not unfairly dismissed if the dismissal is a case of genuine redundancy.[63] Further, independent contractors are not able to access the unfair dismissal regime in the event that their agreement with the principal contractor is terminated.

Assuming these threshold requirements are satisfied, the task of the Commission in considering an application for a remedy for unfair dismissal is to determine whether the dismissal was unfair within the meaning of the *FW Act*. This requires the Commission to determine whether the dismissal was 'harsh, unjust or unreasonable'.[64] Importantly, a dismissal may still be considered unfair if it is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust.[65]

The concepts of harshness, injustice or unreasonableness may also overlap.[66] A termination, for example, may be:

> unjust because the employee was not guilty of misconduct on which the employer acted … unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and … harsh in its consequences for the personal and economic situation of the employee because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.[67]

In determining whether the dismissal was harsh, unjust or unreasonable, the Commission must take into account a number of matters specifically identified in s 387:

> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
>
> (b) whether the person was notified of that reason; and
>
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
>
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
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> (e) if the dismissal is related to unsatisfactory performance by the person — whether the person had been warned about that unsatisfactory performance before the dismissal; and

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62 Ibid s 386(1).
63 Ibid ss 385(d), 389.
64 Ibid s 385(b).
65 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 465.
66 Ibid.
67 Ibid.

> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (g) the degree to which the absence of dedicated human resources management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (h) any other matters that the [Commission] considers relevant.

If the Commission is satisfied that a protected person has been unfairly dismissed, a remedy may be ordered.[68] It is explicitly stated in the objects of the unfair dismissal regime that the emphasis is on reinstatement.[69] An employee may be reinstated by reappointment to the position in which they were employed immediately before their dismissal or by appointment to another position on terms and conditions no less favourable than those they previously enjoyed.[70] Importantly for present purposes, if the position in which the person was employed no longer exists, but there is an equivalent position with an associated entity of the employer, the relevant reinstatement order may be directed to the associated entity.[71] Compensation may only be ordered if the Commission is satisfied that reinstatement of the person is inappropriate.[72] While the unfair dismissal regime ostensibly privileges reinstatement over other remedies, in reality reinstatement following an unfair dismissal claim is the 'exception rather than the rule'.[73]

B *Small Business Fair Dismissal Code*

Important exceptions apply to the unfair dismissal regime where the employer is a 'small business employer', defined as a business that employs fewer than 15 employees at the time of the relevant dismissal. For the purposes of calculating how many employees a small business employs, all full-time and part-time employees are counted, but not casual employees who are not employed on a regular and systematic basis. Employees who work for an 'associated entity' are also counted.[74] 'Associated entity' has the meaning given to it under s 50AAA of the *Corporations Act*, which provides that one entity (the associate) is the associated entity of another (the principal) if one of a number of circumstances exist, such as where: the principal and associate are related bodies corporate (s 50AAA(2)); if the principal controls the associate (s 50AAA(3)); the associate controls the principal and the operations, resources or affairs of the principal are material to the associate (s 50AAA(4)); or the associate has a qualifying investment in and significant influence over the principal (or vice versa) (s 50AAA(5)–(6)). Given that the legal relationship between franchisors and franchisees is contractual, rather than constitutional, in nature, franchise networks generally fall outside the ordinary definition of a corporate group. With the exception of company-owned units, there

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68 *FW Act* (n 7) s 390.
69 Ibid s 381(1)(c).
70 Ibid s 391(1).
71 Ibid 391(1A). The definition 'associated entity' in the context of *FW Act* pt 3-2 is discussed in further detail below.
72 Ibid s 390(3)(a).
73 Stewart, Forsyth and Irving (n 56) 796 [23.79].
74 *FW Act* (n 7) s 23(3).

is generally no interlinking of ownership between franchisors and franchisees, rather they are constructed as entirely separate legal entities with no common share ownership. Given this, it is not surprising that franchise networks are not generally captured by corporate law concepts directed at 'associated entities'.

Small business employers are afforded a number of leniencies under the current regime. First, the minimum employment period is one year for small business employers, rather than the standard six months.[75] Second, for small business employers a dismissal will not be considered unfair unless it was 'not consistent with the Small Business Fair Dismissal Code'.[76] Under the *Small Business Fair Dismissal Code*, it is fair for an employer to dismiss an employee without notice or warning ('summary dismissal') when the employer 'believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal'.[77] In non-summary dismissals, small business employers must give an employee notice of the reason for which he or she is at risk of being dismissed and the reason must be a 'valid reason based on the employee's conduct or capacity to do the job'.[78] The employee 'must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement'.[79] The employee must be given an opportunity to respond to such a warning and a 'reasonable chance to rectify the problem'.[80] Employees are permitted to have 'another person present to assist' in discussions 'where dismissal is possible', but that person must not be 'a lawyer acting in a professional capacity'.[81] In the event that an employee makes a claim under the unfair dismissal regime, '[a] small business employer will be required to provide evidence of compliance with the Code … including evidence that a warning has been given'.[82] Small business employers are also encouraged to complete a 'Small Business Fair Dismissal Code Checklist' to assist in complying with the Code itself.[83] While the Code has been primarily designed to provide guidance to small business owners who 'do not have the time or expertise to navigate the complexity of the unfair dismissal system',[84] the Productivity Commission concluded in its 2015 inquiry that the Code does not provide sufficiently 'clear and concise advice upon which a small business can rely as a safeguard to a claim'.[85]

More generally, the existence of the Code, and its continuing review and revision, is reflective of Australian industrial relations policy's 'unique and perhaps unusual obsession with attempting to exempt unfair dismissal from the activity of [small] businesses'.[86] Indeed, the 'vexed' question of whether unfair dismissal laws

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75 Ibid s 383(b).
76 Ibid s 385(c).
77 Small Business Fair Dismissal Code (updated 1 January 2011).
78 Ibid.
79 Ibid.
80 Ibid.
81 Ibid.
82 Ibid.
83 Ibid.
84 ASBFEO (n 8) 3.
85 Ibid 8, citing Productivity Commission, *Workplace Relations Framework* (Final Report, December 2015) 600.
86 Victoria Lambropoulos, 'Small Business and Unfair Dismissal: A Review of the Australia Small Business and Family Enterprise Ombudsman's Proposed Reforms' (2019) 47(4) *Australian Business Law Review* 318, 319.

should apply to small businesses has been repeatedly raised as an issue for reform over the course of almost three decades.[87] The issue was first raised by employer groups in the early 1990s and then, between 1997 and 2005, the Howard Government attempted to exempt small businesses from the operation of the unfair dismissal regime on no fewer than 12 occasions,[88] finally succeeding in passing the *Work Choices* legislation that defined small businesses as those businesses employing 100 employees or fewer. The current provisions under the *FW Act* provide small businesses with a 'watered-down version of the unfair dismissal regime',[89] rather than an exemption per se.

But while the Code is 'far from being a licence to small employers to dismiss at will',[90] it clearly makes 'some important concessions to small employers'.[91] The ostensible rationale for these concessions is two-fold: first, it is often claimed that unfair dismissal laws create a disincentive for small businesses to hire new staff and that they otherwise reduce productivity. Despite having been repeatedly debunked,[92] such justifications persist. Second, the differential treatment of small businesses is in recognition of the fact that they have reduced access to expert human resources and/or legal advice. This is important for present purposes and is discussed in further detail below.

