



December 2019

# **7-Eleven response to the Franchising Taskforce Regulation Impact Statement**





## Franchising Taskforce Issues Paper

Principle 1. Prospective franchisees should be able to make reasonable assessments of the value (including costs, obligations, benefits and risks) of a franchise before entering into a contract with a franchisor

Problem 1.1: Disclosure can be hard to comprehend, critical information may be hidden in detail and some information is not provided

<p>Status quo</p>	<p>7-Eleven’s experience is that the amount of information required to be provided to prospective franchisees is substantial.</p> <p>Under the status quo, as required under the Code, when entering into a proposed agreement 7-Eleven additionally provides to a prospective franchisee:</p> <ul style="list-style-type: none"> <li>• a copy of the Franchising Code of Conduct or Oil Code depending whether it is a fuel or non-fuel site;</li> <li>• two copies of the Franchising Code disclosure document or the Oil Code disclosure document (as applicable) to which is attached three discrete audit certificates signed by our auditors);</li> <li>• two copies of the Franchise Agreement (called “Store Agreement”) in the form in which it is to be executed (with all details completed and all exhibits and annexures attached);</li> <li>• a statement of average earnings for the State in which the store is located and for the type of store;</li> <li>• two copies of statements containing the information prescribed under the Codes as to current/previous operation of the store;</li> <li>• copies of the income and expense statements and balance sheets for the past three full financial years and the current year to date for that store (accompanied by disclaimers and cautions as to reliance without due diligence);</li> <li>• Wage Determinations/Current Wages Rates Summary;</li> </ul>
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	<ul style="list-style-type: none"> <li>• Acknowledgement Form;</li> <li>• a further copy of the Franchising Code Information Statement; together with a copy of acknowledgement signed by franchisee;</li> <li>• a copy of the store lease and (in Victoria only) copy of the Lessor's Disclosure Statement;</li> <li>• a pro forma Certificate of Independent Legal Advice to be completed and returned by the franchisee;</li> <li>• a pro forma Statement as to Advice obtained to be completed and returned by the franchisee; and</li> <li>• an Acknowledgement Form for receipt of prescribed disclosure documents.</li> </ul> <p>In addition to the disclosure and related material referenced above, prospective franchisees are provided with templates for their business plan, financial model and employee roster.</p>
<p>Changes to the Franchising Code to increase disclosure</p> <ul style="list-style-type: none"> <li>• Electronic and hard copy disclosure</li> <li>• Separate information statement</li> <li>• Increased and formal financial disclosure</li> <li>• Provision of the ACCC's Franchisee Manual</li> <li>• Leasing disclosure</li> </ul>	<p>Whilst not believing that more information will necessarily create better decision making by prospective franchisees, 7-Eleven would support electronic and hard copies of the disclosure documents.</p> <p>7-Eleven already provides a separate information statement and there would also be no objection to providing the ACCC's Franchisee Manual if this was required.</p> <p>In regard to leasing disclosure, 7-Eleven carries and pays the lease for all our stores. 7-Eleven would have no objection to a franchisee having visibility of the lease and does attach a copy of the lease (where available) to the store agreement.</p>
<p>Simplified disclosure requirements. Require that a simplified disclosure document, which provides all materially relevant information needed to assess the franchise business, is provided to prospective franchisees</p>	<p>7-Eleven strongly supports this option. It is our position that it is not the quantity of information in disclosure documents but the quality and veracity of the information provided.</p>



	Under the current requirements, the documentation provided can be so vast that the critical information required by a prospective franchisee may be lost in the disclosure documentation. However, this needs to be balanced against the risk of such a complex and important decision being made too simple for a prospective franchisee.
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**Problem 1.2: The reliability of information provided to prospective franchisees may be difficult to assess**

Status quo	7-Eleven supports this option.
<p>Requiring franchisors to verify financial statements and introducing a national franchise register</p> <ul style="list-style-type: none"> <li>• Franchisors would be required to include a statement about the accuracy of financial statements</li> <li>• National franchise register</li> <li>• Prohibit third party brokers</li> </ul>	<p>7-Eleven would not object to a statement about the accuracy of financial statements as long as there was a caveat 'to the best of the franchisors knowledge'. This should be coupled with a requirement for the prospective franchisee to sign a form confirming they have received independent legal and financial advice (which is current 7-Eleven practice).</p> <p>7-Eleven has previously recommended that a franchise register be established. We are agnostic as to whether this should sit within the machinery of government, or with an organisation external to government.</p> <p>7-Eleven wouldn't object to the prohibition on 'no agent' and 'entire agreement' clauses in franchise agreements.</p>
Pre-entry education	7-Eleven would support the requirement for prospective franchisees to undertake pre-entry education.

