Holman Webb
Lawyers

Franchise Bulletin

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Introduction

Welcome to the August 2014 edition of the Holman Webb Lawyers Franchise Bulletin.

This year we have seen the delays and uncertainty continue to surround the introduction of the changes to the Franchising Code of Conduct including the new good faith obligation and monetary penalties for breaches.

From 1 January 2015 however it seems that the amendments will finally take effect and the franchising sector will need to ensure that compliance with the Code takes priority or take the risk of incurring fines issued by the ACCC.

All franchisors and master franchisees are encouraged to review their documents thoroughly before that date to ensure that inadvertent breaches are eliminated.

Corinne Attard, Partner heads up our Franchising group. She joined Holman Webb Lawyers in 2013 as a franchising and retail commercial law specialist with more than 25 years franchising and retail industry experience including extensive in-house experience. Her clients include some of Australia's most recognisable retail and franchise brand names.

Corinne's approach is outcome oriented and risk management based and combines practical commercial advice with legal solutions. She acts primarily for retailers, franchisors, master franchisees and multi-unit franchisees.

Corinne has written numerous articles for industry publications and most recently presented at the 30th Annual IBA/IFA International Franchising Committee Joint Conference in Chicago in May 2014 and last month was selected for inclusion in the 2014 edition of the International Who's Who of Business Lawyers as one of Australia's top franchise lawyers. Her contact details are below:

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Pizza price wars and a franchisee rebellion

By Corinne Attard, Partner

Facts

In June 2014 eighty Pizza Hut franchisees applied for an injunction to stop their franchisor YUM! Restaurants Australia Pty Ltd (Yum) from implementing a new marketing strategy across the Pizza Hut network called the "Reduced Price Strategy".

The Reduced Price Strategy would have limited the number of menu items to be sold in Pizza Hut outlets and specified the maximum prices for those items (which as the name of the strategy implies were to be discounted from usual prices).

Yum believed that this strategy would increase sales but the 80 franchisees believed it would have a detrimental – even catastrophic – impact upon the profitability of their individual businesses.

The franchisees' case

The franchisees provided financial modelling by an expert witness to establish their prediction that the strategy would lead to the failure of franchised businesses.

The franchisees claimed that Yum owed implied duties to them to act reasonably and in good faith and to co-operate with the franchisees and it was going to breach these duties with the Reduced Price Strategy.

They also said that Yum was guilty of unconscionable conduct (section 21 Australian Consumer Law).

The Yum case

Yum's case was that something urgently needed to be done to the Pizza Hut business in Australia which had been steadily losing customers for the last 10 years. Yum had used similar strategies in the United States and New Zealand and claimed these were successful. Yum decided to test 2 different pricing models - one in WA and one in Canberra. The WA trial did not succeed and was abandoned but the ACT trial conducted from February to April 2014 was considered a success as sales, transactions and profits increased for the trial stores.

Yum believed the results would be even stronger if the trial was expanded to a national strategy because of the impact of national marketing. Additionally Yum conducted financial modelling on a store by store basis to determine the impact on franchisees. The matter was given serious discussion among Yum's senior executives including the risks of the strategy on "outlier businesses" in particular and the level of increased sales these would need to maintain profitability. Ultimately Yum decided it was a strategy in the best interests of the Pizza Hut system.

Yum also considered that if no action was taken, brand performance would worsen and the risks to Yum and the franchisees of not implementing the strategy outweighed the risks of implementing it. Yum also submitted that the success of the strategy would be evaluated overtime and like any business decision changes could be made as necessary.

On the basis of the evidence submitted by Yum as to the effort it has put into developing and trialling the "Reduced Price Strategy", the Court rejected the franchisee's basic accusation which was that Yum was acting solely in its own financial interests to increase its royalty revenue, at the expense of, and without any proper or reasonable regard for the interests of, the franchisees in maintaining the profitability and asset values of their franchised businesses.

In fact the evidence showed that Yum believed, and continues to believe, that it is acting in the financial interests of all parties to the franchise agreement and with a proper view to maintaining the profitability of the franchisees' businesses as a whole.

As to whether Yum had failed to co-operate in good faith with the franchisees, the Court said any such duty did not give the franchisees a "right of veto over a pricing strategy" where the franchise agreement expressly provides that franchisees must not sell products in excess of the maximum retail prices advised by the franchisor.

The care which Yum took in developing the strategy shows it was not one which was invented capriciously or arbitrarily and demonstrated that Yum was acting in good faith with the intention of advancing the interests of all parties. Further franchisees were involved in the process of developing the strategy although it was agreed, not in any detail.

