

## Senate Education and Employment Committee

### Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders

#### **Senator Sue Lines Questions on Notice to the Australian Competition and Consumer Commission**

##### **QUESTIONS**

##### **Franchise models**

1. In evidence to the committee, the Franchise Council of Australia has stated that the franchising model at 7-Eleven differs significantly from other franchise operations. Could the ACCC explain the differences between the franchising model at 7-Eleven and various other franchise operations?

##### **Franchising Code of Conduct**

2. Could the ACCC explain its experience in enforcing the Franchising Code of Conduct and where its main efforts have been focussed?
3.
  - a) In its submission to this inquiry, the Franchise Council of Australia stated that 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. 7-Eleven gave similar evidence to the committee at its public hearing in Melbourne on 24 September 2015.
    - i) Can the ACCC confirm that it is not 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, and if so, what the process of remedying the breach involves?
    - ii) Why is the Franchising Code of Conduct currently drafted in this fashion, and which stakeholders were keen to have the Code protect the franchisee in this manner and why?
  - b) In its submission, the Franchise Council of Australia proposed that the Franchising Code of Conduct be amended to permit a franchisor to immediately terminate a franchise agreement if a franchisee commits a serious breach of its obligations under any workplace legislation?
    - i) What is the position of the ACCC on this proposal?
    - ii) Does the ACCC envisage any difficulties in determining, for the purpose of legislative amendment to the Franchising Code of Conduct, what would constitute a 'serious' breach of obligations under any workplace legislation sufficient to trigger a termination under the Franchise Council of Australia's proposed amendment to the Franchising Code of Conduct?
    - iii) In the event of an alleged 'serious' breach of obligations under any workplace legislation (under the proposed amendment to the Franchising Code), would the consideration of whether the matter in question did in fact constitute a 'serious' breach be a matter for the ACCC to determine? If not, what agency or regulator would be responsible for determining the matter?

- iv) If such a proposed amendment to the Franchising Code of Conduct were to be made, would it be possible to build in sufficient safeguards to protect the rights of the franchisee, and what would those safeguards need to be?
- 4) The Fair Work Ombudsman gave the following evidence at the hearing in Melbourne on 24 September 2015 (Temporary work visa inquiry *Hansard*, page 71):

For example, we have an arrangement called a 'compliance partnership' which we enter into with businesses which want to ensure they have good practices in place. We often say to them, 'Include a clause that enables you to terminate your contract with any supplier that is not paying its workers properly.' Of course, you need a bit of due process—time to fix it et cetera. I would be very concerned if there were anything in the franchising arrangements that protected a scenario where someone was underpaying and the franchisor could not deal with that.

- a) Could the ACCC comment on:
  - i) The ability to insert a clause that would enable a business to terminate a contract with any supplier that is not paying its workers properly into a contract, and the advantages and limitations of such a clause. Are there precedents for such a clause?
  - ii) The ability to insert a clause that would allow a franchisor to terminate a contract with a franchisee that was not paying its employees correctly in a franchise agreement under the current Franchising Code of Conduct. Are there precedents for such a clause?
  - iii) If the current Franchising Code of Conduct does not permit the inclusion of such a clause, the advantage (if any) of amending the Code to include such a clause, and any potential drawbacks to such an amendment.
  - iv) Any potential difficulties or obstacles to making such an amendment to the Franchising Code of Conduct.
  - v) The safeguards that would need to be in place if such an amendment to the Franchising Code of Conduct were to be considered.
- b) Has the ACCC had any discussions with the FWO in terms of refining the Franchising Code of Conduct, for example, with regard to a clause that would allow a franchisor to terminate a contract with a franchisee that was not paying its employees correctly?

## **ANSWERS**

### **Franchise models**

1. There is no one model for a franchise system. However, we understand that the break-down of payments and costs in 7-Eleven's system is different from other systems in Australia that the Australian Competition and Consumer Commission (ACCC) has observed. For example, 7-Eleven receives a significant percentage of franchisees' gross profit, whereas many other franchisors require franchisees to pay a relatively small percentage of sales or revenue. We also understand that 7-Eleven also covers some expenses that are not usually covered by franchisors (e.g. rent).

### **Franchising Code of Conduct**

2. The ACCC is responsible for ensuring compliance with the Franchising Code of Conduct (Code), and assesses all franchising-related complaints that we receive for compliance with the Code and the *Competition and Consumer Act 2010* (CCA). We have actively enforced the Code since its introduction in 1998, including 30 litigations. We have also accepted a number

of court-enforceable (section 87B of the CCA) undertakings from franchisors and have reached administrative resolutions with many franchisors. We conduct compliance checks (“audits”) under section 51ADD of the CCA and have served audit notices on 84 franchisors since 1 January 2011.

