

**FCA Opening Address to Senate Committee Hearing
Draft 221115**

Dear Senator

Key Points from our Appearance before the Senate Select Committee

Firstly, thank you for the opportunity to appear before the Committee in Melbourne on 20 November.

The FCA is the peak body for Australian franchising – we are a voluntary, not for profit organisation representing Franchisees, Franchisors and service providers to the sector. Fair Work Australia is the designated compliance body and the FCA has a proud history of working closely with Fair Work Australia, as well as the Fair Work Ombudsman and the ACCC.

Franchising is the backbone of Australia's small business community. Importantly, franchising is a very business framework that supports many thousands of independent, small business operators who otherwise would not be in business. Importantly, 95% of franchisors and almost all franchisees fall within the definition of "small business".

7-Eleven model is atypical

Given the very unusual nature of the 7-Eleven model, we are keen to ensure, on behalf of the many small businesses we represent, that any regulatory responses recommended by this Committee are appropriate, and do not impede or prejudice the broader franchise sector.

7-Eleven's approach of a comprehensive day to day business model including, for example, the payment of invoices on behalf of franchisees, provision of payroll services, and a financial model that works on a split of gross profit, is definitely atypical of our sector.

The FCA's recommendations

1) The FCA supports the extension of powers and additional resourcing of Fair Work Australia and the Fair Work Ombudsman to ensure enhanced compliance across all businesses

The FCA supports a level playing field for all and best practice in franchising. Ensuring all small business owners, including franchisees, comply with their workplace obligations is one important mechanism for achieving this.

The notion of reversing the onus of proof in the situation of alleged employee underpayment by franchisees is one solution to ensure that a lack of records does not enable an employer to breach their workplace obligations without consequence

and to the disadvantage of the honest small business people who meet their obligations.

An alternative to this approach that the FCA would support is a significant increase to the fines for not maintaining correct records. While Fair Work may not be able to prove an employer is fraudulently underpaying their staff, there would still be a significant penalty for lack of records that the FCA envisages would act as a significant deterrent from engaging in such behavior.

2) We strongly believe that the current level of fines in the Fair Work Act should be increased with additional provisions to ensure directors of an employer entity are personally liable in the event of that entity being liquidated without satisfying debts to employees and penalties to Fair Work Australia.

The FCA believes measures such as increased fines and making franchisees, as directors of their own employer entity, personally liable for unpaid employee wages, would both discourage the underpayment of employees and work to ensure the employee is ultimately paid the wages owing to them, where underpayment is found to have occurred.

Rather than introducing accessorial liability in franchising, the FCA is committed to working with the Fair Work Ombudsman to help educate franchisors to identify non-compliant franchisees, and to ensure the franchisee complies with their responsibilities in this regard.

The FCA would fully support substantial increases to the fines available for breaches of the Fair Work Act to bring them in line with the level of fines proscribed under the Corporations Act, where breaches can attract fines in excess of \$50,000.

We consider that the current fines are not a significant deterrent to an employer to avoid breaching the Fair Work Act. This approach consistent with the approach the FCA took in consultations with the government on amendments to the Franchising Code of Conduct, where we fully supported the government increasing fines under the franchising code of conduct to \$51,000.

The FCA is committed to creating a level playing field for all small business owners who are doing the right thing by their employees. We support best practice in our sector and believe these measures would help to ensure the majority who are compliant are not unfairly disadvantaged by the few who fail to meet their workplace obligations.

3) Urgently call for the amendment of the Franchising Code of Conduct to allow a franchisor to immediately terminate a Franchise agreement if a franchisee commits a serious breach of workplace legislation. This is NOT currently possible even in the event of a serious breach.

The Franchising Code of Conduct currently provides two triggers that can allow a franchisor to terminate a franchise agreement. That is where **a franchisee is convicted of a serious offence** or the **franchisee acts fraudulently in connection with the operation of the franchised business**.

The current Franchising Code of Conduct was drafted in its current form to provide a safeguard to franchisees against termination of the franchise agreements for minor breaches. The Code is designed to protect franchisees and heavily restricts the action a franchisor can take against a franchisee.

Both the triggers for termination currently available under the Code would, in effect, require a conviction in court, and then would still require scrutiny as to what is determined to be a “serious offence”.

What the FCA is seeking is an amendment to the Code so that it expressly includes reference to a serious breach of workplace legislation by a franchisee as a trigger that can allow a franchisor to terminate a franchise agreement. In practical terms, a third party – potentially the ACCC or Fair Work Ombudsman – would be required to determine what is deemed to be a serious or minor breach of the legislation.

We realise that the simple inclusion of this amendment would be open to the same scrutiny as the situation where **a franchisee is convicted of a serious offence**, however believe this emphasis on the requirement for a franchisee to comply with workplace legislation would serve as a potent reminder to franchisees of their obligations and the potential consequences of non-compliance in this regard.