**Problem 1.3: Information gaps – a potential franchisee might be unaware of which types of information are materially relevant to inform their decision to enter an agreement**

Status quo	This option is supported.
A new government online educational resource for the franchising sector	7-Eleven can see the benefit of such a resource if developed in conjunction with industry.



Mandate all prospective franchisees receive legal and financial advice before entering into a franchising agreement	This is a requirement for entry into the 7-Eleven franchise network and have recommended this requirement previously.
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**Principle 2. Franchisees should have time to consider whether the relationship is right for them before committing to an agreement.**

**Problem 2.1: Cooling off rights may expire before franchisees and franchisors have adequate time to appropriately reflect on their business arrangements after entering the agreement**

Status quo, with clarification of the operation of existing cooling off requirements in the Franchising Code	7-Eleven would not object to clarification that the cooling off and disclosure periods are measured in calendar days and that the 14 day disclosure period begins at least 14 days before the signing of a franchise agreement
Extend cooling off to 14 days and modify the circumstances which trigger the commencement of the cooling off period	7-Eleven would not object to this option.
Amend the Franchising Code to extend the disclosure period to 21 days, with the ability to waive part or all of this period with written agreement of both parties	This option cannot be supported as it would introduce a 'grey area' where parties may feel compelled to offer or accept a waiver to the 21 days. A defined cooling off period would be clearer for both parties.

**Problem 2.2: Cooling off rights may expire before lease arrangements are finalised**

Status quo	This option is supported.
Extend cooling off periods, transparency, and termination rights in relation to leases	There is adequate time during the cooling off period for a prospective franchisee to exercise their rights if they are not comfortable with leasing arrangements.  7-Eleven agrees completely with the identification of the risk in the RIS that "where a franchisor signs a head lessee and then the franchisee utilises their cooling off right, this may leave the franchisor with a premises, but no franchisee to run the business."



Provide a new cooling off period of seven days where lease terms are 10 per cent above maximum estimates provided in disclosure documents	7-Eleven pays the lease on all properties so this is not relevant to our business.
Improve education and awareness around leasing and franchising	This option is supported as long as the education material is developed in consultation with industry.

### Problem 2.3: Cooling off rights in transfers, extensions and renewals can be unclear, including with respect to franchisee to franchisee sales

Status quo	This option is supported.
Extend cooling off to transfers, extensions and renewals	7-Eleven would not object to a cooling-off period being applied to a renewed agreement.
Extend cooling off to transfers only	This is a moot point under the 7-Eleven model as franchises are not transferred, a new agreement is entered into with an incoming franchisee.

**Principle 3.** Each party to a franchise agreement should be able to verify the other party is meeting its obligations and is generating value for both parties.

### Problem 3.1 Marketing funds are not always transparent

Status quo	This option is supported.
<p>Address inconsistency in the Franchising Code on the treatment of marketing funds and increase reporting standards</p> <ul style="list-style-type: none"> <li>• Improve consistency within the Franchising Code about the treatment of marketing funds, particularly clauses 15 and 31</li> <li>• Introduce civil pecuniary penalties for a breach of clause 31</li> <li>• Increase the frequency and standards of reporting of marketing funds</li> <li>• Require master franchisors to meet requirements of marketing funds</li> <li>• Clarify the distribution of marketing funds in the event of franchisor insolvency</li> </ul>	7-Eleven does not have a view on this option as we do not operate a marketing fund.



