



**Maurice
Blackburn**
Lawyers
Since 1919

**Submission in Response
to the PJC Inquiry into the
Operation and
Effectiveness of the
Franchising Code of
Conduct**

May 2018

Maurice Blackburn Lawyers submission to the operation and effectiveness of the Franchising Code of Conduct

Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 31 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Submission

The website relating to the Parliamentary Joint Committee on Corporations and Financial Services' inquiry into the operation and effectiveness of the Franchising Code of Conduct¹ says the following:

"The committee welcomes individual stories that may identify widespread issues and recommendations for reform. The committee's powers allow it to report to Parliament with recommendations for changes to legislation, regulation and government policy".

Maurice Blackburn is pleased to present three case studies – individual and group stories which show the impact on workers of the current regulatory processes applicable to franchising arrangements.

These stories are then discussed in relation to the ongoing issues that Maurice Blackburn deals with on a day to day basis, regarding unscrupulous behaviour within franchisee workplaces.

This submission then offers several recommendations to the Committee, which we believe will go some way to reducing the impacts on individual workers. These recommendations can be summarised as follows:

1. That an independent regulatory body – such as an ombudsman or an ongoing joint Taskforce in partnership with ACCC – be established to oversee the broader franchising system. This would include oversight of employment and workplace issues, as well as franchisor/franchisee relationships. It would regulate compliance against the Code of Conduct, the *Competition and Consumer Act* (2010), the *Fair Work Act* (2009) and other relevant legislation.
2. That a positive obligation be placed on the franchisor to ensure its franchisees are upholding the legislative requirements of workplace law. This positive obligation should be articulated in the Code of Conduct.
3. That any review of the Code of Conduct should also involve consideration of whistleblower protections.
4. That a Funder of Last Resort process be embedded and mandated in the Code of Conduct.

¹ www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising

Case Study #1. Franchisor - 7-Eleven

The case of Sandeep (not his real name) is similar to the stories of many other migrant workers who have been subject to the 7-Eleven wage scandal. Sandeep came from India to Australia to study engineering. He completed his studies and, wanting to stay and work in his new hometown in regional Australia, obtained a Bridging visa B as an interim measure while he went through the process of becoming a permanent resident.

Needing work, Sandeep was briefly interviewed at a 7-Eleven store near his home. The franchisee told Sandeep that he would be paid a flat rate of \$10.00 per hour. This rate is approximately half of the base rate prescribed by the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* ("**the Award**"), and significantly less than half of the Award rate for weekends and public holidays. Sandeep, unaware of employee rights in Australia, agreed to the offered rate. Sandeep worked two weeks of unpaid 'training shifts', and subsequently worked 20 or so hours per week on evenings, weekends and public holidays for the flat rate.

At no stage did the franchisee tell him which award covered his employment, or provide Sandeep with a Fair Work Information Statement. Sandeep also was not given any choice about which fund his superannuation would be paid into, and is still unsure how much superannuation was paid to him.

Due to his financial circumstances, Sandeep found a second job at another 7-Eleven. A colleague from his first store had advised him that the job was available. Sandeep met the franchisee for a few minutes and was quickly engaged to work around 25 hours per week. Similar to the other store, Sandeep was paid a flat rate of \$10.00 per hour regardless of whether he worked evenings, nights, weekends or on public holidays. Also similar to the other store, he was not told anything about his rights as an employee.

Still in financial difficulty, Sandeep found a job at a third store where he worked 20 to 25 hours per week. Once again, he was not provided with basic information about his rights as an employee and was paid a flat rate for his work at the store, for the marginally higher rate of \$12.00 per hour. In total, Sandeep was working between 60 and 70 hours per week at the three stores.

After a few months, Sandeep resigned his job at the first store and started to work more hours at the third store because the work was available and would be paid at the higher rate. Sandeep worked these two jobs until around two years ago, when he found work in a factory that paid award rates.

Sandeep is now an Australian citizen but cannot find engineering work in the field that he studied for, so he continues to work in the factory he was employed at several years ago.

Sandeep's story is notable for the marked similarity in his treatment by the three separate franchisees. Unfortunately, it is all too common to hear almost identical stories from employees of other 7-Eleven franchises about being paid flat rates which are half of the relevant award rates, not being paid penalties or overtime, not being paid any or much superannuation and never being informed of their rights as employees.

Case Study #2. Franchisor - 7-Eleven

The story of Usman (not his real name) has much in common with other workers who have been caught up in the 7-Eleven wage scandal. Like many other claimants, Usman came from the Indian sub-continent to Australia to study, and accordingly held a Higher Education Sector visa (subclass 573). The conditions of the 573 visa placed a cap of twenty hours per week that Usman was allowed to work during his university semesters, although this cap was removed outside of his university semesters.