The franchisees submitted the basis of Yum's modelling was unreasonable and wrong because it did not factor in a reasonable return on investment for the franchisees. Yum's response was that even if the modelling turns out to be wrong it does not mean Yum has breached the implied duty of good faith or is guilty of unconscionable conduct.

The court agreed and said the question is whether Yum has failed to act reasonably and honestly in the performance of its duties or failed to act in good faith, not whether it has adopted a financial model with which the franchisees disagree.

The court considered that the 80 franchisees had a weak case and the balance of convenience (which is what is assessed in an application for an injunction) did not favour the granting of their injunction.

Relevant to the court's decision to reject the injunction and allow Yum to implement its Reduced Price Strategy were the following factors:

(1) The evidence that there has been a continuing deterioration in the overall profitability and brand recognition of the Pizza Hut business, suggesting that something at least needed be done.

(2) There were about 130 other franchisees who are not parties to the proceedings and who, on Yum's evidence, would be adversely impacted by Yum not being able to introduce the Reduced Price Strategy,. The impact on these third parties was an important consideration.

(3) Even if the strategy would have a material detrimental impact on the applicant franchisees, the extent of this would depend on how long the strategy operated and the court accepted Yum's submission that it would act rationally in responding to how the strategy works in practice.

(4) That damages (financial compensation) would be an adequate remedy for any franchisee who suffers loss as a result of the introduction of the Reduced Price Strategy if it is established at trial that the strategy was implemented in breach of any obligation of Yum under the franchise agreement or the unconscionable conduct provisions of the ACL.

(5) An order restraining Yum from implementing the Reduced Price Strategy would be inherently impractical and inconvenient and the effect of an injunction in this form would be to prevent Yum, as a market participant, from competing effectively on price with significant potential adverse impacts.

Update:

Since the injunction hearing above, a class action has been reportedly filed by Diab Pty Ltd, a company owned by Sydney Pizza Hut franchisee Danny Diab, against Yum in the Federal Court on August 12.

The franchisees are seeking damages from Yum to cover the profits they say they have lost since the Reduced Price Strategy was introduced on July 1.

A directions hearing has apparently been set for October 3 and the court has given the franchisee group members until October 28 to opt out of the action.

Obligations, implications and risks associated with changing rosters of your employees

By Rachael Sutton, Partner

Changing an employee's regular roster or ordinary hours of work to suit your organisation's operational needs, whilst trying to keep your employees happy, can be difficult at times. However, following amendments to the *Fair Work Act*, 2009 (**FWA**) in January of this year, that task is now more difficult.

In the past, in the hospitality and retail food industry, employers need only have provided notice to employees of an impending roster change. However since 1 January 2014, with the insertion of a term in all modern awards that requires employers to consult about changes to regular rosters and hours of work, employers must ensure that they:

- consult with employees covered by a modern award or enterprise agreement dated after 1 January 2014 before implementing a change to regular rosters, ordinary hours of work or flexible working arrangements, by:
  - providing information to employees about the change to their hours of work;
  - inviting employees to give their views about the impact of the change, including any impact in relation to their family or carer responsibilities; and
  - considering any views given by the employees about the impact of the change.
- document any discussions or dealings with affected employees about changes to regular rosters, ordinary hours of work and flexible working arrangements to assist in demonstrating that issues raised by employees have been genuinely considered.
- ensure the consultation clause in an enterprise agreement dated after 1 January 2014 adequately addresses the new legislative requirements. The clause should require the employer to:
  - provide information to employees about the change to their hours of work;
  - invite employees to give their views about the impact of the change, including any impact in relation to their family or carer responsibilities; and
  - consider any views given by the employees about the impact of the change.

Importantly, for an industry where casual employment is prevalent, the consultation requirement does not apply to employees who have "irregular, sporadic or unpredictable working hours". However, this is quite broad and the obligation could still arise for casual employees who either undertake regular and systematic work or have a reasonable expectation of hours based on past hours worked. A failure to comply with the consultation term in a modern award or enterprise agreement could result in a number of potential remedies including:

- a maximum civil penalty of 300 penalty units per contravention for a body corporate (currently $51,000);
- an injunction;
- compensation for the affected employee/s; and/or
- any other order the Court considers to be appropriate.

It is important to note that the dispute resolution mechanisms of the relevant award or enterprise agreement will apply to the operation of the consultation term and that compliance with consultation terms, including the new requirements in relation to regular rosters and ordinary working hours, will continue to be enforceable by application to the Federal Circuit or Federal Court.