Increase awareness and provide guidance around existing legal obligations	This option is supported as long as the education material is developed in consultation with industry.
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**Principle 4. A healthy franchising model fosters mutually beneficial cooperation between the franchisor and the franchisee, with shared risk and reward, free from exploitation and conflicts of interest**

**Problem 4.1 Supplier rebates can lead to conflicts of interest**

Status quo	This option is supported.
<p>Address conflicts of interest in the handling of supplier rebates to franchisors by requiring increased disclosure;</p> <ul style="list-style-type: none"> <li>• provision of data on resale pricing and purchase prices of items sold by franchisees</li> <li>• all supplier rebates as a percentage of purchase price for franchisees</li> <li>• the relative proportions of the supplier rebate retained by the franchisor and directed to franchisees, and</li> <li>• supplier rebates received by the master franchisor, if there is one.</li> </ul>	<p>7-Eleven believes the requirements under this option would be highly problematic and cannot be supported. Apart from the administrative complexities and costs involved (which would have to be passed on) in providing this information, there are significant issues surrounding the matter of commercial-in-confidence arrangements.</p> <p>Rebates should be for the benefit of the franchisee. 7-Eleven shares the benefit of all rebates with franchisees by first applying such amounts to production and supply of marketing material and the remaining amounts applied to cost of goods sold. If implemented, this option could create the perverse consequence of suppliers withdrawing rebates completely as they would not wish their commercial arrangements to be visible to other suppliers or franchisors. This ultimately would be to the detriment of the franchisee.</p>
Prohibition of supplier rebates in circumstances where franchisor specifies maximum franchisee sale prices	As stated previously, 7-Eleven shares the benefit of the rebates with franchisee. 7-Eleven agrees with the statement in the RIS that an unintended consequence could be that “such changes could have a significant impact on business models, and could also lead to the use of even less transparent funding approaches.”







**Problem 4.2 Conflicts of interest in the context of capital expenditure**

Status quo	This is not relevant to 7-Eleven as under our franchise model, franchisees are not required to outlay any significant capital expenditure.
Modify the Franchising Code to define significant capital expenditure and provide rights for franchisees to recoup the value of significant capital expenditure	As above
Clarify franchisee rights when significant capital expenditure is required	As above

**Problem 4.3 Unilateral variations can lead to conflicts of interest and exploitation**

Status quo	This option is supported.
Banning or limiting the circumstances in which franchisors can unilaterally vary franchise agreements	<p>The ability of a franchisor to vary a franchise agreement, operating procedures and manuals is critical to remaining competitive in a rapidly changing market. If there were two operators in the same market, one being a franchise business and the other corporate, and a new product or way of doing things was offered to the market it would be ludicrous if the corporate operator could offer the new way of doing things but the franchise business would have to wait to have a vote of franchisees before they could offer the same thing.</p> <p>At a practical level, requiring a franchisor to seek a majority of franchisees to agree to a change would prevent the introduction of changes that would be seen in any other sense as a benefit.</p> <p>For example, in order to reduce assaults on staff, robberies and attempted robberies, 7-Eleven introduced a Locked Door policy in December 2016. Under this policy, doors to 7-Eleven stores are locked between 11pm and 5am and can only be opened by the staff member pressing a button to allow a customer into the store. This mean that if someone is looking or acting suspiciously the staff member can deny them entry, it also means</p>



	<p>that an individual or group cannot suddenly ‘storm’ a store and catch a staff member on the store floor or otherwise unawares.</p> <p>This policy met with significant resistance from franchisees who believed it would negatively impact on trade as customers would not want to have to wait until they were permitted entry to a store. They reasoned that a convenience store must always be convenient for their customers. If this policy had have been taken to a committee of franchisees, or all franchisees it is unlikely it would have been supported.</p> <p>Since the Locked Door policy has been introduced there has been a noticeable reduction in assaults and robberies. For example, the number of assaults on staff has reduced from 18 in 2018 to nine in 2019. Similarly, robberies have reduced from eight in October 2018 to zero in October 2019, the first time this has been achieved since 2011. There were however eight attempted robberies (offenders failing to gain forced entry) in October 2019 which demonstrates this policy is working to protect our team members.</p>
<p>Increase awareness around legal rights</p>	<p>This option is supported as long as the education material is developed in consultation with industry.</p>



