



7-ELEVEN

REGULATORY REFORM POSITION PAPER

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Regulatory landscape

The franchising industry is primarily regulated by the *Competition and Consumer Act 2010 (Cth)* (Act) and a number of mandatory industry codes under that Act. The *Competition and Consumer (Industry Codes-Franchising) Regulation 2014 (Cth)* (Franchising Code) is one such industry code which operates to regulate the conduct of participants in franchising. Similarly, the *Competition and Consumer (Industry Codes-Oilcode) Regulation 2006 (Cth)* (Oilcode) is a mandatory industry code that regulates the conduct of participants in the petroleum marketing industry. As many retailers in the petroleum industry are franchised, they will be regulated under the Oilcode instead of the Franchising Code. Where a franchised network operates both fuel and non-fuel sites (as is the case for 7-Eleven) the franchisor will need to manage compliance across the two separate codes.

Required reform

7-Eleven is keenly aware of the gap between the risks to our brand and reputation of serious fraud and illegal behavior by franchisees, together with the legitimate expectations of stakeholders, and our ability to address these issues adequately within the current regulatory framework. 7-Eleven's proposal focuses on ensuring franchisors can more effectively address illegal and unethical activity within a network, and that such activity is appropriately dealt with, while also accepting greater responsibilities to boost education, prevention and compliance and better protect workers consistent with community expectations.

Our intention is not to increase the overall regulatory burden beyond what is necessary to ensure that our sector consistently upholds the law and community expectations, and is seen to be doing so. We also believe that any new regulations need to be fair and reasonable for all operators - small and large - and are happy for others to put their perspectives forward in terms of any appropriate thresholds and exemptions that should apply.



7-Eleven proposes the following key reforms as a balanced package of measures:

1. Modifying the termination provisions in the applicable industry codes to expressly provide franchisors with the right to terminate a franchise agreement in the case of “serious non-compliance with Commonwealth Workplace Laws or Fair Work Instruments”.
2. Harmonising the relevant provisions of the two key industry Codes (being the Oilcode and the Franchising Code) that govern franchised retailers in Australia, with the goal of ensuring that all franchised businesses are subject to either a single Code, or consistent provisions across the Codes (particularly with respect to termination and disclosure), as soon as possible.
3. Expanding master franchisor responsibilities within the applicable industry code/s as follows:
 - a. An obligation to implement systems and processes to promote education and compliance across their network;
 - b. An obligation to protect the wages of franchisee employees. Specifically, franchisors should have an obligation under the Codes to make good on wages legitimately owed by franchisees to their employees in specific circumstances;
 - c. An obligation to include information on likely wage costs and detailed wage modelling in disclosure documents provided to prospective franchisees; and
 - d. An obligation to provide all new employees of franchisees, as soon as practicable after the commencement of their employment, with information about their workplace rights and responsibilities, an appropriate whistle-blower mechanism for any complaints and how it may be accessed.
4. Increasing penalties for employers who breach the Fair Work Act, consistent with ensuring an effective level of deterrence is in place.
5. A mature discussion on reforming student visa rules to ensure that students are able to earn enough working legally to cover average tuition and living expenses, beyond the first year of their course.

1. Termination - special circumstances - additional circumstance to be included

Terminating a franchise agreement is a profound decision that can have serious financial and other ramifications for the parties. We see termination as a last resort, reserved for serious cases of non-compliance, and ideally, exercised rarely. Further, as a business built on partnerships, 7-Eleven believes that strong termination provisions must co-exist with robust compliance and education measures that minimise the need for franchisors to invoke termination powers. Over recent months, 7-Eleven has invested voluntarily to, among other things:

- Change our franchise agreement, shifting significant value to franchisees and introducing a raft of new compliance, oversight and accountability measures.
- Establish a compliance team to assist Franchisees in complying with obligations but also to detect and report non-compliance in the network.



