



**Submission by the Franchise Council of Australia
to the Senate Standing Committee on Education
and Employment in relation to the impact of
Australia's temporary work visa programs on the
Australian labour market and on the temporary
work visa holders.**

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1. Introduction

The Franchise Council of Australia welcomes the opportunity to contribute to the deliberations of the Senate Standing Committee on Education and Employment, and its consideration of the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders.

The Franchise Council of Australia is the peak industry body for the Australian franchise sector. Although many aspects of the deliberations of the Senate Committee are only of general relevance to the franchise sector, the FCA has taken a keen interest in recent deliberations as an observer as a consequence of some references to franchising more broadly due to focus on the 7-Eleven organisation.

A key role of the FCA is to promote best practice in Australian franchising and we have and will continue to work closely with Government and authorities, including Fair Work Australia to this end. This submission contains some analysis and suggestions that we hope will assist the Committee in its deliberations. Franchising is the backbone of Australia's small business community, providing a framework for independently owned and operated small businesses right across the nation. While the 7-Eleven model is unusual and contains a number of unique features, we are, of course, following the Committee's proceedings closely to identify any learnings for the broader sector.

Given the unusual nature of the 7-Eleven model, we are keen to ensure that any regulatory responses recommended by the Committee are appropriate, and do not impede or prejudice the broader franchise sector or impose unnecessary compliance costs.

KEY POINTS:

- 1. 7-Eleven's approach of a comprehensive day to day business model including the payment of all invoices on behalf of the franchisee, provision of a payroll service, and a financial model that operates on a split of gross profit, is not typical of a franchise network.** Most franchises are structured to celebrate and support the independent nature of the individual franchisees with the business owner operating the business independently within the support network of product, deals, training and profile provided by the franchisor.
- 2. It is not currently possible under the Franchising Code of Conduct to terminate a franchise agreement even in the event of serious breach of workplace obligations by a franchisee. The FCA's recommendation is to amend the Code of Conduct to permit a franchisor to immediately terminate a franchise agreement if a franchisee commits a serious breach of its obligations under any workplace legislation.**
- 3. The FCA enjoys an excellent relationship with Fair Work Australia and the Fair Work Ombudsman, and has a long and proud track record of proactively helping these bodies implement a number of initiatives to enhance knowledge and promote compliance. We support the extension of powers and additional resourcing of Fair Work Australia and the Fair Work Ombudsman that appears to be required to enhance compliance across all businesses, particularly small businesses.**
- 4. It seems that the evidence largely relates to the specific instances of abuse within the convenience industry (especially those businesses operating on a 24-hour basis) rather than policy issues with the franchising sector.**

2. The importance of the Australian Franchising Sector

There are approximately 1180 business format franchise systems in Australia, with an estimated 79,000 outlets employing more than 460,000 people¹ with an estimated \$144bn of annual turnover 95% of franchisors and almost all franchisees fall within the definition of "small business" and our members represent the backbone of independently owned and operated small businesses right across Australia.

Our members are market leaders in many industry sectors notwithstanding the fact that they have to compete with large corporations. Automotive retail, bakeries, casual dining, fast food, coffee shops, convenience

¹ Franchising Australia Survey

stores, real estate, tyre retail, bedding, furniture retail, postal services and home services are just a few sectors which FCA Members provide valuable services in.

Franchised business typically outperform non-franchised businesses (and indeed major corporate chains) in every market economy because of the synergistic relationship between franchisor and franchisee. **This synergistic relationship is structural - franchisor and franchisee work collaboratively to achieve a mutually beneficial outcome and deliver the customer promise, but they do so by taking on clearly-defined, separate tasks. This structure accommodates and supports the independence of the small business operator while providing the support and profiling benefits that flow from being part of a franchise brand.**

Typical Franchisor-Franchisee Responsibility split

While there is a diversity of business structure given the range of sectors involved, typically the franchisor will focus on the brand, the development and enhancement of the common franchise system used across the network, as well as product supply and the bigger picture issues. The independently-owned and operated franchisee will focus on day to day operations, including appointing and managing employees. Just as the franchisee does not get involved in the franchisor's activities, the franchisor does not get involved in the franchisee's activities.

Franchising and employment

In the case of employment matters, given the independent nature of the franchisee's business, it is predominantly the franchisee's responsibility to seek, appoint, train, pay and manage all staff, and meet all workplace obligations. As good corporate citizens, most franchise systems also disseminate information on compliance with employment laws to franchisees, including material provided by Fair Work Australia. They will also include content in training programs.