**Principle 5.** Where disagreements turn into disputes, there is a resolution process that is fair, timely and cost effective for both parties

**Problem 5.1:** Some disputes are not being resolved in a fair, timely and cost effective manner

<p>Status quo</p>	<p>7-Eleven believes the dispute resolution processes under the Franchising and Oil Codes are effective, timely and at minimal cost, easily accessible no matter the size of the franchisee or franchisor</p>
<p>Expand options for dispute resolution, and streamline mediation procedures and services</p> <ul style="list-style-type: none"> <li>• Merge OFMA and ASBFEO</li> <li>• Strengthen third party involvement in dispute resolution, including pathways for binding dispute resolution</li> <li>• Clarify the availability of multi-party mediation</li> <li>• Require that mediation and then arbitration commence within a specified time period once a mediator or arbitrator has been appointed</li> </ul>	<p>7-Eleven sees merit in merging OFMA and ASBFEO. However, this should be undertaken with a communications and education campaign informing the franchise sector of the roles and services available to them.</p> <p>We would not support a levy on industry to pay for dispute resolution functions. As stated previously, on what would a levy be based? Turnover? Net profit? Number of franchisees? Number of times resolution services have been called upon under a model akin to the calculation of workers compensation premiums? Given the diverse nature and size of franchisors it is difficult to see how a levy could be implemented without some unintended consequences.</p> <p>7-Eleven believes arbitration should be a last resort. This would normally involve legal representation which would be costly to both parties, but proportionally more expensive for the franchisee</p>
<p>Clarify the complaint handling procedure requirements in the Franchising Code, to require dispute resolution processes be included in franchise agreements. Provide best practice guides for these processes (including options and timeframes).</p>	<p>7-Eleven does not disagree with this option in principal, however would caution that arbitration can be as expensive as legal action and should not be seen as a panacea for dispute resolution.</p>



**Principle 6. Franchisees and franchisors should be able to exit in a way that is reasonable to both parties**

**Problem 6.1 Reasonable exit arrangements may not be, or may not be perceived to be, available or accessible for some franchisees**

<p>Status quo</p>	<p>This option is supported.</p>
<p>Limit termination in circumstances where the franchisee seeks mediation, and/or breaches have occurred for fraud or public health and safety reasons, and introduce statutory termination rights into the Franchising Code</p> <ul style="list-style-type: none"> <li>• Additional requirements where the franchisor is terminating in special circumstances</li> <li>• Provide statutory termination rights to franchisees</li> <li>• Holding rent payments from franchisees in trust</li> </ul>	<p>7-Eleven completely rejects this option of additional requirements when a franchisor is terminating in special circumstances. Allowing a franchisee to lodge a notice of dispute with a third party when a franchisor proposes to terminate under special circumstances would run in contradiction to other government policy and legislation.</p> <p>If a franchisee was found by a franchisor to be underpaying staff and issued a notice to terminate, the franchisee could lodge a dispute and the franchisee could continue operating, and possibly underpaying the same or other staff, until the dispute is resolved.</p> <p>Further, this option considers the possibility that a franchisee would need to be convicted of fraud before a termination could take effect. It is not clear if this would be a civil or criminal conviction of fraud but either way, this would take an inordinate amount of time and underpayments could continue throughout this period with the franchisor powerless to remedy the situation. It would appear under this option that more consideration is being given to the franchisee than the employees of the franchisee when surely there should be equal consideration.</p> <p>Similarly, public health and safety issues can have an enormous impact on the reputation of a franchise brand. If a franchisee were to repeatedly be found to breach health regulations under this option, they would be able to continue operating as long as they remedy the breach. This could be as serious as food poisoning where there are regular cases reported from the same store but the franchisor is powerless to protect public health and</p>



	<p>safety by terminating a franchise agreement. Meanwhile, enormous damage could be done to the franchise brand and the value of the stores of other franchisees in the network. It would appear again that greater consideration is being to the franchisees than health and safety of the community.</p> <p>In regard to providing statutory termination rights to franchisees, under the 7-Eleven Franchise Agreement franchisees can terminate with 30 day notice so we do not believe this right needs to be codified.</p>
Clarify the termination processes available to franchisees and support greater awareness of negotiation pathways	7-Eleven does not object to this option.