IV Unfair Dismissal in Franchise Networks: The Case Law

There is a growing body of unfair dismissal cases that involve, in different ways and to varying extents, franchising arrangements. This section argues that, on close examination, the cases raise a number of key themes or issues, outlined in Part IV(A)–(C) below, that are worthy of further consideration. While this case law analysis provides us with a platform for exploring some of the most pronounced practical and legal issues that appear on the public record, it is important to recognise the inherent limitations of this data. Given that the vast bulk of unfair dismissal claims are resolved via private and confidential settlement, an examination of the case law provides us with bounded insight into broader patterns of behaviour.[93] Further, on the face of the decision, it may not be easy to discern whether the applicant was a franchise worker and the respondent a franchisee.[94] The way in which the cases have been framed and argued before the Commission also constrains deeper analysis of some of the issues at stake, such as the size of the relevant business and the possible tensions and conflicts between the franchisee and the franchisor:

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87 See generally, Marilyn Pittard, 'Unfair Dismissal Laws: The Problem of Application to Small Businesses' (2002) 15(2) *Australian Journal of Labour Law* 154, 154.

88 See generally Lambropoulos (n 86) 319–20; Pittard (n 87).

89 Lambropoulos (n 86) 320.

90 Stewart, Forsyth and Irving (n 56) 793 [23.73].

91 Ibid.

92 See, eg, Pittard (n 87) 166–8; and, more recently, Benoit Pierre Freyens and Paul Oslington, 'A First Look at Incidence and Outcomes of Unfair Dismissal Claims under *Fair Work*, *Work Choices* and the *Workplace Relations Act*' (2013) 16(2) *Australian Journal of Labour Economics* 295.

93 See Stewart, Forsyth and Irving (n 56) 800 [23.86]; Ashlea Kellner, Paula McDonald and Jennifer Waterhouse, 'Sacked! An Investigation of Young Workers' Dismissal' (2011) 17(2) *Journal of Management & Organization* 226, 229.

94 Howe, Berg and Farbenblum (n 4) 26.

all of which are relevant to the question of where responsibility for unfair dismissals should lie.

A *Application of Exemptions for Small Business Employers*

A large number of the available cases consider the application of the *Small Business Fair Dismissal Code* in the franchising context. The case law reveals that franchisees are routinely categorised as small business employers on the basis that only the employees directly engaged by the franchisee employer should be counted for this purpose. There are a number of examples of cases in which employees who are seeking a remedy for unfair dismissal, and who have not served the minimum employment period of 12 months, have sought to argue that the franchisee employer is, in fact, not a small business employer. Such arguments are typically rejected out of hand. In *Tudball v Marvarela Pty Ltd*, for example, the applicant employee, who had been employed for less than 12 months, argued that the franchisee employer, who employed 6–8 people at the relevant time, was not a small business employer because the franchisee and franchisor businesses were 'associated entities'.[95] The employee submitted that the employer's business was 'a franchise business attached to a franchise group'[96] that provided 'a lot more support than a typical small business and pays franchise fees for staff training days etc. Whilst operating individually these guys work as a unit…'.[97] The respondent franchisee employer submitted, on the other hand, that it 'maintained control over its management and operations … [the franchisor] provided branding to the respondent. … Monthly franchise fees were paid to [the franchisor] and it received a percentage of all sales to the respondent.'[98] It was submitted by the franchisee employer that s 50AAA of the *Corporations Act*, which, as discussed above in Part III(B), sets out the definition of related entities, could be distinguished from the definition of a franchise under the *Corporations Act* and the fact that the franchisee employer was operating a franchisee unit should not lead to a finding that the franchisee and franchisor were associated entities. The Fair Work Commission accepted this and found that there was no evidence to demonstrate that the franchisee employer and franchisor were associated entities within the meaning of the *Corporations Act*.[99] It followed that the franchisee employer qualified as a small business employer under the *FW Act* and could rely on the relevant jurisdictional exemption.[100] Other similar examples can be found. It is clear that, typically, franchisees and franchisors will not be considered associated entities in the context of unfair dismissal.[101]

It is also clear that franchisee businesses under the same franchisor will not generally be considered to function as a single entity or as associated entities. Thus, employees who have worked for more than 12 months, but across multiple

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95 *Tudball v Marvarela Pty Ltd* [2015] FWC 1620, [8]–[10].
96 Ibid [9].
97 Ibid.
98 Ibid [10].
99 Ibid [18].
100 Ibid [19].
101 See, eg, *Glick v Domoney Properties Pty Ltd ATF Domoney Investments Unit Trust* [2016] FWC 7649; *Lilwall v The Trustee for Smollen Family Trust* [2019] FWC 4571; *Italia v Viva Life Photography Pty Ltd* [2019] FWC 5710; *Arends v Discount Auto Parts Unit Trust* [2021] FWC 3304.

franchisee businesses within the same franchise network have often been found to fall outside of the regime. The case of *Patel v AAA Tools Pty Ltd*[102] provides a stark example. The applicant employee was employed as a bookkeeper and administrator by AAA Tools Pty Ltd trading as Total Tools Hoppers Crossing ('Total Tools Hoppers Crossing'), which was a franchisee of the nationwide franchise network operating as 'Total Tools'. Some months after starting work with Total Tools Hoppers Crossing, the employee was asked to perform bookkeeping and administrative duties at a separate franchisee business, Mornington Peninsula Tools Pty Ltd trading as Total Tools Mornington ('Total Tools Mornington'). The respondent franchisee owner of Total Tools Hoppers Crossing, Mr Jones, held a beneficial interest in Total Tools Mornington and was a director in both businesses.[103] Further, in undertaking her work, the employee was subject to direction from Mrs Jones, the wife of the franchisee, in relation to both businesses. In order to determine whether the employee was able to proceed with her unfair dismissal application, the Fair Work Commission needed to determine whether the franchisee employer was a 'small business' (that is, employed less than 15 people): a question that ultimately hinged on the number of people employed by Total Tools Hoppers Crossing and any associated entities.[104] The employee sought to argue that 'the two businesses Total Tools Hoppers Crossing and Total Tools Mornington were associated entities because she performed work for both businesses; because she was subject to direction by Mrs Jones, who had an involvement in both businesses; and because she saw Mr Jones to have involvement in both businesses'.[105]

Ultimately, the Commission found that the definition of associated entities under the *Corporations Act* was not satisfied as, among other things, it was not clear that 'one of Total Tools Hoppers Crossing and Total Tools Mornington controls the other, or that the operations, resources or affairs of one is material to the other'.[106] Rather, the relationship between Total Tools Hoppers Crossing, Total Tools Mornington and the franchisee owner (who was a common investor and director of both entities via a family trust) was found to be 'more diffuse'[107] and 'more arm's-length than would be expected'[108] by the *Corporations Act* definition.[109] It was therefore found that Total Tools Hoppers Crossing employed fewer than 15 employees and was a small business employer. This meant that the employee was precluded from proceeding with her unfair dismissal application as she had not served the minimum employment period. Cases such as this raise real questions about whether the concept of 'associated entities' — and the relevant definitions and

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102 *Patel v AAA Tools Pty Ltd* [2016] FWC 6958 ('*Patel v AAA Tools*').

103 Ibid [25]. In particular, ASIC extracts referred to at [25] showed that

> Mr Jones is the Director and Company Secretary of Total Tools Hoppers Crossing Pty Ltd [sic] and that he is the only shareholder of the company. They also show that Mr Jones is a Director of Mornington Peninsula Tools Pty Ltd along with another person, Gerard Kelly, and that two other entities, which Mr Jones describes as trustee companies, are equal shareholders in the company, holding their shareholding beneficially on behalf of the respective directors and their families.