Not only can a failure to consult lead to potential remedies under the FWA, but it may result in a workers compensation claim if the process for making such changes is unreasonable. An employer that changed a worker's hours, and told her the new roster was "non-negotiable", was found liable for her psychological condition. Whilst the Court found that it was reasonable for the worker's employer, Centrelink, to require her to work five days a week instead of four, the employer did not comply with the Centrelink Agreement 2009-2011 by undertaking genuine negotiations with an employee every time management seeks to change an employee's regular hours.

If change is to occur, employers are to genuinely consult with the affected employee prior to that change being implemented allowing sufficient time for the affected employee to consider the proposed changes and raise any concerns. While you should consider the views of your employee you do not have to agree with or act on them but you need to show that you have genuinely considered them.

Online selling by franchisors - breaking down territories

By Corinne Attard, Partner

In the United States, the issue of the competition between 'bricks and mortar' retail franchises and the online channel conducted by the franchisor has taken front place as the new form of "encroachment" claim made by franchisees in recent years. In Australia our mandatory franchise disclosure document under the Franchising Code of Conduct requires prior disclosure to a franchisee of information relating to the franchise "territory", but it refers to a physical geographic territory only and does not address encroachment through alternative channels of distribution, such as e-commerce. This has been remedied with the proposed new form of disclosure document due for commencement from 1 January 2015. (Note the new form is not law yet).

New disclosure about online sales

The new disclosure document will contain a new Item 12 which requires a franchisor to give details of whether it intends to sell the same goods or services online or whether the franchisees may do so. Also if goods or services are to be sold online by the franchisor or by other franchisees, the details of the extent to which they may be supplied to customers in the prospective franchisee's territory (assuming there is one) and whether there will be any sharing of the revenue generated by those sales must be disclosed. The inclusion of this new information reflects the increased importance of the internet as a distribution channel generally.

A new form of encroachment claim

The outcomes in the recent US "online encroachment" cases have depended on the wording of the particular franchise agreements and whether the franchisee had an exclusive territory which the franchisor had breached. Most franchise agreements in the US and Australia drafted since the rise of the internet and online shopping go into detail about which precise channel of distribution is granted to the franchisee and what the franchisor may do online, although in established systems this continues to be a sensitive issue, particularly with long-term franchisees.

Many franchisors have had to deal with the dilemma of having a system of franchisees with exclusive distribution or marketing territories along with increased competition from online sellers. Unless the franchise system also develops an online presence the sales to internet customers will simply be lost to competitors.

In addition to selling directly to customers over the internet, franchisors are seeking to sell their products or services through alternative distribution channels including supermarkets, non-franchised outlets, mobile vendors and food trucks.

The old cases of "encroachment" in which the franchisor opened a retail outlet too close (in the view of the franchisee) to the franchisee's store and "cannibalising" the franchisee's sales, applied the critical legal concepts which apply generally with respect to franchisor and franchisee relationships in Australia, namely:

- The implied duty of good faith (soon to be the express obligation to act in good faith);
- Unconscionable conduct; and
- Misleading and deceptive conduct.

A recent NSW case, *Video Ezy International Pty Ltd v Sedema Pty Ltd*[1] (2014) has shown the application of these well known legal concepts to the contemporary issue of online selling by a franchisor in competition with its franchisee.

Video Ezy case – the territorial exclusivity is breached by online sales

Video Ezy International (VEI) as franchisor granted franchises for the operation of Video Ezy outlets in defined territories in Australia. A related company, Blockbuster, was responsible for the 'TiVo' movie service, a set top box service that allows access to on-demand videos via a television, and another company, EzyDVD was responsible for the website "ezydvd.com.au" that allows customers to order DVDs online. As the three companies were centrally owned and controlled, the court treated them effectively as a single entity.

[1] Video Ezy International Pty Ltd v Sedema Pty Ltd. [2014] NSWSC

On 1 April 2003, Sedema Pty Ltd purchased the Video Ezy business in Hazelbrook in the Blue Mountains from the franchisor VEI with the condition that VEI would grant Sedema a 10 year exclusive franchise in Hazelbrook.

The Hazelbrook sale agreement contained a restrictive covenant which granted Sedema exclusivity in that VEI undertook that it would not carry on "the trade or business involving the rental and/or sale of video products or any other business of a similar nature within the territory of the franchise for "Video Ezy Hazelbrook" for the term of the Franchise Agreement (other than as Franchisor of the Video Ezy franchise system).

VEI submitted that this did not apply to the business operated by EzyDVD and Blockbuster, as the clause refers to the sale or rental of video products "within the territory" and not the sale or rental of video products "into" the territory. VEI said that the business itself must be "within the territory of the franchisee" to be a breach of the exclusivity.