- Update policies and modules so that from the point of enquiry, to on-boarding and through to operating, franchisees have clear, multiple and persistent reminders of their obligations to their employees and other obligations under Australian law.
- Mandate the use of an enhanced central payroll system by all franchisees that maximises 7-Eleven's ability to ensure legal wages are being paid by franchisees to their staff, in part through real time exception reporting, that will be auditable and actionable by 7-Eleven.
- Introduce an education campaign to ensure franchisees and their staff are aware of their obligations and entitlements respectively.
- More actively promote our whistle-blower hotline, the conduct of which will be auditable and available to the FWO.
- Increase payroll audits from May 2015 and directly provide payslips to franchisee staff.

These actions and others planned demonstrate 7-Eleven's commitment to the highest possible standards of corporate governance, oversight and compliance, operational integrity and brand credibility. We believe that actions such as these should form the basis of a minimum standard enshrined in the Code/s and incumbent on all franchisors to meet or exceed (see point 3 below for details).

Nevertheless, it is clear that despite all efforts there is likely to be a small number of cases where termination is the only appropriate response. It is imperative therefore that clear, robust and consistent termination powers are available to franchisors.

Currently, each of the industry codes prescribe the circumstances when a franchise agreement may be terminated immediately by the franchisor. Accordingly, a franchisor must not terminate a franchise agreement for breach (without first giving the franchisee an opportunity to rectify the breach) unless the breach is specified as a special circumstance in the Code.

Contrary to commonly held views, neither Code provides the franchisor with an express right to immediately terminate a franchise agreement in circumstances where the franchisee has failed to comply with workplace laws. This is consistent with the comments made by the ACCC in its submissions to the Senate Inquiry.

Instead, in order to terminate on the basis of such a failure, the franchisor needs to either establish another basis for termination (such as fraudulent conduct, or, in the case of the Oilcode, reputational damage) or provide the franchisee with an opportunity to remedy the breach. In 7-Eleven's experience, the alternative approaches are problematic for a number of reasons.

It can difficult to gather the weight of evidence required to confidently establish that the conduct falls within one of these remaining provisions - even in egregious cases. For example, underpayment of wages is unlikely, of itself, to constitute fraud (the fraud in fact arises from the lodgement of incorrect payroll records). It is therefore necessary to gather sufficient evidence to prove that there was some fraudulent conduct in the underpayment practices.

If there is insufficient evidence to establish one of the special circumstances, the franchisor is then required to issue a breach notice and allow the franchisee an opportunity to remedy the breach. The franchisor will only be permitted to terminate if the actual breach described in the notice is not rectified. While under the Oilcode, franchisors also have a right to terminate



immediately if three breach notices have been issued (i.e. to prevent continual repeat breaches), the Franchising Code provides no such recourse, thereby enabling the process to occur repeatedly throughout the term.

The current Codes establish a bar that is simply too high, takes too long to meet, and does not strike the right balance between protecting the legitimate rights of franchisees and upholding the rights of workers and the broader integrity of the sector. Existing provisions significantly crimp the ability of franchisors to act against illegal activity, and in fact create disincentives to do so. In addition, the application of two separate codes results in unnecessarily burdensome reporting obligations, with differing disclosure standards.

Further, 7-Eleven supports the view of the Government and others that the FWO is in need of more resourcing in order to be able to move quickly and with appropriate focus wherever allegations of illegal activity are made (including referrals from franchisors).

7-Eleven therefore recommends the addition of a further special circumstance for immediate termination under both of the Codes being “serious non-compliance of Commonwealth workplace laws and Fair Work instruments”. Serious non-compliance would include:

- a contravention of any of the general protection provisions contained in Part 3-1 of the Fair Work (FW) Act;
- multiple or deliberate contraventions of an employer’s record keeping obligations in relation to employee records contained in Part 3-6 Division 3 of the FW Act and the FW Regulations;
- one or more contraventions giving rise to significant underpayments (upwards of \$5,000 in total and including underpayment or non-payment of overtime and penalty rates);
- any contravention of sections 323 or 325 of the FW Act relating to unreasonable deductions from wages or an unreasonable requirement to spend, or any other allegation that employees are required to repay a portion of their wages, however structured;
- any successful prosecution of the franchisee under the Fair Work Act or
- a failure to comply with a notice to produce or compliance notice issued by a Fair Work Inspector under sections 712 or 716 of the FW Act.