104 Ibid [14].

105 Ibid [24].

106 Ibid [30].

107 Ibid [32].

108 Ibid [31].

109 Ibid [29]–[32].

tests drawn from the *Corporations Act* — need to be reviewed or refined in order to account for the unique features of franchise networks. This is an issue considered in further detail in Part V below.

It is also worth noting that in some cases, the Commission has accepted the franchisee employer's claim to be a small business employer with little or no interrogation.[110] For example, in *Cook v Asia Pacific Cleaning Services Pty Ltd*, the Commission found that the managing director of the respondent employer had sought incorrectly to characterise the applicant employee as an independent contractor.[111] The Commission also found that the managing director was not a witness of truth and rejected, for example, his claim that the relevant employment contract was 'fraudulent'.[112] Notwithstanding this, however, the Commission did not scrutinise the employer's claim that it was a small business with 'six franchise operators and no employees',[113] simply stating that '[n]otwithstanding whether these franchise arrangements are properly characterised as such, I have accepted this advice and have concluded that on [the managing director's] advice [the respondent business] was a small business'.[114] While the respondent succeeded in being classified as a small business employer, the dismissal in that case was ultimately found to be unfair. Despite finding in favour of the applicant, the Commission's scant consideration of the proper characterisation of the respondent's business and the workers' employment status is concerning. This is especially so in light of cases that suggest that self-employed franchisees may be used to substitute direct employees effectively enabling the putative franchisor/employer to save on labour costs, avoid unfair dismissal laws and reduce responsibility for other employment-related obligations, including superannuation and workers' compensation.[115]

B *The Role and Influence of the Franchisor*

There are a handful of cases in which the franchisor has played an active role in prompting or even carrying out the dismissal of employees. In some cases, for instance, the franchisor has brought conduct-related issues to the attention of a franchisee with respect to a particular worker and has requested that the worker be excluded from further paid engagements. In *D'Ambrosio v Jakroas Financial Services Pty Ltd*, breaches of client privacy by the applicant worker (who was found to be an independent contractor) were brought to the attention of the franchisee by the franchisor, who requested that the worker be 're-accredited'.[116] In *Caine v Audi Enterprises Pty Ltd*,[117] the respondent company was a franchisee of a franchised network of couriers and engaged the applicants as drivers. The relevant franchise agreements stipulated that the franchisor must give their approval for an individual to be 'substitute driver' on the basis that the individual has 'met the stringent

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110 *Cook v Asia Pacific Cleaning Services Pty Ltd* [2013] FWC 1641 ('*Cook*'). See also *Chandan v Language Smart Pty Ltd* [2020] FWC 1057.
111 *Cook* (n 110) [18]–[28].
112 Ibid [13], [17]–[18]
113 Ibid [36].
114 Ibid.
115 See, eg, *Sibic v Xmas Pty Ltd* [2011] FWA 5211.
116 *D'Ambrosio v Jakroas Financial Services Pty Ltd* [2017] FWC 1264, [19].
117 *Caine v Audi Enterprises Pty Ltd* [2018] FWC 1097 ('*Caine v Audi*').

requirements of [the franchisor] including completion of various training and safety courses'.[118] The franchisor was also entitled 'in their absolute discretion' to require the franchisee not to use particular drivers.[119] The drivers, who were found by the Fair Work Commission to be employees of the franchisee and not independent contractors, were alleged to have stolen deliveries from the depot of the franchisor. After a meeting with representatives of the franchisor, which the franchisee attended but did not participate in, it was agreed that the drivers were to be 'excluded from working with [the franchisor] as [substitute drivers] for [the franchisee]'.[120] The franchisee did not meet separately with the drivers.

In considering whether there was a valid reason for termination, the Fair Work Commission considered cases occurring in the context of labour hire arrangements where a host employer exercises its contractual right to have the employee removed from the host site.[121] The Commission found that there was a valid reason for the dismissal related to capacity because the franchisor 'had the unfettered right to prohibit the Applicants from working as drivers' and redeployment was not practical in the circumstances.[122] However, the dismissal was found to be unfair on the basis that the franchisee employer had not explained to the drivers that the franchisor had exercised that right or '[initiated] its own dismissal process',[123] and had therefore failed to notify the drivers of the reason for termination and to provide an opportunity to respond. It is worth noting that the franchisor was not a party to the proceedings and was not called to give evidence.

Another case that underlines the interventionist role that franchisors can play with respect to employment supervision and termination is that of *Bridge v Globe Bottleshops Pty Ltd*.[124] In that case, a customer had made a complaint of sexual harassment to the Cellarbrations 'national office' following a comment made by a franchisee store employee.[125] Following receipt of this complaint, the State Manager from the Cellarbrations' national office, Mr Quarry, contacted the complainant and then took carriage of the investigation into the allegations.[126] The sole director of the franchisee was not directly involved in the investigation of the matter. The franchisee director 'did not speak with the complainant himself but relied on the opinion of Mr Quarry who had interviewed the complainant and believed she was being truthful'.[127] Further, in making a decision to terminate the employee for serious misconduct, the franchisee had relied on 'the Corporate office (Cellarbrations) in regard to disciplinary policies and procedures'[128] and sought

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118 Ibid [9].
119 Ibid.
120 Ibid [63].
121 The Commission noted at [66] that the present case was 'most analogous' to the case of *Pettifer v MODEC Management Services Pty Ltd* [2016] FWCFB 5243 but also considered the cases of *Tasmanian Ports Corporation Pty Ltd v Gee* [2017] FWCFB 1714 and *Kool v Adecco Industrial Pty Ltd* [2016] FWC 925: *Caine v Audi* (n 117) [65]–[66].
122 *Caine v Audi* (n 117) [72].
123 Ibid [78].
124 *Bridge v Globe Bottleshops Pty Ltd* [2021] FWC 3153 ('*Bridge v Globe Bottleshops*').
125 Ibid [22].
126 Ibid [44].
127 Ibid [34].
128 Ibid [14].

guidance from the relevant employer association, Tasmanian Hospitality Association ('THA').

Ultimately, the Fair Work Commission found that while there was a valid reason for the termination of the applicant's employment, the dismissal 'was nothing less than procedurally disastrous'.[129] The Commission noted that although the franchisee employer 'did not have its own internal human resource management, it relied on both the national office of [Cellarbrations] and the THA for its human resource advice'.[130] However, in finding for the employee, the Commission ultimately concluded that it was the franchisee employer — Globe Bottleshops — that had 'an obligation to ensure it managed its disciplinary processes in a procedurally fair way and it failed to do so'.[131]