Also like many employees of other 7-Eleven stores, Usman and his family are not wealthy, so Usman needed to find work to support himself whilst he studied. As he lived and studied in one of Australia's capital cities, Usman found work at two 7-Eleven stores. Usman performed several weeks of unpaid training, and then worked for nearly one year in the two stores. Usman was hired for approximately half of the hourly rate prescribed by the *General Retail Industry Award 2010* ('Award') and was never paid any overtime or penalty rates. Usman was also not paid for a considerable amount of work that he had performed at the store, which resulted in him resigning his employment.

Usman approached Maurice Blackburn Lawyers ('Maurice Blackburn') shortly after the underpayment scandal broke on ABC's 4 Corners program aired in August 2015. Usman realised that his circumstances were very similar to those of the employees who had come forward as part of the program. Usman's Australian friends also confirmed that he was likely to have been underpaid, and urged him to use the pro bono services that Maurice Blackburn offered to affected 7-Eleven workers.

Usman's student visa meant that he was scared about making a claim to the Fels Wage Fairness Panel ('Panel'), but he was more comfortable about the process after hearing that the Department of Immigration and Border Protection ('DIBP') would not cancel visas if:

- the employee had a genuine underpayment claim;
- the employee had cooperated with any investigations by the DIBP;
- there was no other basis for the visa cancellation; and
- the employee agreed to comply with visa conditions in the future.

These statements by the DIBP were enough to make Usman feel comfortable about his ability to make a claim and to continue living, studying and working in Australia. He assisted a lawyer at Maurice Blackburn in drafting a statement. This statement was a list of the relevant facts that the lawyer determined were relevant to Usman's claim of underpayment under the Award and under the *Fair Work Act 2009* (Cth).

Although the claim took approximately six months to draft, submit and to be determined by the Panel, Usman was patient during these steps because of the reassurances by the DIBP about visas and because he was able to speak to his law firm when he had concerns.

When the Panel sent the determination details, Usman was very happy with the outcome as the Panel had determined that he should be paid a five-figure amount that was very close to the amount that he had claimed. He also successfully claimed interest on the underpayment at Federal Court pre-judgement rates because the interest claimed amounted to nearly 20% of the overall amount that the Panel determined in his favour.

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Case Study #3. Franchisor - Caltex

Maurice Blackburn assisted and provided advice to workers working for a Caltex franchisee.

The workers were international students who were exploited by the Caltex franchisee. The workers were not provided with any information about their entitlements prior to starting work. They were not paid for training shifts. They were often the only worker in the store and did not get rest or meal breaks.

They were significantly underpaid. The workers were paid less than the correct hourly rate under the award and did not receive overtime or penalties. Amounts were deducted from their wages including, for example, if a customer drove off without paying for fuel. Superannuation contributions were not always made.

As a result they were working long hours and did not receive their minimum entitlements.

The workers were directed to provide incorrect information to the Fair Work Ombudsman about their rate of pay during an audit and believe that their work records were manipulated to pass a Fair Work Ombudsman audit. For a period the workers were being paid correctly, however, they were directed by the owner to pay some of the money back in cash.

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Discussion:

Investigations into the many wrongdoings that have been committed by employers under franchise agreements have highlighted fundamental shortcomings in the regulation of these arrangements.

Maurice Blackburn is concerned that the current regulatory regime overseeing the franchising system, including the Franchising Code of Conduct, seems restricted to matters pertaining to the franchisor/franchisee relationship, and fails to hold either accountable for issues related to employees or the workplace.

Maurice Blackburn believes that the Code of Conduct lacks adequate provision for the independent oversight of complaints – specifically when it comes to the rights of employees in franchise work arrangements. The Code of Conduct documents an internal process for dispute resolution, with an allowance for external mediation for franchisor/franchisee disputes, but is silent on broader complaint procedures involving workers.

Maurice Blackburn submits that the industry has proven time and time again that a separate, independent regulatory body – such as an ombudsman or an ongoing joint Taskforce with ACCC – is required to ensure proper oversight of the broader franchise industry. This would include oversight of employment and workplace issues, as well as franchisor/franchisee relationships. It would regulate compliance against the Code of Conduct, the *Competition and Consumer Act* (2010), the *Fair Work Act* (2009) and other relevant legislation.

We currently have a Royal Commission in place showing how industry codes of practice, with inadequate enforcement, will always generate worse outcomes for consumers or in this case, workers.

A number of shortcomings in the regulation of franchise arrangements have come to the attention of Maurice Blackburn staff. These are discussed in the paragraphs below.

Often, franchise arrangements place restrictions on franchisees in such matters as procurement of stock, branding and the provision of payroll services. The inability of the franchisee to take advantage of competitive market processes means that their margins are often tight.

One avenue available to the franchisee to cut costs is in how much they pay their staff. The Committee will have seen numerous media accounts of drastic underpayment of staff – especially the most vulnerable of workers².

Professor Allan Fels, past chairman of the Australian Competition and Consumer Commission is on record as saying: “*My impression – my strong impression – is that the only way a franchisee can make a go of it in most cases is by underpaying workers, by illegal behaviour*”³.

