

SUBMISSION

Senate Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct

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THE OPERATION AND EFFECTIVENESS OF THE FRANCHISING CODE OF CONDUCT

Introductory comments

The Shop, Distributive and Allied Employee's Association (SDA) is Australia's largest trade union with approximately 213,000 members. The majority of these members are young people and women. Registered in 1908, the SDA has coverage of areas including retail, fast food, warehouse, drug and cosmetic manufacturing and distribution, hairdressing, pharmacies and modelling.

The Code is deficient in respect of the employment obligations of franchisors and franchisees

Over recent years a large number of franchise operations have been publicly identified with wage fraud scandals.

Many of these franchises are household names such as 7 Eleven, Subway and Caltex.

In such situations it is inevitably those who are employed in such franchise who are among the hardest hit.

A large number of workers in these franchises have been defrauded of significant sums of money.

The key concern of this submission is to address the inter relationship between the Franchising Code of Conduct and employment in franchise operations.

In the view of the SDA the current Franchise Code of Conduct is deficient in that it makes no effective reference to the Workplace Relations Act or employment matters more generally.

The Code makes no attempt to ensure that franchisors and franchisees abide by workplace laws.

It makes no attempt to ensure that workers are treated fairly

It totally neglects the obligations franchisors and franchisees have towards those employed in franchise operations.

It would appear that the major drivers of underpayment of workers are

- greed and/or
- a desperate desire by the franchise holder to make their business viable and/or
- ignorance as to what the correct wages and working conditions are.

Further, ignorance is often used as a defence by employers in wage underpayment cases, irrespective of the real reasons for such actions.

The Code does not require a franchisor to ensure that franchisees provide proper wages and working conditions to those employed in franchise operations.

It does not require a franchisee to abide by the law in regard to those who are employed by the franchisee.

There is nothing in the Code which requires an employer to be aware of their legal obligations towards their employees.

There is nothing which requires a lead franchisor to provide franchisees with information relating to employment.

The provision or otherwise of such information for franchisees inevitably has the potential to have a major impact upon the viability of a franchise.

Understanding all their contractual and cost obligations is critical for franchisees if they are to operate a successful business.

Most franchises are by nature small businesses.

Small business is an important part of the Australian economy. It provides employment for large numbers of people.

Government should provide fair and reasonable levels of support for small business.

Government must also ensure that small businesses provide fair and equitable wages and employment conditions for their employees.

Just as any individual should have the right to set up their own business so should anyone employed in such a business expect to receive fair and just wages and working conditions.

All workers and their families are entitled to income sufficient for them to live decently with dignity.

There are no fair grounds to argue that an employee in a small business such as a franchise should receive substandard wages or working conditions.

It is clear that many individuals enter into franchise arrangements without having a clear understanding of all that is required.

Under a franchise arrangement it is typically the head office which sets the price at which goods are sold and also bought, generally from or through the head office.

The head office usually sets the hours the store is open.

The head office charges the franchise for extra expenses such as marketing and promotions.

The franchise holder must then pay other costs such as lease expenses, bank fees, returns to the head office and wages.

In many franchisees wages are a major business cost.

Once all the costs have been met the actual return to the franchise holder is often minimal or even non-existent.

It is no surprise that the Fair Work Ombudsman has described some franchise models as "broken".

It is virtually impossible for many franchise holders to operate a successful business without "cutting corners" such as engaging in wage fraud.

In some franchise models the extent of wage fraud is extensive and systematic. Caltex and 7 Eleven are just two examples.

Nevertheless, it is important to note that some franchisees and some franchise models succeed without widespread wage theft.

The Code does not directly mention the Workplace Relations Act or employment law.

It does not reference health and safety requirements.

Currently it is the Fair Work Act and the National Employment Standards which provide a safety net of wages and working conditions for most workers.

In 2017 the Fair Work Act was amended to hold franchisors accountable and provided for punishment for breaches of the industrial law.

While the amendments to the Fair Work Act may assist with limiting or stopping some current practices, they do not satisfactorily address the reality for many workers.

Some franchises engage in forms of employment which are not effectively covered by the Fair Work Act.

Neither the Workplace Relations Act nor the Code of Conduct effectively addresses the fact that large numbers of overseas residents are employed in Australian franchise operations.

The Code does not address the issue of the interaction of employment and immigration law.

Overseas workers still face fears and threats of being reported to immigration and deported.

Legislation alone does not address this as many overseas workers are still frightened notwithstanding their legal rights.

The Code does not address the situations where overseas workers are subject to exploitation and intimidation.

Workers still face obstacles in pursuing claims for underpayment. Many workers simply do not know what their wage or employment conditions should be.

The SDA has devoted considerable time and expense pursuing claims for workers underpaid in franchise operations.

Proceedings to recover unpaid wages in the current system are complex, time consuming and costly.

For workers not in a trade union this constitutes a serious barrier to them pursuing redress for exploitation.

It is no coincidence that with the decline in union membership we have seen the corresponding increase in worker exploitation.

Those who complain and seek to assert their rights are sometimes still being intimidated or even bashed.

There is still a lack of effective requirement that employers keep payslips and make them available to employees. Too often payslips are still not provided, are falsified or are missing.

The Fair Work Ombudsman is charged with ensuring franchisees comply with their workplace obligations. Notwithstanding the efforts of the FWO wage scandals in this sector continue to emerge.

It appears that the FWO lacks sufficient resources to deal comprehensively with this problem. It is apparent that there is a lack of resources necessary for ensuring compliance and labour regulation.