There have also been a number of discrete cases that have considered whether, in the context of a genuine redundancy, there is an obligation to redeploy a worker within the franchise network. In particular, in *Romeu v Quest Acquisitions No 2A Trust & Quest*, the applicant employee's position as a Business Development Executive with 'Quest on Chapel', the franchisee employer, was made redundant after a severe decline in occupancy rates as a result of the COVID-19 pandemic and accompanying restrictions imposed by the Victorian Government throughout 2020.[132] In late August 2020, the 'Quest head office' advised the respondent employer that Quest on Chapel 'could be "de-branded"'.[133] This appeared to suggest that the franchise agreement would be terminated. Without the support of the Quest head office, the respondent formed the view that it would be unable to survive as an independent business outside the Quest network.[134] In September 2020, the respondent attended a meeting with Quest head office where it was decided that Quest on Chapel (along with four other properties) was to close. At this meeting, there were also discussions about redeployment opportunities for staff, including with other franchisees in the Quest network.[135] Two redeployment opportunities were identified, and offered to the employee, at Quest Ballarat and Quest Wangaratta. But, as the Fair Work Commission pointed out, these hotels were not operated by the franchisee employer, but by 'another franchisee operating under the Quest brand such that it is not an associated entity of the Respondent, so that no right to redeployment in relation to an associated entity arises'.[136]

Such decisions are illustrative of the way in which operational decisions of the franchisor can directly impact upon the franchisee's decision to dismiss one or all of their employees. Furthermore, these cases highlight the fact that franchisors are not accountable for the role they play in such dismissals and expose the limitations of considering 'associated entities' in a formal and narrow sense when it comes to questions of redundancy and redeployment. This is not something that has been explored in any detail in decisions by the Commission. This leads to a third,

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129 Ibid [64].
130 Ibid [73].
131 Ibid.
132 *Romeu v Quest Acquisitions No 2A Trust & Quest* [2021] FWC 272, [14]–[19] ('*Romeu v Quest*').
133 Ibid [16].
134 Ibid [16].
135 Ibid [19].
136 Ibid [63].

related issue that in a large number of cases the existence of a franchise arrangement is apparent, but is not, beyond a passing mention, discussed.[137] In some of those cases, it is not clear whether the employer is a company-owned unit (which may mean that the franchisor is, in fact, the direct employer) or an independently-owned unit (in which case the franchisee is the employer).

C *Access to Human Resources Advice*

The cases shed some light on the extent to which access to human resources advice in the franchising context affects the Fair Work Commission's assessment of whether a dismissal was harsh, unjust or unreasonable. The cases reveal that, often, the Commission simply notes the fact that a franchisee has had access to the human resources advice of a franchisor, but does not consider the matter any further. Indeed, in determining whether the dismissal is 'unfair' in the circumstances of a particular case, significant weight has rarely been attached by the Commission to the fact that the franchisee was part of a broader franchise network when considering either:

(a) 'the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal' (s 387(f)); or

(b) 'the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal' (s 387(g)).

In some cases, it has been emphasised that the human resources services in franchisors are not services 'dedicated' to the franchisee business. In *Nicholls v The Trustee for MJ Hooper Trust*, for example, the Fair Work Commission said that

> [a]s a franchise there is some likelihood that the employer may have had access to the Franchisor's human resource expertise, but this is speculation. It would be reasonable to assume the employer itself has no 'dedicated' human resource expertise within its own immediate business and that this may have impacted on the procedures affecting the dismissal.[138]

While there have been some cases in which the Commission has attached some degree of weight to the franchisee's access to human resources,[139] for the most part such access is considered to carry little weight, to be neutral or even irrelevant in determining whether the dismissal was harsh, unjust or unreasonable.[140] This tendency in the case law is most relevant in the context of franchisee employers who also qualify as small business employers under the *FW Act*. As discussed above, one

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[137] See, eg, *Cooper v The Trustee for Cleveland 24-7 Unit Trust* [2020] FWC 6715; *Anderson v Spirit WA Pty Ltd* [2020] FWC 4199; *Seitz v Iron Bay Pty Ltd* [2017] FWC 6926; *Costigan v Dobont Pty Ltd* [2014] FWC 3947; *Banda v Mrs Australia Ltd* [2017] FWC 5522; *Evans v Cigarette & Gift Warehouse (Franchising) Pty Ltd* [2015] FWC 2276; *Smith v Cigarette and Gift Warehouse (Franchising) Pty Ltd* [2013] FWC 3300.

[138] *Nicholls v The Trustee for MJ Hooper Trust* [2016] FWC 6700, [52].

[139] In *Lavender v Electrocity Pty Ltd*, for example, the Commission found that though the franchisee was 'a small business' it nonetheless had 'access to HR expertise and relied upon that advice, at least to some extent': *Lavender v Electrocity Pty Ltd* [2017] FWC 4221, [86].

[140] See, eg, *McConnell v Terry White Chemists Victoria Point* [2015] FWC 4060; *Candappa v Inedit Holdings Pty Ltd* [2020] FWC 468; *Cooper v Making Dough Pty Ltd* [2016] FWC 6206.

of the key rationales for the differential treatment of small businesses has been to recognise the fact that they have reduced access to expert human resources and/or legal advice. Where this is not the case, and franchises have access to sophisticated and expert human resources advice, the force of the argument for increased leniency for such employers under the unfair dismissal regime is not so easily sustained.

V Analysis

As discussed in Part II(A) above, franchise networks give rise to a series of regulatory conundrums. They do not neatly fit within existing legal categories and defy the entrenched assumptions on which regulatory frameworks, including the unfair dismissal regime, have been founded. In this Part, we draw on the existing scholarship concerned with franchise networks, as well as the preceding case law analysis, to critically examine a number of these core assumptions. We also explore a range of possible reforms to address perceived legal deficiencies, such as expanding the ascription of responsibility beyond the direct employer, redefining 'small business employer' in order to reduce jurisdictional hurdles faced by franchise workers and permitting the Fair Work Commission to consider the interlocked nature of the franchising relationship in determining whether the dismissal is unfair.

A *The Legacy of Binary Assumptions and its Legal Implications*

As we alluded to earlier, franchised businesses may look and operate much like a branch of a larger corporation — given that all outlets share the same model, marketing and brand name. However, the franchisee retains a distinct legal persona.[141] Moreover, with the exception of company-owned units, it is the franchisee which ordinarily enters into an employment contract with the employee working in the franchise network. As there is no direct contract between the franchisor and the employee, any claim for compensation by an employee lies solely against the franchisee.[142]

In structuring arrangements in this way, the franchisor can obtain the benefit of the work, and the ability to control the worker either directly or via control of the franchisee, but without exposure to the concomitant employment responsibilities.[143] Collins has previously described this as the 'capital boundary problem' — that is, firms may freely circumscribe the limits of their capital boundaries, which also effectively determines the limits of their legal responsibilities.[144] Under most laws, it is difficult, if not impossible, for one capital unit to be held liable for the actions of another. The capital boundary problem is exacerbated in circumstances where work-related responsibilities are ascribed on the basis of: (a) a pre-existing contractual nexus between the employer and the employee; and (b) a unitary

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141 Felstead (n 6) 1.

142 Collins (n 13) 59.

143 Pauline Thai, 'Unfair Dismissal Protection for Labour Hire Workers? Implementing the Doctrine of Joint Employment in Australia' (2012) 25(2) *Australian Journal of Labour Law* 152, 157.