The Court disagreed and found that in selling the video products through ezydvd.com.au or 'TiVo' to customers located in the territory of the franchisee, the Franchisor had breached the Hazelbrook agreement. The appeal court agreed with the Magistrate in the case who said:

The distinction suggested between the operation of a "bricks and mortar" business and on-line trading is illusory.... It would have been no different had VEI, VEA, Blockbuster or EzyDVD commenced operating a business of the sale or hire of video products by mail order, at a market stall or out of the back of a truck in the territories. It would be an affront to the reasonable person on the "Bondi bus" to suggest that it was the common understanding of the parties that VEI and VEA could sell or hire video products by mail order, at a market stall or out the back of a truck in the territories. So too would it be to suggest that the TiVo movie service and ezydvd.com.au on-line businesses were any different.

Implied good faith obligation also breached

The Court applied the principles in older cases dealing with "traditional" encroachment and found that VEI had an obligation to act in good faith in relation to Sedema, "in relation to its contractual obligations to remain loyal to, comply with honest standards of conduct, and act reasonably in relation to the promise of exclusivity in the territories by not competing against Sedema for rental or retail business.

Unconscionable conduct too

In addition to a breach of good faith the court found that VEI was also guilty of unconscionable conduct in business transactions, (s 21 of the Australian Consumer Law).

Previous cases had said that unconscionable conduct required a high level of "moral obloquy" and VEI argued this had not been demonstrated. The Court said it was not necessary that there be "motive, intent, bad faith and intent to injure with some purpose to drive the franchisees out of the franchises. It was enough to establish unconscionable conduct where VEI's conduct "was inconsistent with a proper relationship between franchisor and franchisee, and demonstrated a lack of good faith."

Unconscionable conduct has been notoriously difficult to establish however the Sedema decision may represent a new willingness to find such conduct in relation to these encroachment situations.

Conclusion

Franchisees should be aware that the new Code disclosure recognises the importance of e-commerce to Australian business, however in accordance with previous policy and in line with principles of 'caveat emptor' and economic freedom, the approach is to provide disclosure of the information rather than to mandate terms or proscribe certain behaviours. Having disclosed that it intends to provide the goods or services online and the details of any profit sharing arrangement it may have with its franchisees (or the fact that it does not intend to share the online revenue), a franchisor is completely free to conduct its business online in competition with the franchisees as it has disclosed. A potential franchisee is free to enter into the franchise relationship or not.

A franchisor should be aware however that any changes it makes to the way online (or other competing) sales are conducted (from the way disclosed) to which the franchisees have not agreed is likely to be unconscionable conduct, a breach of the express obligation of good faith (to be part of the Code from 1 January 2015) and/or misleading or deceptive conduct.

This article includes material from the paper "Internet Issues in International Franchising" presented at the 30th Annual IBA/IFA Joint Conference on May 7, 2014 in Chicago USA (Authors: Corinne Attard –Partner Holman Webb Lawyers (Aust) with John Pratt Partner, Hamilton Pratt (UK), Michael Lindsey, Counsel at Steinbrecher & Span LLP (USA) and Karsten Metzlaff, Noerr LLP (Germany).

Unfair Contracts Legislation – Another Concern for Franchisors?

By Tal Williams, Partner

Standard form contracts are often used by businesses as a convenient way of allowing parties to enter into arrangements quickly, and to provide the business with uniformity of trading terms. It has long been recognised that standard form contracts may allow larger businesses to insert unfair contract terms into arrangements sometimes without the other party knowing or properly appreciating the consequences of such provisions.

These standard form contracts give rise to a risk that larger businesses improperly transfer business risks from themselves to the consumer, by empowering them to vary terms of the contract, terminate the contract at their discretion, or change the price or characteristics of the goods or services being supplied. Under the Australian Competition and Consumer Law (ACL), the government sought to protect consumers from being exploited in this way by allowing consumers to challenge such terms as being unfair.

Currently there are three elements that must be satisfied under the ACL if a contract is to be attacked as being unfair:

- The contract must be a consumer contract. These are contracts of the supply of goods and services, or a sale or grant of interest in land, to an individual who's acquisition is wholly or predominately for personal or domestic household use.
- It must be a standard form contract which is prepared by one party and is not subject to negotiations between the parties.

  The terms of the contract must be unfair in that:

  - it will cause a significant imbalance between the contracting parties, or
  - the term was not necessary to protect the interest of a party it is said to advantage and it would cause detriment to the weaker party if relied upon.

These laws have been in place for some time and the ACCC has produced a report of incidents that have dealt with it to date which is available on its website.

Extending protection to small businesses

The issue for franchisors is that the protections currently afforded to consumers may be extended to small business.