It is also important to note that the Franchising Code of Conduct currently restricts the action franchisors can take against franchisees in the event of non-compliance. As was stated in evidence to the Committee by Dr Tess Hardy, 7-Eleven representatives and others **it is not currently possible under the Code to terminate a franchise agreement even in the event of serious breach of workplace obligations by a franchisee.** A franchisor can only serve a notice of breach, which then allows a franchisee an opportunity (usually within 30 days) to remedy the breach. Remedial action by a franchisee such as providing an undertaking not to re-offend, compensating prejudiced employees and attending refresher training would prevent termination.² **You will note the FCA's recommendation to amend the Franchising Code of Conduct to permit a franchisor to immediately terminate a franchise agreement if a franchisee commits a serious breach of its obligations under any workplace legislation.**

The unusual nature of the 7-Eleven network

When we observed the Committee's deliberations it did seem that there may be some misconceptions in relation to the typical franchise arrangement, and the rights and responsibilities of franchisor and franchisee under a franchise agreement and at law under the Franchising Code of Conduct. Given the focus on 7-Eleven, we wish to stress the atypical nature of the 7-Eleven structure.

7-Eleven's approach of a comprehensive day to day business model including the payment of all invoices on behalf of the franchisee, provision of a payroll service, and a financial model that operates on a split of gross profit, is not typical of a franchise network. Most franchises are structured to celebrate and support the independent nature of the individual franchisees with the business owner operating the business within the support network of product, deals, training and profile provided by the franchisor. The issues raised with respect to penalty rates flow from the particular pressures of a 24-hour business and are confined as such to the convenience industry.

Franchising and Fair Work Australia / The Fair Work Ombudsman

The FCA enjoys an excellent relationship with Fair Work Australia and the Fair Work Ombudsman, and has a long and proud track record of proactively helping these bodies implement a number of initiatives to enhance knowledge and promote compliance. Fair Work Australia and the Fair Work Ombudsman understand the

² See clause 27 (termination for breach) and clause 29 (termination – special circumstances) of the Franchising code of Conduct.

dynamics, and the typical split of responsibilities, between franchisor and franchisee. We are keen to continue to work with them to promote compliance, and ensure the franchise sector delivers fair outcomes to workers.

Our members have embraced the voluntary Fair Work initiatives, and remain keen to continue to work with the regulators to assist them to meet their investigation and enforcement obligations. You will note in this submission that **we support the extension of powers and additional resourcing of Fair Work Australia and the Fair Work Ombudsman that appears to be required to enhance compliance across all businesses, particularly small businesses.**

We will also be consulting with the regulators as to our additional suggestions in the hope of coming up with a shared view. We believe we all share a common objective, and are confident an industry solution will produce the best outcome for all.

3. The temporary work program

Background

The Franchise Council of Australia does not hold a definitive view in relation to the current temporary work program. The franchisors and franchisees we represent will seek to utilise whatever Government programs are in place that provide access to potential business owners and employees. We will defer to others as to whether the current program is effective, or could be improved. In terms of a general viewpoint, the FCA's position is generally aligned to that contained in the submission from the Australian Chamber of Commerce and Industry.

As noted above, the FCA has taken an interest in the more recent deliberations of the Committee in the context of the 7-Eleven organisation. **The 7-Eleven organisation is not a small business, and the 7-Eleven business model is very different to the typical franchise model, particularly as a result of the business operating on a 24/7 basis. The instances of employee abuse provided to the Committee are indefensible if proven, and 7-Eleven has presented to the Committee on its intended response to these issues.** The FCA does not seek to intervene in relation to those specific matters.

Appropriate solutions

In this submission we have provided some suggestions for the consideration of the Committee after considering the content of the various submissions made, and the deliberations of the Committee to date. These suggestions are intended to address the legitimate concerns identified by the Committee and in submissions, but to do so in a way that avoids unintended damage to the broader franchise sector or unreasonable additional compliance cost to small business.

The FCA appreciates the opportunity to provide this input into the formulation of policy, and the development of a workable and constructive implementation framework. We would welcome the opportunity to discuss this submission with the Committee in further detail.

Although the specific detail and extent of the unfortunate events involving the 7-Eleven organisation are yet to be fully determined it is clear that a number of indefensible instances of exploitation have occurred. No doubt the Committee and others will continue to pursue these matters, and seek further explanations and information from all involved.

The purpose of this submission is to provide a somewhat objective assessment of the market place reality of the guest worker program in the context of small business, and make some suggestions for regulatory reform. This submission takes into consideration all submissions made to the Committee, and the public record of the evidence provided in public hearings. **It seems that the evidence largely relates to the specific instances of abuse rather than policy issues.**

4. Workplace policy issues and reform suggestions

In the table below we have set out some of the policy issues, and our comments and suggestions for reform where relevant. In summary, our view is that some relatively minor but important changes to the Fair Work Act and the powers and resources of Fair Work Australia and the Fair Work Ombudsman will substantially reduce the risk of exploitation and lead to behavioral change in those employers tempted to break the law. These changes will not however impose unreasonable compliance costs, or damage the Australian small business sector.