144 Hugh Collins, 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53(6) *Modern Law Review* 731. See also Thai (n 143) 156.

conception of the employer. Both these issues are discernible with respect to the way Australia's federal unfair dismissal regime applies to franchise networks.[145]

In particular, with the exception of the provisions relating to 'associated entities', the unfair dismissal provisions of the *FW Act* are generally premised on the pre-existence of a binary relationship between a single employee and a single employer. The provisions also assume that there is a concentration of both ownership *and* control in one person or entity. Combined, these provisions have led the Fair Work Commission to focus on the action of the 'real' employer (that is, the franchisee), while ignoring the role played by the franchisor.[146]

Indeed, while the franchisee may have the ultimate, contractual right to terminate the employment of the employee, the franchisor often retains a level of functional control — by shaping work practices, imposing disciplinary processes and compelling dismissal decisions. Franchisor control is manifest in a number of the cases we examined above. In some instances, such as *Bridge v Globe Bottleshops*, the franchisor may have provided advice to the franchisee on disciplinary procedures.[147] In other matters, the franchisor's intervention or involvement in the dismissal is much more direct. For example, in *Caine v Audi*, the franchisor effectively made the decision to dismiss the drivers and executed the terminations with only tacit involvement of the franchisee.[148] In *Romeu v Quest*, the employee's position was made redundant after the franchisor decided to 'debrand' the franchisee's hotel and terminate the franchise agreement.[149]

In many franchise relationships, it is difficult for a franchisee to resist or refuse a direction or command issued by the franchisor.[150] Elmore explains:

> Discounting franchisor-required operational policies as evidence of control because the franchisor is not present in the worksite to implement them ignores the franchisee's heavy incentives to implement them because of its dependency on and loyalty to the franchisor. Rejecting evidence of a franchisor's policies that trigger employment law obligations as mere 'recommendations' ignores the franchisee's loyalty to the franchisor that leads the franchisee to adopt recommendations in order to protect the franchisee's survival and future growth within the franchisor's network.[151]

Notwithstanding the power and control exercised by the franchisor over the franchisee, and the franchisor's influence over working conditions within the franchised unit, in the absence of a bilateral contract between the franchisor and the employee there is no obvious legal avenue to bring unfair dismissal proceedings against the franchisor. Further, it remains difficult, if not impossible, under the current statutory regime to attribute the unfair conduct of the franchisor to the franchisee in the context of an unfair dismissal application. Often, this means that

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145 Thai (n 143) 156.

146 Ibid 160. See also Paul Davies and Mark Freedland, 'The Complexities of the Employing Enterprise' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart Publishing, 2006) 273, 287.

147 *Bridge v Globe Bottleshops* (n 124).

148 *Caine v Audi* (n 117).

149 *Romeu v Quest* (n 132).

150 Elmore (n 20) 936.

151 Ibid 937–8 (citations omitted).

the dismissed employee 'has no claim against the wrongfulness or unfairness of the dismissal against anyone',[152] resulting in a 'no employer black hole'.[153] In the following sections, we explore a number of possible reforms that seek to ameliorate these problems and bridge this gap.

B *Expanding Liability Ascription*

The complexities and tensions evident in franchise networks suggest that the approach to liability ascription may need to shift in the context of unfair dismissal claims. A range of different models for ascribing liability in fissured workplaces have been explored by scholars in Australia, the United Kingdom and the United States ('US'), principally in the context of wage and hour claims.[154] In the context of unfair dismissal in Australia, there are at least two options which merit further discussion: (a) introducing a concept of 'joint employment'; or (b) applying a modified form of statutory secondary liability to unfair dismissal claims. We will address each of these options in turn.

1 *Joint Employment*

As we flagged in Part II, it is difficult to address problems presented by franchise networks under the ordinary principles of the common law. Some have floated the idea of 'joint employment' as offering an alternative avenue for addressing these limitations.[155] In essence, the doctrine of joint employment allows courts and agencies to find that if more than one entity exercises the requisite level of control over the performance of work, then all relevant 'employer' entities should be held jointly and severally liable for employment-related violations.[156] While the joint employment concept is a longstanding feature of labour legislation in the United States, the complex interplay of federal and state law in the US means that there is no single standard for finding joint employment, and the test to be applied often differs 'depending on the legal claim, type of employment, and possibly geography'.[157]

Notwithstanding the inherent uncertainty and unpredictability associated with the doctrine, joint employment has previously received some tentative judicial

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[152] Collins (n 13) 60. See, eg, *Romeu v Quest* (n 132).

[153] Hugh Collins, 'A Review of *The Concept of the Employer* by Dr Jeremias Prassl', University of Oxford, *Labour Law Blog* (Blog Post, 10 November 2015) <https://blogs.law.ox.ac.uk/content/labour-law-0/blog/2015/11/review-concept-employer-dr-jeremias-prassl>.

[154] For an overview of some of this literature, see Tess Hardy, 'Who Should be Held Liable for Workplace Contraventions and On What Basis?' (2016) 29(1) *Australian Journal of Labour Law* 78; Tess Hardy, 'Big Brands, Big Responsibilities? An Examination of Franchisor Accountability for Employment Contraventions in the United States, Canada, and Australia' (2018) 40(2) *Comparative Labor Law & Policy Journal* 285 ('Big Brands, Big Responsibilities?').

[155] For further discussion of joint employment in the Australian context, see Craig Dowling, 'The Concept of Joint Employment in Australia and the Need for Statutory Reform' (LLM Thesis, University of Melbourne, 2008).

[156] Carl H Petkoff, 'Joint Employment under the *FLSA*: The Fourth Circuit's Decision to be Different' (2019) 70(4) *South Carolina Law Review* 1125, 1126.

[157] Jeffrey M Hirsch, 'Joint Employment in the United States' (2020) 13(1) *Italian Labour Law e-Journal* 55, 59.

support in the context of unfair dismissal in Australia. Most notably, in *Morgan v Kittochside Nominees Pty Ltd*, a Full Bench of the Fair Work Commission observed, that '[w]ere it necessary to do so, we would incline to the view that no substantial barrier should exist to accepting … joint employment … for certain purposes'[158] under the applicable workplace relations legislation. However, later cases, such as *FP Group Pty Ltd v Tooheys Pty Ltd*,[159] cast some doubt on the Tribunal deploying and developing a foreign common law concept such as joint employment.[160] In light of the limitations of the common law in this regard, Thai advanced the idea of introducing a statutory standard for joint employment into the *FW Act* — principally with respect to unfair dismissal claims in labour hire arrangements.[161] The statutory model proposed by Thai, which would enable a worker to pursue an unfair dismissal claim against both the labour hire agency and the agency's client as joint employers, comprises two steps.[162] First, in bringing a claim against the agency and the client, the worker would need to show that the client's actions constituted or contributed to the source of unfairness in the dismissal.[163] In practice, this would mean that 'if the agency unilaterally dismissed the worker from its books without the client's involvement, then the client could not be a joint employer in any ensuing unfair dismissal claim'.[164] Second, Thai suggests that the Fair Work Commission would need to assess 'whether the client is a joint employer' according to the test for functional (as opposed to formal) control set out in leading US cases applicable at that time.[165] That test looked to factors such as whether the client's equipment or premises were used for the worker's work, the degree to which the client supervised the worker's work and whether the worker worked predominantly or exclusively for the client.[166] The Commission would need to weigh such factors in making a conclusion about whether or not a client is a joint employer.

However, since then, some have criticised the joint employment doctrine. For instance, Collins has argued that the joint employment concept 'is unsatisfactory because in effect it tries to invent a business association or firm like a partnership when the business reality is rather a heterarchical network between autonomous businesses'.[167] By focusing on questions of formal or functional control, the joint employment concept may inadvertently reinforce the capital boundary problem and implicitly encourage counterproductive liability avoidance on the part of the franchisor.[168] Further, even where the joint employment standard has been

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158 *Morgan v Kittochside Nominees Pty Ltd* (2002) 117 IR 152, 75.