#### Problem 6.2 Excessive restraint of trade clauses may inhibit lawful pursuit of subsequent business interests

Status quo	7-Eleven supports this option.
Amend franchising agreement requirements and clarify wording of clause 23 of the Franchising Code	7-Eleven supports raising awareness amongst franchisees of restraint of trade provisions within franchise agreements. 7-Eleven has a limited restraint of trade provision in that a franchisee cannot open or operate a competing business within 30 days of expiration or termination of the franchise agreement.
Codify common law that restraints of trade should go no further than reasonable to protect legitimate interests	7-Eleven would not object to the Franchising Code being amended to “include common law principles to protect franchisees against unreasonable restraints of trade clauses within their franchise agreement.”

#### Problem 6.3 There are different expectations around the treatment of goodwill in franchise arrangements

Status quo	7-Eleven supports this option.
Clarify the franchisees' rights in regard to goodwill, if any, in the franchise agreement	Under the 7-Eleven Franchisee Agreement, the franchisee is not 'entitled' to goodwill, they are entitled to cash flows that come from operating the franchise business. If a franchisee is selling a business, they may attach an



	<p>amount frequently referred to by the franchisees as 'goodwill' to the purchase of that store, however that is a commercial matter between the outgoing and incoming franchisee.</p> <p>It is noted that consideration is given to the development of a method to calculate goodwill, and it is pleasing that the Taskforce recognises this is a complex task. 7-Eleven would hold that this would be an impossible task given all of the commercial and human factors that can influence the value of goodwill.</p>
<p>Increase awareness of how goodwill is handled in franchising</p>	<p>7-Eleven supports this option.</p>

**Principle 7. The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency**

**Problem 7.1: Some franchisors experience additional regulatory burden from having to comply with both the Franchising Code and the Oil Code**

<p>Status quo</p>	<p>7-Eleven supports this option.</p>
<p>Increase the number of common provisions between the Oil and Franchising Codes to reduce the regulatory burden for some franchisors</p> <ul style="list-style-type: none"> <li>• Align the Oil Code with the Franchising Code in relation to marketing funds and fees</li> <li>• Align the Oil Code disclosure provisions with the Franchising Code</li> <li>• Align clause 36 of the Oil Code for termination in special circumstances with clause 29 of the Franchising Code</li> <li>• Implement ACCC-recommended penalty regime, including significantly increasing the quantum of civil pecuniary penalties for a breach of the Franchising Code and introducing the same civil penalties to the Oil Code</li> <li>• Align the Oil Code with the Franchising Code where any amendments are made to the Franchising Code</li> </ul>	<p>7-Eleven has maintained that the termination provisions in special circumstances in the Franchising Code should be aligned with those in the Oil Code.</p> <p>7-Eleven believes any proposed amendments to the Oil Code should be dealt with as part of a separate comprehensive review rather than as an addendum to a review of the Franchising Code.</p>



<ul style="list-style-type: none"> <li>• Ensure that industry codes remain aligned over time</li> </ul>	
<p>Repeal the Oil Code of Conduct and add specific fuel retailing provisions (such as terminal gate pricing) to the Franchising Code</p>	<p>This option is not supported. While a case could be made that this option would lead to a reduction in regulatory and administrative complexity, 7-Eleven believes the potential ambiguities would outweigh any benefits.</p> <p>The Oli Code is specific to the industry not only setting fairness of relationships but also transparency to the community around matters such a terminal gate pricing.</p>

**Problem 7.2: Compliance with the Franchising Code, Oil Code and where relevant the Competition and Consumer Act and the Australian Consumer Law, remains imperfect**

Status quo	7-Eleven supports this option.
Application and enhancement of civil penalties to all breaches of the Franchising and Oil Codes	7-Eleven does not believe compliance with the Franchising Code would be increased by raising the dollar value of civil penalties. This would be better achieved through more vigilant enforcement of the Codes under the current penalty structure and would support relevant regulators in seeking greater resources to undertake this task.
Improved education and guidance on expectations around compliance with the code	7-Eleven would support a greater role for the ACCC in promoting compliance under the Franchising Code.