In a government discussion paper that recently closed for comment, the government sought responses from the industry in relation to the definition of 'small business transactions'. It sought responses to determine a way that would enable the unfair contract provisions to apply to them. The paper proposed that a small business could be defined as a business that was not a publicly listed company, or by reference to a transaction below a particular threshold, or by reference to the annual turnover of the business or by reference to the number of employees engaged by a business.

It is clear from the above that franchisees could easily be covered by one of these extended definitions. If that is the case then the franchisor utilising a standard form arrangement will need to not only consider the application of the Code (which as we all know is also under review by the government) but will also have to comply with this extension of the ACL.

Such changes could result in a franchisor having to review the terms and conditions of its standard franchise agreement to ensure that they will not be voidable and "unfair".

The process of implementing the change has only just commenced. Submissions in relation to the original discussion paper recently closed and the government is now moving to consider those submissions.

Spar Match-Round 2 – Do you have to update your Disclosure Document on 1 July?

By Corinne Attard, Partner

There has been some recent speculation amongst franchise lawyers about the potential impact of the recent Federal Court of Appeal decision in the case of *Spar Licensing Pty Ltd v MIS Qld Pty Ltd* (1 May 2014) on the practice of giving disclosure documents to prospective franchisees. The decision raises some doubts about when to update the disclosure document.

The Franchising Code says that a franchisor has to give a "current" disclosure document to a franchisee (clause 6B). It has been standard practice for franchisors to update their disclosure documents once a year (normally at the end of October when hopefully they have their updated financials or audit report for the previous financial year). Until the issue of the new disclosure document, franchisors usually hand over the existing form of disclosure document to any prospective franchisees.

This practice has always been overlaid with the requirement that the disclosure document should not be misleading or deceptive and that franchisors should provide updated information in relation to any change in specified materially relevant facts under clause 18 of the Code (such as a change of ownership of the franchisor or its intellectual property).

In this case the franchisor of Spar supermarkets issued a disclosure document to its renewing franchisee in July 2010. The disclosure document provided was the one for the previous financial year but would still be regarded as "current" in accordance with the practice of most franchisors as outlined above.

Unfortunately the franchisee did not sign the franchise agreement until February 2011 and Spar did not provide a fresh disclosure document in between.

In the 6 month period after the issue of the disclosure document but before signing the agreement, the franchisee had discussions with Spar about amending the franchise agreement to allow it to terminate early and switch to a competing brand (IGA). No change was agreed to be made to the franchise agreement but the Spar representative told the franchisee that early termination was permitted by Spar on payment of a termination fee.

As it happened, when the franchisee came to terminate and switch to IGA, Spar had changed its position on early terminations and wanted to enforce the terms of the franchise agreement.

It is not always misleading to change your mind (or policy)

The appeal judges of the Federal Court decided that Spar was not guilty of misleading or deceptive conduct in making the statement about allowing early termination on payment of a fee, because when those statements were made that was Spar's termination policy and the employee who made them therefore had reasonable grounds for saying it.

It is possible however that the franchisee could have shown a case of "promissory estoppel" if it had proved that Spar had made the statement knowing the franchisee was relying on it to make its decision (unfortunately for the franchisee this evidence was not provided by them in court).

Disclosure Document not current but for different reasons

The judges all agreed that Spar breached the Code as it did not give the franchisee a "current" disclosure document and because this was a material breach the franchise agreement was set aside from the date of the judgement. Unfortunately for the franchise community the judges in this decision did not agree on the reasons why the disclosure document was not "current" or even on exactly what are a franchisor's disclosure obligations.

Reason 1- needs to be current when the franchisee signs not just when given

Justice Buchanan (with whom Justice Foster agreed) stated that the disclosure document needed to be "current" at the time the franchise agreement was made (February 2011) or 14 days beforehand and since it was not current at that time, this made it ineffective and a breach of the Code.

This seems to be based on the fact that the financial position of Spar had declined over the preceding year and the financials for the year ending July 2010 if given would have disclosed this to the franchisee. Justice Buchanan also said that while the Code in clause 6B required the franchisor to give a current disclosure document when a party became a "prospective franchisee" this does not excuse a failure to give a disclosure document 14 days prior to signing the franchise agreement (which is required under clause 10 of the Code).

Effectively Justice Buchanan treated the Code as providing two separate disclosure obligations. It should be noted that clause 10 in fact provides a minimum disclosure time stating that the disclosure document should be given "at least" 14 days beforehand but it does not specify a maximum time from when disclosure can be given. This was the point made by Justice Farrell.

Unlike Justice Buchanan he said there was no requirement in the Code to provide a fresh disclosure other than through the update requirements in clause 18.