159 *FP Group Pty Ltd v Tooheys Pty Ltd* (2013) 238 IR 239. See also *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* [2004] SAIRComm13.

160 Stewart, Forsyth and Irving (n 56) 260 [10.30]–[10.31].

161 Thai (n 143).

162 Ibid 173–4.

163 Ibid 174.

164 Ibid.

165 Ibid. Thai principally draws on the test set out in *Zheng v Liberty Apparel Co Inc*, 355 F 3d 61 (2nd Cir, 2003) ('*Zheng*'). This test has been superseded in some jurisdictions either by later decisions, or by administrative guidance: see Hirsch (n 157) 66–8.

166 *Zheng* (n 165) 72. See also discussion in Thai (n 143) 162–3.

167 Collins (n 13) 61.

168 Collins (n 144) 740. See also Cynthia Estlund, 'Who Mops the Floor at the Fortune 500? Corporate Self-Regulation and the Low Wage Workplace' (2008) 12(3) *Lewis & Clark Law Review* 671, 692; Hardy (n 38).

interpreted broadly, Elmore believes it still fails to account for the structural imbalances that characterise the franchising relationship and shape the working conditions for franchise workers.[169] Rather than simply expand on joint employment, many have pushed for a legal mechanism that better contemplates the economic logic adopted by, and the implicit promises existing between, franchise actors. More specifically, Collins argues that:

> What the legal analysis requires is a conceptual scheme that both recognises the fundamental contractual character of the market ordering in the relation between the parties, whilst at the same time adding the dimension of the multilateral associational qualities of the network.[170]

2 *Extending Statutory Secondary Liability to Unfair Dismissal Claims*

The extension of the accessorial liability provisions of the *FW Act* (contained in s 550) is one possible way in which liability could be ascribed to a third party beyond the direct employer. However, as discussed elsewhere, this provision falls into many of the same traps associated with the joint employment doctrine. In particular, s 550 has a tendency to focus the court's attention on fact-heavy questions of whether the accessory possessed the requisite level of knowledge, rather than whether the third party person was in a position to effectively prevent or deter the wrongdoing.[171] Section 558B of the *FW Act* was explicitly drafted to address some of the weaknesses of s 550, and specifically designed to deal with the hybrid features of franchise networks. Extending the application of this existing provision to unfair dismissal applications could have certain advantages, such as promoting a level of consistent treatment across different provisions of the *FW Act*.[172] However, for two primary reasons we argue that this liability mechanism may be inappropriate in the context of unfair dismissal.

First, in determining an unfair dismissal claim, the Fair Work Commission is not exercising judicial power — there is no statutory prohibition on unfair dismissals and an unfair dismissal claim is not contingent on proving the contravention of a civil remedy provision. This sets unfair dismissal apart from many other provisions of the *FW Act*, including those sections dealing with unlawful termination and adverse action. It also underlines the fact that the Commission, as an administrative tribunal, is exercising a function distinct from that of a court under the *FW Act*.[173] For this reason alone, s 558B sits uncomfortably within the context of the unfair dismissal regime.

Second, from a normative point of view, it seems incongruous that liability for an unfair dismissal claim should be based solely on the franchisor's knowledge of the wrongdoing, or the reasonable steps taken to prevent an unfair dismissal,

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169 Andrew Elmore, 'The Future of Fast Food Governance' (2016–17) 165 *University of Pennsylvania Law Review Online* 73.

170 Collins (n 13) 61–2.

171 Hardy, 'Big Brands, Big Responsibilities?' (n 154) 319.

172 Contraventions of pt 3-1 of the *FW Act* ('General Protections'), however, would still sit outside the extended liability regime as it currently stands.

173 Stewart, Forsyth and Irving (n 56) 120–1 [5.43]–[5.45].

as this fails to account for the range of ways in which the franchisor may have been involved in the dismissal (as outlined in Part IV above).

One possible — and we argue, preferable — way of navigating these complex questions of responsibility is to provide the Fair Work Commission with a broad power to join a relevant third party (such as a 'responsible franchisor entity') to an unfair dismissal proceeding where that third party has 'constituted or contributed to the source of the unfairness in the dismissal'.[174] The power to join parties beyond the direct employer may be confined to franchise arrangements. Alternatively, it may be conceived and applied more broadly to other types of business networks, such as labour hire arrangements or corporate groups. Of course, in permitting unfair dismissal proceedings to be brought against parties other than the employer, it would be necessary to accord an appropriate level of procedural fairness (for example, by ensuring that the franchisor or third party has an adequate opportunity to respond to the submissions advanced on the part of the applicant and/or the primary respondent). Assuming that a franchisor may be joined to an unfair dismissal proceeding at the initiative of the Fair Work Commission, some new factors could also be added to the list of matters that the Commission must consider in determining whether the termination is harsh, unjust or unreasonable — a possibility that is discussed in further detail below. We argue that this approach could be easily incorporated into the existing unfair dismissal regime and would accord with its broader objectives to balance the needs of business with the needs of employees, adopt procedures that are 'quick, flexible and informal'[175] and ensure that a 'fair go all round'[176] is accorded to the relevant parties. Furthermore, we contend that this approach would enable the Commission to simultaneously recognise the 'market ordering in the relation between the parties',[177] while also taking into account the multilateral associational qualities of franchising networks.

Determining the appropriate remedial consequences presents a separate challenge where more than one entity is being held responsible for an unfair dismissal claim. In order to enable the ascription of responsibility to franchisors, it would also be necessary to amend the remedial provisions of pt 3-2 of the *FW Act*. For example, reinstatement is still stated to be the primary remedy under the unfair dismissal regime. Arguably, such orders would not be appropriate if the relevant respondent is a franchisor and not the direct employer, although it is possible to contemplate orders of reinstatement applying to other franchisees in the franchise network (for example, following a redundancy). Further, s 392 of the *FW Act*, which deals with compensation, would need to be amended so as to allow orders to be made not just against the person's employer, but against the responsible franchisor entity. The challenge then becomes how to reasonably apportion liability to pay compensation as between the franchisor and the franchisee. Under the joint employment doctrine, joint and several liability is imposed by default. Such an approach has been criticised as inherently unjust given that it fails to adequately

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174 This picks up on Thai's model for ascription of liability to some extent: Thai (n 143).
175 *FW Act* (n 7) s 381(1)(b)(i).
176 Ibid s 381(2).
177 See above n 170 and accompanying text.

account for relative responsibility or culpability of the respective parties.[178] Another possible way of resolving this unfairness is to afford the Fair Work Commission a high level of remedial discretion, which would permit the tribunal to make different orders for contribution as between the franchisor and the franchisee.[179]

It is important to recognise that there is likely to be strong resistance to any approach that extends liability to franchisors. As discussed above, accessorial or secondary liability has never been a feature of the unfair dismissal regime, which is infused with binary notions of employment. The broader and more radical concept of joint employment has also been largely dismissed. Enabling the Fair Work Commission to ascribe responsibility to a third party beyond the employer in the context of a dismissal would be a big step. There are legitimate questions about whether extended liability provisions such as those set out in s 558B are appropriate or justified with respect to individual, as opposed to systemic, problems. Outside of mass redundancies, unfair dismissal applications are generally concerned with the performance or conduct issues of a specific employee, and the management and response to those issues by a specific employer. Some may argue that the franchisor is more removed from the direct issues at stake and should therefore be insulated from the relevant legal consequences. Another question arises in relation to whether there is a need for deterrence in the context of unfair dismissal as there is in cases of underpayment or sham contracting (which are the concern of s 558B). The State — via the Office of the Fair Work Ombudsman — also has an active interest in curbing non-compliance with prescribed provisions, such as contraventions of a modern award and adverse action, but has no mandate to intervene in disputes about the fairness of any given dismissal. Is there a need for deterrence in the context of unfair dismissal claims? If so, then liability questions are more pronounced. If not, then ascribing liability to the franchisor is potentially more of a stretch. Nonetheless, in light of the inequities identified in the cases discussed above in Part IV, we believe that there remains a robust case for extending liability for unfair dismissal claims to franchisors in certain circumstances.