	Issue	View	Comments / possible recommendations
1.	Does the Fair Work Act offer adequate legislative protection for employees?	Yes	<p>Subject to our comments below, the evidence does not disclose loopholes in the law. Rather the evidence shows blatant and conscious avoidance, and enforcement shortcomings.</p> <p>Recommendation: The FCA does not see any need to change the underlying provisions of the Fair Work Act except as specifically noted below.</p>
2.	Does the Fair Work Act provide adequate sanctions against employers that breach the Fair Work Act?	No	<p>Actions such as the liquidation of the employer entity appear to too easily allow a part to avoid the intended consequences of the law. The FCA supports the introduction of other remedies such as incapacitation and disqualification orders against directors of employers convicted of a serious breach.</p>
	Are the fines adequate?	No	<p>The fines imposed upon the employers, and particularly directors and officers of employers, appear inadequate.</p> <p>Recommendation: The FCA considers that the current level of fines should be increased, and additional provisions inserted to make directors of an employer entity personally liable in the event that an employer entity is liquidated without fully satisfying all debts to employees and penalties to Fair Work Australia.</p>
3.	Do Fair Work Australia and the Fair Work Ombudsman have adequate resources to investigate claims?	No?	<p>This is a matter for Fair Work Australia and the Fair Work Ombudsman. However there was evidence that the resourcing of the regulators required them to take more of an educative approach. This is a policy matter. However there was also evidence in the case of 7-Eleven that regulators had been unable to complete investigations in a timely manner. Fair Work Australia indicated in evidence it required substantially more resources to increase investigative and prosecution activity.</p> <p>Recommendation: The FCA would support increased resourcing to Fair Work Australia to increase its investigative and enforcement capabilities.</p>
4.	Do Fair Work Australia and the Fair Work Ombudsman have adequate resources to investigate breaches and enforce the law?	No?	<p>There was considerable evidence of evidential challenges faced by regulators in gaining proof, particularly if an employer denied breaching the law and there was no complainant willing to testify. 7-Eleven gave similar evidence concerning its own internal audit program. There was also evidence of lack of records inhibiting enforcement action. Information gathering powers are not as comprehensive as enjoyed by the ACCC or ASIC.</p> <p>Recommendation: The FCA believes consideration should be given to increasing the information gathering powers of the regulators.</p> <p>The FCA further recommend consideration be given to reversing the onus of proof if records are inadequate. In other words if an employer has not kept adequate records, the employer must establish its innocence rather than the regulator establish guilt.</p>

5.	Does the Fair Work Act enforcement regime act as a deterrent and promote compliance?	No	FWA and FWO enforcement activity seems insufficient in circumstances where international workers are reluctant to speak up. (Often due to visa consequences.) An amnesty may work, but that ignores other reasons why workers may willingly stay silent and also does not address (and possible encourages) the provision of false information in visa applications.
6.	Does the Fair Work Act provide adequate sanctions against parties that aid or abet a breach?	No	<p>There was evidence of employer entities structured to avoid compliance obligations, and challenges in proving individual liability. The penalties against individuals also seem light.</p> <p>Recommendation: The FCA recommends that penalties against individuals are increased to a level commensurate with those applying under the Competition and Consumer Act or immigration laws. The FCA further recommends that personal liability extended without the need to prove knowledge where the individual is a director of the employer and the employer becomes insolvent or otherwise unable to pay fines and make restitution to employees.</p>
7.	Should third parties such as franchisors, labour hire companies and the like be liable?	No	There was evidence of organisations structuring themselves so as to deliberately step away from a direct employment relationship, notably in outsourcing and labour hire arrangements. In these instances an extension of the accessorial liability provisions could be justified. However this is better achieved by targeting directors of employers than by attempting to extend liability to third parties. The accessorial liability provisions are substantively identical to those that apply under the Competition and Consumer Act, and work well
8.	Should third parties such as unions be able to take action against employers under the legislation?	Maybe	The FCA would wish to discuss this matter further with trade union and other stakeholders before forming a view.
9.	Does the Franchising Code of Conduct need to be amended?	Yes	<p>Committee members appeared to be surprised that franchisors are unable to immediately terminate a franchise agreement in the event of serious breach of workplace obligations. This is also a cause of significant frustration to franchisors, and impedes their ability to assist the regulator with enforcement activities.</p> <p>Recommendation: The FCA considers that the Franchising Code of Conduct should be amended to enable a franchisor to terminate immediately in the event of serious breach of workplace legislation. The FCA is prepared to consider inserting additional disclosure obligations in franchise documentation in relation to the explicit Awards and other obligations that might apply to the franchisee, and a specific warning concerning student visa requirements. However it did appear that the evidence showed the franchisees that breached their obligations in the 7-Eleven network were well aware of the legal position, but chose to deliberately breach the law.</p>
10.	Are other changes required?	Yes	The FCA offers the following comments as general observations, and in the context of our earlier observations on overall causation. The visa program appears to be subject to widespread abuse, and needs to be reviewed to ensure it meets policy objectives. Imposing a 20 hour work limit on student visas without appropriate safeguards and checks creates an environment conducive to abuse. Additional remedies may need to be considered including an offence of aiding or abetting abuse of a visa.