The current Code has been a step forward but it does not go far enough. It has deficiencies.

There is nothing in the Code which makes the franchisor legally responsible for fraudulent activities of franchisees.

There is presently no effective disincentive for an employer who chooses to exploit workers and deny them minimum wages and conditions.

This is evidence by the 7 Eleven cases of worker exploitation, and the difficulty in seeking appropriate remedies for these workers.

The fact that 7 Eleven can choose to 'self-manage' the process of underpayments is fanciful and does little to dissuade other exploitative employers from such behaviours.

In the case of 7 eleven the franchisor was not legally responsible for franchisees who did not pay correct employee entitlements. There is of course an argument that they did and do have a moral responsibility. This was and is of little comfort to the employees who were subjected to wage theft.

Addressing the problems.

Franchisees should have clear guidance on what they are required to understand and do in regard to employment and how to properly correct mistakes if they occur.

Both the Code and the Workplace Relations Act must be amended to address this matter.

It is critical that franchisees are given all relevant information regarding finance, including all relevant and prospective charges which may be levied by a franchisor.

Such information must include all relevant employment information.

This information should be provided as part of the due diligence process before the prospective franchisee actually signs up to a franchise arrangement. There is a need for transparency and full disclosure in all franchise contracts.

A proper disclosure regime would ensure that all prospective franchisees were aware of their obligations.

In such an environment ignorance or attempts to justify breaches of the law should be not be a defence.

Failure by a franchisor to provide all relevant information to a franchisee or a prospective franchisee would constitute a major breach of the Code and the Workplace Relations Act.

It would make lead franchisors equally liable for any breach with individual franchisees.

The Code does provide for legal redress for misleading or unconscionable conduct by a franchisor towards a franchisee but it is unclear whether this extends to an obligation of a franchisor to provide relevant employment information to a franchisee.

Franchisors should be equally liable for any breach with individual franchisees.

Liability for breaches of the Fair Work act by Franchisees should extend to the Franchisor. This would be akin to the provisions of the NSW Industrial Relations Act 1996 (s127) which extended liability all the way up to the 'principal contractor' in the event that lawful remuneration was not paid by a sub-contractor to their employees.

Any action by a franchisee against a franchisor in respect to this broad obligation is time consuming and expensive for the franchisee.

It is even more so for an employee of a franchise.

The extension of liability to the Franchisor, as set out above, should be done in conjunction with strengthening the rights of the Franchisor to terminate a franchisee license where a franchisee has been found to be engaging in systematic and deliberate wage fraud. This could be achieved by relevant amendments to clause 29(1) of the Franchising Code.

The ACCC investigates breaches of the franchising Code and can take action where it considers it appropriate.

If the Code does not address employment matters effectively the ACCC cannot take action. In any event it is questionable whether the ACCC is the appropriate body to deal with such matters.

However, if the Code made proper reference to the employment obligations of franchisors and franchisees including their responsibilities to be aware of and abide by the Workplace Relations Act at least the ACCC would then have the capacity to refer employment law breaches which it identified to the relevant trade union or the FWO.

It would make a breach of the WRA a breach of the Code.

Notwithstanding recent changes to the Act and the activities of the FWO wage scandals continue to emerge. It is clear that penalties, while increased from where they were are not yet strong enough to deter all wrong doers.

Trade unions must be afforded proper legislative powers to ensure effective compliance of the industrial relations system.

In our view the Workplace Relations Act needs to be further strengthened in relation to franchise operations.

A proper industrial relations system must be able to address all forms of work to ensure there is a genuine safety net of wages and conditions for all workers, regardless whether they are direct employees, dependant contractors, or engaged in the gig, shared services or Uber economy.

It must outlaw sham contracting.

Trade unions must have their general enforcement rights restored and the FWO needs to have its resources increased so that breaches can be more effectively pursued.

Those who were guilty of wage fraud should face severe penalties including in serious cases gaol and or disqualification as company directors. Similar strict penalties should apply to franchisors who do not fulfil their obligations.

Summary

Wage fraud has emerged as a major and pervasive factor in many franchise operations.

This is a most serious matter given the prevalence of the multiple wage frauds which are associated with the franchise sector

It is clear that the Code does not properly address the matter of employment.

In the view of the SDA the current Franchise Code of Conduct is deficient in that it makes no effective reference to the Workplace Relations Act or employment matters more generally.

The Code should make it clear that all franchisors and franchisees must abide by relevant workplace law.

A breach of workplace law would also constitute a breach of the Code.

The Workplace Relations Act needs to be further strengthened in relation to franchise operations.

A proper industrial relations system must be able to address all forms of work to ensure there is a genuine safety net of wages and conditions for all workers, regardless whether they are direct employees, dependant contractors, or engaged in the gig, shared services or Uber economy.

Transparency and full disclosure provisions in the Code must be strengthened.

Legislation should be enacted which ensures that franchisors are responsible for providing all relevant information, including employment information to prospective franchisees.

Without full information on their employment contractual obligations franchisees cannot make fully informed decisions regarding the financial viability of their business.

Coupled with the obligation of the Franchisor to provide information relating to employment law obligations and liability for unpaid wages being extended to them, Franchisors should be given clear rights to terminate a franchise licence in the event of deliberate and systematic wage fraud.

Resources for investigating and prosecuting breaches of the Code and or workplace laws should be increased and the enforcement rights of unions re-instated.

Penalties for breaches should be increased.