There should be no need to prove repeated breaches before termination rights are

7-Eleven believes the addition of such a clause in the Codes would provide measured and appropriate scope for franchisors to act decisively on the issues currently facing the sector, consistent with public expectations and the expectations of regulators and policy makers.



2. Code harmonization - Move to one Code for Franchised Businesses

As flagged above, termination provisions across the two relevant industry Codes (the Oilcode and the Franchise Code) are not consistent. The termination provisions in the Franchising Code compared to the Oilcode are outlined in the appendices. There is no practical or public policy reason why franchisees who sell fuel and those who don't should be subject to different termination standards. Further, it is 7-Eleven's experience that the existence of varying provisions muddies the waters in terms of the rights of the parties in any individual case, tacitly establishes different standards in terms of acceptable behaviour across the franchisee base and further complicates and frustrates the ability of franchisors to take effective action where required.

The Codes also provide two different sets of disclosure requirements. While the objective of the disclosure requirements in each Code is consistent, the differences between the provisions in each Code results in organisations such as 7-Eleven having to prepare two different sets of disclosure documents annually.

It is 7-Eleven's view that the provisions contained in clause 36(1) of the Oilcode should be replicated in clause 29(1) of the Franchising Code at a minimum and that the disclosure requirements should be consistent. However, 7-Eleven strongly believes that moving to an arrangement in which all franchised businesses are subject to a single Code is common-sense and would materially benefit all parties and the sector as a whole. This change should be undertaken as soon as possible.

3. Expanding franchisor responsibilities

7-Eleven is unique within the franchise sector in having stepped forward to ensure that any aggrieved franchisee staff are paid their full entitlements. 7-Eleven is doing this through the mechanism of its in-house Wage Repayment Program and the earlier Fels Panel process. To date, more than 500 claims have been paid by 7-Eleven, totalling over \$20m.

While the fundamental structure of the franchise model both in Australia and overseas relies on the separation and independence of franchisor and franchisee businesses, community expectations and standards are such that all businesses that bear a brand must meet appropriate workplace standards. 7-Eleven accepts that to move forward, all franchisors must do more to ensure that all of our standards - including Australian workplace laws - are fully upheld. That's why 7-Eleven is investing millions of dollars and significant organisation effort in a comprehensive compliance program, as referenced above. This encompasses a range of compliance initiatives including:

- The rollout of leading edge technology at store level, using biometric data, CCTV and other leading technologies to accurately produce and verify time and attendance records for all employees;
- Centralising of payroll processes, to ensure Franchisee compliance with relevant laws and Fair Work Instruments, improve transparency of record keeping and payment practices, and highlight non-compliance events in real time;
- A redesign of mechanisms to receive and investigate workplace complaints from franchisee employees, which involves a significant increase in field-level compliance activity;



- The launch of new company values, embedded in all core recruitment and performance processes, supported by a significant communications effort and
- An overhaul of our store-facing engagement, including the rescoping of the critical DM and RM roles and the promotion of independent whistle-blower hotlines where franchisee employees and other staff can confidently and anonymously report their concerns.