C *Justifications for the Small Business Exemptions and Privileges*

As noted above in Part III, it has been commonly assumed by policymakers and the judiciary that larger firms are better equipped to comply with the law given that they have more resources at their disposal and more ready access to expert advice. Conversely, smaller firms are frequently viewed as being less sophisticated and less capable of keeping on top of the relevant regulatory requirements.[180] These assumptions have led to divergent legal requirements being imposed on large and small firms under the *FW Act*. Small businesses are afforded more leniency when it comes to jurisdictional objections and defending their decision to dismiss.

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178 Charles Wynn-Evans, 'A Solution to Fissuring? Revisiting the Concept of the Joint Employer' (2021) 50(1) *Industrial Law Journal* 70.

179 Thai (n 143) 175.

180 For a general discussion of these assumptions, see Paul Edwards, 'Employment Rights in Small Firms' in Linda Dickens (ed) *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart, 2012) 139.

The distinct legal treatment of businesses of different sizes has been an enduring and contested feature of the unfair dismissal laws since their inception.[181] In its recent review of the *Small Business Fair Dismissal Code*, the Australian Small Business and Family Enterprise Ombudsman ('ASBFEO') observed that '[t]he unfair dismissal jurisdiction within Australia's workplace relations system is commonly identified as a regulatory "pain point" for small businesses'.[182] While it has been common for business groups to focus on the negative effects of unfair dismissal on small business survival and job creation, far less emphasis has been placed on the way in which expanding the small business exemption could further erode fundamental rights of certain groups of employees and exacerbate the discriminatory application of unfair dismissal laws to certain groups of workers.[183] Indeed, one of the reasons for ensuring that 'associated entities' of the employer are captured when determining the size of the business is to guard against a corporate group restructuring their business in order to avoid the operation of the laws by 'dividing its workforce between a series of small employing entities'.[184]

In the US, franchisees were historically excluded from the definition of 'small business'. This was because the vertical controls that defined franchising relationships meant that the franchisees were seen as being an integral part of franchisor organisations and not independent businesses at all. As a result, franchisees were rendered ineligible for financial assistance directed towards small businesses. However, through successful lobbying in the 1960s, franchisors were able to argue that franchisor control should be disregarded when considering the franchisee's independence. Rather, franchisors successfully contended that the regulatory framework should focus on whether 'the franchisee had the "right to profit" from effort and bore the "risk of loss or failure"'.[185] In changing the rules around small business, the franchise lobby groups were able to open up 'an important new source of financing to franchisors that remains important to this day'.[186] For our purposes, this example underlines the fact that the classification of franchisees as a small business (or not) has been contested for over 50 years and remains central to many practical and legal questions.

Indeed, our review of unfair dismissal applications in the franchising context revealed that a large number of claims fell down on the basis that the franchisee was not an 'associated entity' of another franchisee unit or the franchisor. This has often meant that applications could not proceed on jurisdictional grounds. The case of *Patel v AAA Tools*,[187] referred to above in Part IV(A), illustrates this problem. Whether or not the employer was part of a broader corporate group has also arisen in the context of redundancy. While the Fair Work Commission has often considered whether there were any redeployment opportunities in 'associated

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[181] Pittard (n 87) 154 (citing Marilyn J Pittard, 'International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment' (1994) 7(2) *Australian Journal of Labour Law* 170).

[182] ASBFEO (n 8) 5.

[183] Pittard (n 87) 168. See also Craig Dowling and John Howe, 'Fried Chicken, Unfair Dismissal and Job Creation: One of These Things is Not Like the Other' (2002) 15(2) *Australian Journal of Labour Law* 170; *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78.

[184] Stewart, Forsyth and Irving (n 56) 775 [23.36].

[185] Callaci (n 18) 171.

[186] Ibid.

[187] *Patel v AAA Tools* (n 102).

entities', as well as the employer's business, redeployment opportunities in the broader franchise network were not essential to satisfy the relevant requirements following a redundancy.[188] In this section, we challenge some of the assumptions that underpin the exemptions and privileges afforded to small businesses in the context of franchise networks. In particular, we propose that the definition of 'small business' should be narrowed in order to reduce some of the jurisdictional obstacles faced by franchise workers seeking to bring an unfair dismissal claim. We also argue for a revision of the relevant factors to be considered by the Commission in determining whether a dismissal is unfair. Finally, we contend that the meaning of 'genuine redundancy' should take into account redeployment opportunities in the franchise network.

Redefining 'Small Business'

In its review of the *Small Business Fair Dismissal Code*, the ASBFEO acknowledged that 'there is no universal measure of what constitutes a small business and definitions vary between policy contexts'.[189] Accordingly, one of the recommendations made by the ASBFEO was to '[c]learly explain the meaning of "small business employer" in the Code so an employer can identify whether they are able to apply it.'[190] However, the ASBFEO did not expand on this recommendation or explicitly identify business models, such as franchising, which may fall within this legal grey zone.

Borrowing the definition of 'associated entities' from the *Corporations Act* may have presented a simple way of dealing with corporate groups when the unfair dismissal regime was first introduced in 1993. However, it is doubtful whether it remains appropriate today. The 'associated entities' provision has the effect of capturing corporate groups and ensuring that they cannot evade the unfair dismissal law through clever or creative restructuring. However, as the case law makes clear, the 'associated entities' provision does not easily graft onto franchise networks where the employer is legally independent, but economically reliant, on the franchisor.

In our view, the definition of 'small business employer' is excessively tied to traditional conceptions of the unitary employer and is too narrow in its conception of business networks. In failing to keep pace with contemporary work arrangements, the definition has the effect of permitting franchisees and franchisors to exploit the capital boundary and minimise legal liability for arbitrary or capricious dismissals. It also treats small businesses in franchise networks differently from small businesses in corporate groups. In our view, this inconsistent treatment is difficult to justify on an instrumental or normative basis. To tackle these issues, we recommend that the definition of 'small business employer' in s 23 of the *FW Act* be amended.[191]

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188 See, eg, *Romeu v Quest* (n 132).

189 ASBFEO (n 8) 5.

190 Ibid 9.

191 Amending the general definition of 'small business employer' would also affect the operation of a number of other provisions of the *FW Act* (n 7) outside the unfair dismissal regime, such as s 66AA (small business employers have no obligation to offer casual conversion) and s 121(1)(b) (small business employers are excluded from obligation to pay redundancy pay under s 119). Alternatively, a new definition of 'small business employer' could be introduced into Part 3-2 alone.

In particular, we suggest that for the purpose of calculating the number of employees employed by an employer at a particular time, all franchisee units within a particular franchise network, as well as the franchisor, are taken to be one enterprise. In our view, this would better reflect the 'federated' nature of franchise networks,[192] remove the inconsistency related to the 'associated entities' provision in the context of unfair dismissals and reinforce other provisions in the *FW Act* that apply to franchise networks (including those concerned with multi-employer bargaining and extended liability for certain civil remedy contraventions).

