

FOLEY'S | LIST

BAD CALL: NON-DISCLOSURE BY FRANCHISOR OF FRANSISEE WAGE COSTS

Author: Glen Pauline

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[THINK FOLEY'S FIRST]

THE BACKSHEET

FOLEY'S LIST WORKPLACE RELATIONS NEWSLETTER

"Bad call": Non-disclosure by franchisor of franchisee wage costs

7-Eleven wage scandal – by Glen Pauline

The 7-Eleven wage scandal puts the spotlight on franchisees, franchisors and the obligation to pay employees their proper wages. But whose problem is it? Is underpayment of franchisee wages solely the responsibility of the franchisee? Can a franchisor that turns a blind eye to franchisee underpayment of employees, or worse, encourages such practices, be exposed to any liability once a franchisee has commenced business and employed its own staff?

Like the profitability and success of a franchised business, the liability for underpaid franchisee employee wages might ultimately be shared by the franchisee and franchisor.

Breach of Fair Work Act 2009

Franchisee employers are, like any other employer, liable to civil proceedings claiming hefty penalties and orders for compensation, due to underpayment of wages. Proceedings may be brought by the Fair Work Ombudsman or disgruntled employees for contravention of the relevant Award and the *Fair Work Act 2009* (Cth). The directors of the franchisee company are also likely to be sued and personally liable as accessories to the wage underpayment contraventions.

But what about the franchisor?

Breach of Franchising Code of Conduct

Complicity by a franchisor in underpayment of

wages by its franchisees, may be in breach of the *Franchising Code of Conduct* ("Code").¹ A franchisor is required² to provide a compliant disclosure document to any prospective franchisee or any franchisee proposing to renew or extend the scope of a franchise agreement. Clause 14.7 of the disclosure document contained in Annexure 1 of the Code requires details of each "recurring or isolated payment, that is within the knowledge or control of the franchisor or is reasonably foreseeable by the franchisor, that is payable by the franchisee to a person other than the franchisor".

It would be hard to argue that Award wages, including penalty rates payable, are not within the knowledge of the franchisor or reasonably foreseeable by a franchisor, especially where the franchise is an established brand that has been operating for years.

Clause 14.7 of the disclosure document must provide a description of the payment, the amount of the payment or *formula used to work out the payment*, to whom the payment is made, and when the payment is due. If the amount cannot easily be worked out, it is acceptable to provide "the upper and lower limits of the amount".³ Modern Awards in operation since 2010 contain clauses which effectively allow the amount of wages payable for employees working shift work, evenings, weekend and public holiday work to be calculated in



Glen Pauline

T 9640 3294

E glen.pauline@vicbar.com.au**Footnotes**

1 *Competition and Consumer (Industry Codes – Franchising) Regulation 2014, Schedule 1 – Franchising Code of Conduct*

2 By clause 8 of the Code.

3 Clause 14.8 of the disclosure document for franchisee or prospective franchisee contained in Annexure 1 to the Code

Foley's List Clerking Team

(click name to email a clerk)

John Kelly T 9225 7654
Andrew Turner T 9225 8954
Matt Parnell T 9225 6084
Kate Conners T 9225 7882

Clerk's Office

T 9225 7777

F 9225 8480

M 0412 360 174 (24/7)

A 250 William Street
Melbourne, VIC 3000

DX 92 Melbourne

W www.foleys.com.au

advance, and wages are usually paid on a weekly or fortnightly basis. In other words, there ought to be an item in clause 14.7 of the disclosure document referring to the estimated wages (including superannuation payments) payable every week or fortnight in line with the hours of work and rosters utilised in the franchised business model. The relevant Award classification for employees who will be required in the business ought to be used to calculate the estimated wages and superannuation or upper or lower limits. If there was no such item in the disclosure document, or the amount or limit stated was inaccurate, and the franchisee is able to demonstrate that payment of the true high wage costs associated with the business caused, or is likely to cause lack of profitability, the franchisor may also find itself in hot water.

Remedies under Competition and Consumer Act and Australian Consumer Law

If a franchisor has failed to include an accurate statement of the upper and lower limits of such wage cost in a disclosure document, to a franchisee or prospective franchisee, in breach of the Code, it may be liable to a penalty of up to \$54,000 for breaching an Industry Code, in contravention of s.51ACB of the Competition and Consumer Act 2010 ("CCA"). A claim for misleading and deceptive conduct pursuant to s.18 of

the Australian Consumer Law ("ACL") contained in the CCA might also be brought due to reliance on an inaccurate statement relating to wage costs in the disclosure document. A franchisee may seek orders against the franchisor for damages pursuant to s.82 or compensation pursuant to s.87(1) and (2) of the CCA and s.236 or s.237 of the ACL.

Conclusions

Employment and franchising lawyers and clients are on notice. Failure to pay correct wages to employees of a franchise is not only unlawful, it is a "bad call" for both franchisee and franchisor, and could see both end up in court. Damage to the franchised brand will surely follow.

The relevant Award provisions need to be used by franchisors to calculate the likely wages payable. Disclosure documents need to disclose at least the upper and lower limits of anticipated employee wages costs, in order to comply with the Code. Accurate disclosure of wages costs is a "good call" by franchisors.

Prospective franchisees are wise to consider the contents of the disclosure document carefully, and obtain considered legal, business and financial advice about the franchise and its profitability, prior to entering or renewing a franchise agreement.

Glen Pauline's
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Glen Pauline practises in employment and commercial law including franchising disputes and underpayment cases. He is also a mediator on the Office of Franchising Mediation Adviser panel of mediators.

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