Franchisees often operate businesses which attract and employ the most vulnerable workers. These may include workers from culturally and linguistically diverse backgrounds, early school leavers and students. This vulnerability often places them at a distinct status disadvantage in negotiating appropriate employment conditions. This is typified by:

² See, for example, <https://www.smh.com.au/interactive/2015/7-eleven-revealed>; <https://www.smh.com.au/business/careers/caltex-accused-of-squeezing-service-station-operators-and-workers-20161123-gsvgal.html>; <https://www.smh.com.au/interactive/2017/the-dominos-effect/>; <http://www.abc.net.au/news/2017-01-27/pizza-hut-fair-work-audit-finds-delivery-drivers-underpaid/8216500>;

³ <https://www.smh.com.au/interactive/2015/7-eleven-revealed/>

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- Employee non-engagement with unions or forms of workforce organisation,
- Employees not questioning inappropriate behaviours of employers through fear of retribution, or not being able to find alternative work, and
- Employees not seeking external information on entitlements.

Berg & Farbenblum (2018)⁴ in their examination of the 7-Eleven wage repayment program, note four main ways that staff underpayments are transacted by franchisees:

- Claiming a worker is a 'trainee'. This in may involve asking the worker to do unpaid work under the guise of training.
- The 'half pay scam'. This involves franchisees only recording half the hours worked by an employee into the central payroll system, on the basis that the reporting of all hours worked would put the worker's visa compliance at risk.
- The 'cash back scam'. This involves the franchisee correctly reporting the number of hours through the central payroll system, but then requiring the employee to pay a portion back in cash.
- The payment of a franchisee's payroll by 7-Eleven head office into the franchisee's own account for distribution to the workers. (p.8-9)

Maurice Blackburn sees franchisors as complicit in enabling such behaviours to occur.

Maurice Blackburn is concerned that the current regulatory regime contains gaps that might allow unscrupulous franchisors to sidestep their responsibilities to workers. The Act contains a carve out for franchisors who are able to argue that they have taken reasonable steps to prevent wage theft and exploitation. This tick-a-box approach highlights the need for a more holistic approach, as outlined above.

Maurice Blackburn submits that for any improvement to be seen in the incidence of franchisees depriving their workers of proper pay, a positive obligation must be placed on the franchisor to ensure its franchisees are upholding the legislative requirements of workplace law.

A positive obligation refers to an obligation to engage in an activity to secure the effective enjoyment of a fundamental right, as opposed to the classical negative obligation to merely abstain from improper activity.

There are several limitations with the current negative obligation model when it comes to workplace issues within franchise arrangements, including that:

- unlawful behaviour remains unaddressed if there is no complaint;
- the focus is on redressing harm not preventing harm;
- penalties against individuals do not motivate organisational change;
- there are no incentives for promoting proper behaviour; and
- focusing on individual complaints reinforces the characterisation of poor behaviour as an interpersonal phenomenon – or 'a few bad apples' - rather than a systemic or cultural issue.

Maurice Blackburn also submits that the positive obligation on franchisors in relation to franchisees' worker's pay should also extend to ensuring that appropriate superannuation, leave entitlements and workers compensation coverage are addressed.

⁴ Laurie Berg and Bassina Farbenblum, 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program' (2018) 41(3) *Melbourne University Law Review* (advance)

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Maurice Blackburn submits that the positive obligation on franchisors could be articulated in the following sections of the Code of Conduct:

- In Schedule 1, Part 1, Division 3 – Obligation to Act In Good Faith. Under s.6 include a new subclause entitled “Positive Obligation on Franchisor”.
- In Annexure 1, s.1 (e) – detailing the provisions of the disclosure document, and
- In Annexure 2 – the information statement for prospective franchisees.

Maurice Blackburn submits that any review of the Code of Conduct should also involve consideration of whistle-blower protections. We would be in favour of protocols being put in place to incentivise, rather than punish workers who draw attention to poor behaviour by a franchisee.

Maurice Blackburn also recommends that a Funder of Last Resort (FoLR) process be embedded into the Code of Conduct.

Maurice Blackburn believes it should be a mandated part of any franchise contract that the franchisor provide details of a FoLR process covering the entitlements of staff should the franchisee be unable to do so.

Berg and Farbenblum (2018)⁵ note that “...even if 7-Eleven employees received a judgment against their franchisee employer through litigation, the franchisee would simply liquidate and avoid paying the employee.”

Maurice Blackburn submits that the Code of Conduct should protect against such activity.

Similarly, Maurice Blackburn submits that the Code of Conduct should protect against ‘phoenix’ activity of franchisees – that is, an entity which liquidates as above thereby avoiding providing payment of staff entitlements, but which reforms under a different name.

Maurice Blackburn would be pleased to work with the Committee to determine the most appropriate way for this to be expressed in the Code of Conduct.

⁵ Ibid, p.40