D *Other Recommendations for Reform*

1 *Revising Relevant Factors to be Considered by the Fair Work Commission*

A more modest change to the unfair dismissal regime may be to amend those factors that the Fair Work Commission considers when assessing whether the dismissal is harsh, unjust or unreasonable. This amendment could complement the introduction of a new statutory power enabling the Commission to join a third party to unfair dismissal proceedings. Alternatively, an expanded list of factors under s 387 could be implemented as a standalone reform.

For example, in assessing the 'size of the employer's enterprise' under s 387(f) or the degree to which the enterprise has access to 'dedicated [HR] management specialists or expertise' under s 387(g), 'enterprise' could be defined broadly to encompass franchise networks. Accordingly, in assessing whether procedural fairness has been afforded to the applicant, the Commission would be permitted to take into account the size and resources of the franchisor, and the HR support and assistance provided by the franchisor to the franchisee. This statutory shift may also mean that the Commission has a greater opportunity to critically examine the relationship between the franchisor and the franchisee. So, for example, the Commission could look at whether the franchisee is a company-owned or independently-owned unit.[193] More broadly, this legislative amendment might mean that, rather than focus exclusively on the actions and decisions of the direct employer, the capacity of the franchisee and the control exercised by the franchisor may be considered relevant in determining not just whether the decision to dismiss was unfair, but ultimately where responsibility for the dismissal should rest. However, if there is no accompanying recourse against the responsible franchisor entity, this amendment would need to be carefully constructed and applied in order to avoid creating an 'employer black hole' where a franchisee is able to argue that the unfairness of a dismissal was caused by a franchisor who cannot, in turn, be held accountable.

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[192] See above n 22 and accompanying text.

[193] Maryse J Brand and Evelien PM Croonen, 'Franchised and Small, the Most Beautiful of All; HRM and Performance in Plural Systems' (2010) 48(4) *Journal of Small Business Management* 605, 607.

2 *Reviewing the Definition of 'Genuine Redundancy'*

If the person was dismissed on the basis that their position has been made redundant, then the Fair Work Commission is currently required to consider whether it was a case of 'genuine redundancy' or not. In particular, s 389(2) of the *FW Act* states that the dismissal would not be classified as a 'genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within: (a) the employer's enterprise; or (b) the enterprise of an associated entity of the employer.' As noted above in Part IV(B), applicant franchise employees have previously attempted to argue that the franchisee employer should have explored all redeployment opportunities within the broader franchise network before proceeding to terminate the person's employment on the grounds of redundancy. In the case of *Romeu v Quest*, the Commission gave short shrift to this argument finding that independent franchisees were not 'associated entities' and the employee could not challenge the redundancy on the grounds that it was not genuine.[194] In our view, the circumstances of this case, and the conclusion that was ultimately drawn, suggests that the definition of 'genuine redundancy' should be reviewed to ensure consistent treatment between corporate groups and franchise networks. For example, it might be possible to redefine 'the employer's enterprise' to include all units within a relevant franchise network. Alternatively, a new sub-section could be added to s 389(2) to deal explicitly with the need to assess redeployment opportunities within the wider franchise network.

VI Conclusion

Franchise networks represent a unique form of economic coordination between multiple parties that are bound by a collection of bilateral contracts. They also have the effect of blurring long-held distinctions between responsibility and control, markets and hierarchies and small and large business. While franchise relationships share many similar features to business associations there is a 'darker side' to franchise networks.[195] As Collins has argued, 'these novel forms of business organisation achieve part of their advantage over other mechanisms of economic co-ordination by externalising and evading the risks of their activities'.[196]

We have sought to explore this problem in the context of the federal unfair dismissal regime under the *FW Act*. The regime has been described as 'a foundational aspect of statutory labour law in Australia and … a safeguard against other forms of exploitation'.[197] Given its importance, it is critical that we understand the way in which the regime regulates, and responds to, a range of different work arrangements and organisational forms. While unfair dismissal in the context of labour hire arrangements has received scholarly attention,[198] the regulation of

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194 *Romeu v Quest* (n 132) [62]–[67].
195 Collins (n 13) 71.
196 Ibid 71.
197 Howe, Berg and Farbenblum (n 4) 38.
198 See, eg, Thai (n 143).

arbitrary or capricious termination in franchise networks has flown under the regulatory radar.[199]

The body of case law dealing with applications for unfair dismissal in the context of franchising arrangements reveals a number of issues. In particular, it shows that important features of franchise networks often go unexamined in the Fair Work Commission's assessment of jurisdictional issues or its determination of whether the dismissal is unfair, resulting in many applicants who are employees in franchise networks being unable to access a remedy. For example, the interpretation of 'associated entities' as excluding franchisee–franchisor relationships or franchisee–franchisee relationships expands the scope of jurisdictional exemptions intended for small businesses and intensifies the barriers faced by applicants. In addition, adhering to the capital boundaries imposed by franchise networks implicitly benefits franchisors who remain immune from legal responsibility even where it is the franchisor which has been primarily responsible for key decisions relating to the dismissal — either by terminating the franchise agreement, restructuring the network or compelling the franchisee to suspend, stand down or dismiss workers within their units. At the same time, assumptions about employer business size mean that many franchisee respondents are able to defend a lack of procedural fairness based on the absence of in-house HR resources and capacity. These issues suggest that there is a level of deficiency and incoherency in both the coverage and content of the unfair dismissal regime as it applies to franchise arrangements.[200]

This, in turn, raises important instrumental and normative questions about how the law should respond to franchise networks that simultaneously defy easy juridical classification[201] and 'exhibit traits of organised irresponsibility' in the context of unfair dismissal.[202] We have suggested several options for reform. First, we argue for the introduction of a new liability mechanism in the unfair dismissal regime, which would have the effect of allowing the Fair Work Commission to take into account the role and influence exercised by the franchisor in the context of disciplinary procedures and dismissal decisions. Second, in order to achieve a 'fair and balanced approach that takes into account business size',[203] we advance the idea that 'small business employer' should be redefined to account for the broader franchise network. Third, we contend that the capacity and resources available to the direct employer via the broader franchise network needs to be taken into account in assessing whether the relevant dismissal is harsh, unjust or unreasonable. Finally, we argue that, in cases involving redundancy, the Commission should be required to take into account whether, and to what extent, redeployment opportunities in the franchise network have been explored. In combination, these reforms would dispense with the simplistic distinction between small and large businesses and enable a more nuanced approach tailored to franchise arrangements.

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199 Buchan (n 23) 55.

200 Howe, Berg and Farbenblum (n 4).

201 Gunther Teubner, 'Beyond Contract and Organization? The External Liability of Franchising Systems in German Law' in Christian Joerges (ed) *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States* (Nomos, 1991) 105, 116.

202 Collins (n 13) 73.

203 ASBFEO (n 8) 6.

Ultimately, we suggest that careful reconsideration of the unfair dismissal regime is required not just in relation to franchises, but a range of other types of business networks, including labour hire arrangements. In our view, maintaining the status quo, and adhering to misplaced assumptions regarding the nature of employment relationships and business size in the contemporary labour market, may have the effect of eroding fair dismissal procedures for all workers and jeopardising the promotion of decent work in Australia.[204]

[204] Dowling and Howe (n 183) 7.