Reason 2- needs to be current from the start of the new financial year

Justice Farrell did however agree that the disclosure document was not "current" although he considered that it was not current when it was given in July 2010 rather than only at the time the franchise agreement was signed.

The reasoning for this is that the Code requires that the disclosure document provide a solvency statement by a director of the franchisor as at the end of the last financial year. Since the solvency statement here was dated at the end of the 2008/2009 financial year rather than the 2009/20010 financial year (which had just passed) it was not current.

Issues to consider for 1 July

This case raises further issues and problems with the drafting of the Code which hopefully will be looked at by the Federal Government in finalising its redraft for next year.

However until then franchisors have to tread with particular care in the process of issuing disclosure documents and signing up franchisees during the July to October period.

In view of the fact that another financial year is about to end there are some points to remember in issuing documents from 1 July:

- Use every effort to update your disclosure document as quickly as possible for the new financial year rather than relying on last year's one to the end of October.
- Even though the financial reports or audit report may not yet be available consider having an interim updated version of the disclosure document with other updated information and an updated director's solvency statement.

The new financials should be provided as soon as possible to the franchisees, no later than the end of October. Be aware that the Code does not provide a solution for this situation and disclosure of any information after the agreement is already signed is not proper disclosure. To be safer you may consider providing both the prior year's disclosure document and the new one.

It should be remembered that two of the three judges did not say that the disclosure document was not "current" when it was provided in July so it is presumably fine to continue to provide the previous year's financial details until October provided they are not misleading as to the company's current financial position.

While Farrell J stated the director's solvency statement needs to be as at the last financial year (a technically accurate interpretation of the Code), without the finalised company accounts or audit report a director may not always feel comfortable making this statement.

Tell your accountants of the importance of providing the accounts or finalising their audit report as soon as possible after the end of the financial year and no later than October.

If there has been a delay between the provision of the disclosure document and the signing of the franchise agreement by the franchisee then consider whether the disclosure document is still current and needs updating or fresh disclosure.

The *Spar* judgement leaves open certain issues for franchisors such as how long a disclosure document can be relied upon as "current". It is possible for example that the significant addition or reduction in the number of franchisees may be a cause to update the disclosure document although arguably this was always the case as a disclosure document or any other document provided to the franchisee must not mislead or deceive.

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Privacy Update: Privacy Reforms – Is Your Franchise System Compliant?

Tal Williams, Partner and Sandra Ivanovic, Senior Associate

The amendments to the Privacy Act 1988 (the Act) came into force in March 2014 and introduced major reforms to the way Commonwealth government agencies and private businesses collect, use and deal with personal information. The reform saw the introduction of 13 harmonised Australian Privacy Principles (APPs) applying to both Commonwealth Government and private sector agencies with an annual turnover of more than $3 million and some small business, replacing the National Privacy Principles (NPPs) and the Information Privacy Principles which applied to private and government agencies respectively.

Our strong recommendation, however, is that you apply the principle whether or not your turnover is less than $3 million. This is to accord with community expectations and is generally a commercially sound business approach. It also means that if a franchise's turnover exceeds $3 million, everything is in place.

While the APPs largely mirror the NPPs, they put a much greater onus on organisations to manage their privacy policies, systems and practices to ensure compliance with the APPs, and introduce more stringent controls on direct marketing and sending data offshore.

It is essential that all organisations review and update their privacy policies and undertake a review of the internal practices and procedures to ensure compliance. Under the new provisions the powers of the Privacy Commissioner have significantly increased. Organisations may face penalties of up to $1.7 million and individuals of up to $340,000 for serious non-compliance and repeated breaches.

KEY CHANGES:

APP1 – open and transparent management of personal information

The object of the principle is to ensure that the personal information is managed in an open and transparent way. An organisation must take such steps as are reasonable in the circumstances to implement practices and systems relating to the organisation's functions and activities that will ensure compliance with the APPs and enable it to deal with inquiries from individuals relating to the compliance of the organisation with the APPs.

Both franchisees and franchisors will collect personal information from individuals and must have readily available, free of charge to those individuals, a clearly expressed and up-to-date policy about the collection, use and management of their personal information. This privacy policy must relay to the individuals:

- the kinds of personal information that is collected and held;
- how the organisation collects and holds the information;
- the purposes for which the personal information is collected, held, used and disclosed;
- how an individual may access its personal information and seek the correction of same;
- how an individual may complain about the organisation's breach of the APPs; and
- whether the personal information is likely to be disclosed to overseas recipients.