As previously flagged, 7-Eleven sees robust investment in compliance processes, systems and culture as a necessary corollary to stronger termination powers and penalties. We believe the FCA should be consulted in determining appropriate minimum standards that might be enshrined in the Code/s, however 7-Eleven suggests the following compliance obligations should be placed on franchisors through new requirements in the relevant Codes:

- Information provisions:
 - that franchisors include information on likely wages costs and detailed wages modelling in disclosure documents provided to prospective franchisees. This would ensure that all franchisees enter into franchise agreements with full and accurate knowledge of the likely labour costs of that specific business, and with no ambiguity as to the cost of compliance with workplace laws.
 - that franchisors provide all new franchisee staff, as soon as practicable after the commencement of their employment, with clear and up to date information about their workplace rights and responsibilities. This information would ideally be sent to employees' home addresses and include the details of a confidential process (for example, a whistle-blower hotline) that is available free of charge and on a confidential basis for employees to raise any questions or complaints.
- that franchisors have in place a mechanism for franchisee staff to report suspected breaches of workplace rights to the franchisor; and
- that franchisors have in place mechanisms to investigate and audit network compliance.

7-Eleven also considers that there may be circumstances where franchisors could accept additional obligations with respect to legitimate underpayment claims (substantiated to the franchisor's reasonable satisfaction) by franchisee's employees. Such additional obligations would include the requirement for:

- a. The franchisor to be notified of the claim and investigate it within a reasonable time;
- b. The franchisor to communicate its findings to the franchisee and direct the franchisee to make any payment owed to their employee/s and
- c. In the event that the franchisee fails to remedy the underpayment or cannot pay (e.g.: declares bankruptcy), the franchisor must make the payment owed to the employee/s (in concert with taking the appropriate action against the franchisee).



4. Increased employer penalties for breaches of Fair Work Act

In our view, any legislation and regulatory framework should deliver a balance between productive labour relations, protecting workers, having the right penalties and sanctions in place and ensuring the ability of business to grow and operate effectively and efficiently. In this context, 7-Eleven is supportive of increasing penalties for employer breaches of Fair Work Act, in order to ensure an effective level of deterrence is in place.

5. Reform of Student Visa regulations

This paper focuses largely on the franchising sector given 7-Eleven's industry leadership and ambition to 'prove out' reforms and drive change in our sector as quickly as possible. We believe however that a number of the underlying issues will require broader policy and regulatory reform to permanently address.

For example, consideration should be given to reforming student visa arrangements that do not appear to allow students to legally work sufficient hours to cover their tuition and living expenses. We believe these arrangements may inadvertently be helping to create a pool of vulnerable workers and contributing to their exploitation.

We fully recognise that these issues are complex, and believe mature discussion is required. This may well be one of the issues to be considered in more detail by the soon-to-be-established Migrant Worker Taskforce within FWO.

Attachment:

Appendix 1 - Current Franchisee termination provisions in relevant Codes



APPENDIX 1 - CURRENT FRANCHISEE TERMINATION PROVISIONS IN RELEVANT CODES

Oilcode (clause 36)	Franchising Code (clause 29)
Franchisee no longer holds a licence that it is required to hold to carry on the business	Franchisee no longer holds a licence that it is required to hold to carry on the business
Franchisee becomes insolvent	Franchisee becomes insolvent
	Incorporated franchisee is deregistered by ASIC
Franchisee voluntarily abandons the franchised business	Franchisee voluntarily abandons the franchised business
Franchisee is convicted of a serious offence	Franchisee is convicted of a serious offence
Franchisee operates the franchised business (or associated business on the premises) in a way that endangers public health, safety or the environment	Franchisee operates the franchised business in a way that endangers public health or safety
Franchisee operates the franchised business (or associated business on the premises) in a way that is fraudulent	Franchisee acts fraudulently in connection with operating the franchised business
Parties agree to termination	Parties agree to termination
Franchisee breaches the agreement at least 3 times	
Franchisee is likely, by continued occupation of the site, to cause substantial damage to the business, property or reputation of 7-Eleven.	
In the case of a commission agency, where the franchisee fails to bank the franchisors money as required under that agreement	
The premises are either subject to compulsory acquisition by the Commonwealth or subject to a law that prohibits the sale of fuel	