We generally focus on ensuring that franchisors comply with the Code’s requirements relating to disclosure, termination and dispute resolution. We have found that overall there appears to be a high level of compliance with the Code.

3.

a)

- i) The Code sets out the mandatory requirements that must be observed by all franchisors when terminating a franchise agreement (refer to clauses 26 to 29 of the Code).

The Code does not provide franchisors with the automatic right to terminate a franchisee for a serious breach of workplace legislation. However, the Code does provide franchisors with the ability to terminate a franchise agreement for a serious breach of workplace legislation in certain circumstances. These circumstances are discussed below.

If a franchisor proposes to terminate a franchise agreement because of a breach of the agreement by the franchisee, the Code requires the franchisor to give the franchisee reasonable notice of the breach, in writing and to tell the franchisee what they need to do to remedy the breach. The franchisor must also allow the franchisee a reasonable period of time to remedy the breach (although this period need not be more than 30 days). If the franchisee remedies the breach within the specified period of time in the breach notice, the franchisor is not permitted under the Code to terminate the franchise agreement on this particular ground.

If a franchise agreement contained a clause requiring the franchisee to comply with all applicable laws, or with workplace legislation specifically, and a franchisee failed to comply with workplace legislation (i.e. by not paying its staff in accordance with the applicable award), the franchisee would be in breach of the franchise agreement.

The franchisor could then issue a breach notice to the franchisee requiring the franchisee to remedy the breach. This notice must set out clearly what the franchisee must do to remedy the breach (for instance, it might state that the franchisee must undertake an immediate audit and organise additional salary payments to its employees before a certain date to effect full compliance with the award).

If the franchisee remedies the breach (i.e. by undertaking the required audit and paying its employees the amount they have been underpaid by the nominated date), the franchisor would not be permitted to terminate the franchising agreement on the basis of the stated breach. Conversely, if the franchisee does not remedy the breach, the franchisor would be permitted to terminate the agreement.

The Code also allows a franchisor to terminate an agreement *without notice* to the franchisee, or without first issuing the franchisee with a breach notice, if the

franchisee acts fraudulently in connection with the operation of the franchised business (refer to in subclause 29(1)(g) of the Code), provided the express terms of the franchise agreement allows for this.

Inadvertent or mistaken underpayment of employees is unlikely to be considered fraudulent conduct. However, certain circumstances surrounding the underpayment of employees in some situations may amount to fraudulent behaviour, particularly where dishonesty and deliberate conduct designed to obtain a financial advantage by the franchisee is involved. As such, it may be possible to terminate a franchise agreement immediately if a franchisee commits a serious breach of workplace legislation.

ii) This is a matter of policy and should be directed to The Treasury.

b)

i) This is a matter of policy and should be directed to The Treasury.

ii) Without further guidance in the legislation or the related explanatory memorandum, it will likely be difficult to determine whether conduct would constitute a 'serious' breach of obligations under workplace legislation.

iii) Only a court would ultimately be able to determine whether conduct constituted a 'serious' breach of obligations under any workplace legislation. However, in assessing complaints, the ACCC would have to form a view on whether conduct constituted a 'serious' breach of workplace legislation. This would likely require the ACCC to develop expertise in a large area of law that we do not currently have expertise in, and may require the ACCC to consult with the Fair Work Ombudsman (FWO) in relation to complaints.

iv) This is a matter of policy and should be directed to The Treasury.

4.

a)

i) The Code does not prevent these types of clauses. It is unclear whether the relationship this question is referring to would be caught by the Franchising Code. We are not aware of precedents.

ii) A franchisor can include a clause in its franchise agreement requiring a franchisee to comply with all relevant laws, or with workplace legislation specifically. Many franchise agreements include these types of clauses.

iii) Not applicable, refer to response to 4(a)(i).

iv) Not applicable, refer to response to 4(a)(i).

v) If a franchise agreement states that a franchisee must comply with all relevant laws, before they can be terminated for breaching a law, they must be given a reasonable time to remedy the breach. This provides a level of safeguard to franchisees.

b) The ACCC has had discussions with the FWO in relation to the FWO's investigations into 7-Eleven franchisees and the operation of the Code. The ACCC and FWO do not have the power to amend or refine the Code.