If you have not already reviewed and updated your privacy policy in line with the reforms you must immediately seek to do so. Organisations should also undertake a risk assessment of their practices and procedures to identify any compliance and risk issues. These should be updated and managed accordingly. Privacy training should be organised for the franchisees and your employees to ensure that they are up to date with the changes and are aware of their duties.

Your privacy policy should be available on your website and you may include it as an annexure to your manuals noting that it is subject to change.

APP5 – notification of the collection of personal information

If you are collecting personal information about an individual, wherever practicable, you must inform the individual at or before the time of the collection of the personal information of the following matters:

- the identity and contact details of the organisation collecting the information;
- if collecting personal information from sources other than the individual (such as credit reporting agencies when undertaking due diligence on prospective franchisees), the individual must be informed of this fact and told why the collection is necessary;
- details of any law or court order which requires collection of the personal information;
- the purposes for which the personal information is collected;
- the consequences (if any) for the individual if some of the information is not collected (for example, not being able to provide a service to your customers if certain information is not collected);
- details of other entities and persons to which you usually disclose the personal information to (for example, if you are collecting customer information for purposes of marketing is that information shared with other franchisees, a marketing company and so on);
- that your privacy policy sets out how an individual can seek access or correction of its personal information and complain about a breach of the APPs; and
- the likelihood of offshore disclosure.

Collecting personal information from potential franchisees would be covered by the APPs, as would customer data from loyalty programs or competitions. As mentioned above, your first step should be to review and update your privacy policy. Further, you need to undertake a review of your privacy collection statements to ensure that they address the mentioned mandatory matters. This may include a review of your franchise application form, prospective employees' application form, loyalty program terms and conditions etc.

APP4 – unsolicited information

If your organisation receives personal information about an individual which is not solicited (meaning the entity has taken no active step to collect the information) you are required to assess whether your organisation could have lawfully collected the personal information. If not you must as soon as practicable destroy or de-identify that personal information.

Unsolicited information could be obtained through job enquiries or franchise enquiries.

Your franchise system needs to have standardised policies and procedures to deal with this APP (as well as the other APPs). The procedures you put in place must assist you to identify unsolicited information and set out a step by step plan on how to deal with it (including securely de-identifying or destroying unsolicited information).

APP7 – direct marketing

Franchisors must review their marketing strategies as this APP prohibits the use or disclosure of personal information for the purposes of direct marketing unless:

- there is consent from the individual to use the personal information for direct marketing purposes or the information is collected from the individual and the individual would reasonably expect you to use or disclose the information for direct marketing; and
- you provide a simple opt out mechanism for individuals to request not to receive the marketing information; and
- the individual is informed that they may request that the organisation stop using their personal information for purposes of direct marketing (and the individual has not made such a request).

The best practice is to always get an individual's consent if you intend to use their information for direct marketing purposes. Don't forget that it is essential to advise individuals that they can opt out getting direct marketing

material at any time. The opt out mechanism needs to be clearly visible and accessible on each piece of direct marketing material that is sent.

APP 8 - cross-border disclosure of personal information

It is important to remember that you may be directly liable for breaches of the APPs by an overseas entity to whom you disclosed personal information. If your franchise system is disclosing personal information that it collects to an overseas entity you must ensure that the overseas recipients do not breach the APPs and this must be done in a way that can be proved and is enforceable against the overseas party – usually in a contract or terms and considerations that bind the overseas entity to comply with our principles.

This could relate to material provided to the head franchisor who is resident outside Australia, and may also relate to cloud computer services who store data in overseas jurisdictions.

We suggest undertaking due diligence on the overseas entity prior to disclosing the information and imposing suitable contractual obligations on the entity requiring compliance with the APPs.

What does this mean for your franchise system?

As a franchisor you should:

- review and update your privacy policy and take care to ensure that your privacy policy is placed on your website;
- update your internal practices and procedures ensuring that each APP is addressed;
- undertake a risk assessment to identify any compliance and risk issues;
- regularly audit your systems to ensure their security and address any vulnerabilities;
- ensure that you take reasonable steps to destroy and de-identify information that you no longer need or use (including unsolicited information);
- appoint a privacy officer or key contact person who is well trained to deal with individual requests relating to their personal information and any complaints;
- provide training to all staff and franchisees to ensure that they are up to date with the changes and are aware of their duties.

Your franchise system must have strategies and procedures in place which allow it to monitor compliance with the APPs. This should be a continuous process. Finally, organisations must remember that it is not enough to put policies and procedures in place – you must ensure that you adhere to them.

Look before you blog! The case of *Nextra Australia v Fletcher*

By Joann Yap, Lawyer

Owners of businesses need to exercise care when making comments online about their competitors or industry, even where those comments are posted on a personal blog - be it a personal Facebook page, blog or Twitter account as demonstrated by the recent Federal Court case of Nextra Australia Pty Limited v Fletcher[2], in which an online blog post amounted to misleading and deceptive conduct, and therefore breached section 18 of the Australian Consumer Law (ACL).

Who said what

The case arose in relation to an article about Nextra posted on the website of the "Australian Newsagency Blog" (the Blog) a newsagency industry blog personally operated by Mr. Mark Fletcher, a part owner of NewsXpress and operator of his own newsagencies. Nextra, the franchisor of a newsagency franchise system is a direct competitor to NewsXpress. The article written by Mr Fletcher was entitled "Nasty campaign from Nextra misleads newsagents", and criticised a recruitment flyer distributed by Nextra to prospective franchisees.

The flyer was intended to encourage newsagents to leave their current marketing or franchise group and join Nextra. The flyer claimed "There are many stores changing to the Nextra Group" and called for newsagents to "Believe the Industry Rumours" and to "Take the Logical Step to improving your GP." The flyer contained a number of testimonials from current and former Nextra newsagents.

In his article Mr Fletcher claimed the Nextra flyer contained false and misleading information.

Nextra applied to court for orders to restrain what it alleged was misleading or deceptive conduct by Mr Fletcher, including to:

- remove the article from the Blog as well as any responses or comments received;
- restrain Mr. Fletcher from publishing the article in any other form; and
- publish on the Blog a retraction of the article and an apology to Nextra.

What the court said

The first issue for the court to determine was whether Mr. Fletcher's posting of the article on the Australian Newsagency Blog constituted conduct engaged "in trade or commerce" which would therefore be covered by the misleading and deceptive conduct provisions of the ACL.

Nextra submitted that Mr. Fletcher, through the Blog, promoted his personal commercial interests (in particular the NewsXpress franchise) and in seeking to attack Nextra through the article, was protecting his own commercial interests.

The Court stated that where a person works in a particular industry, it would not always be conduct "in trade or commerce" for the person to engage in an activity relating to that industry. Self-publication by a person of articles or thought pieces relevant to a particular industry, including for example, on a blog, is not necessarily conduct "in trade or commerce" where for example it is clear that the blog is merely the publisher's personal opinion on topics for the interest of readers.

Mr. Fletcher claimed he published the Blog for altruistic reasons, being for the information and benefit of the newsagent community, noting that the Blog contains articles on numerous topics unrelated to his own commercial interests.

However, the Court found that Mr. Fletcher's motives for posting the article on his Blog were in fact mixed. The Court was satisfied that although Mr. Fletcher had a genuine interest and aim in promoting discussion in the newsagency community on topics of interest to newsagents, and that the Blog was a key element in achieving that objective, he did not hesitate to use the Blog to promote his own commercial interests.

[2] [2014] FCA 399

Although he did not purport to post the article on behalf of NewsXpress, the Court found that it was clear that he did so to defend NewsXpress from what he saw as potential poaching of franchisees by Nextra. The Court was satisfied that the posting of the article was therefore conduct "in trade or commerce" within the meaning of the ACL.

The Court was also satisfied that Mr. Fletcher had engaged in misleading and deceptive conduct in contravention of the ACL. The article was ordered to be removed from the Blog website and Mr. Fletcher was restrained from publishing the article in any other form. The Court did not order Mr. Fletcher to publish an apology or corrective advertising, as to do so would only draw attention to the article and be counterproductive.

Take Precautions

Franchisors and franchisees should be aware that any blog posts, articles or comments made online which may be seen to be promoting one's own commercial interests may be deemed to be 'in trade of commerce' and may breach section 18 of the ACL if found to be misleading and deceptive.

A number of steps should be taken when maintaining an online presence:

- ensure you (and if you are a franchisor, your franchisees) do not publish potentially damaging content about competing businesses, even if published in a personal blog, as this may have a 'commercial' character. Having a social media policy in place will greatly assist; and
- actively monitor your social networking and other blogging and industry websites for relevant content to ensure you are aware of outside publications containing potentially damaging content to your business and brand.

Franchise Bulletin in Summary

Takeaway points:

- Roster changes from 1 January 2014 require consultation with employees.
- Disclosure about online sales is needed from 1 January 2015 along with other changes to the Code.
- Consider if your disclosure document is "current" each time you disclose.
- Privacy reforms from March 2014 mean you need to review your privacy policy and information collection practices.
- Comments about competitors on blogs and social networking sites can be actionable under ACL.

Important dates for your diary:

- 26-28 October 2014 – FCA Conference at Homebush – *hope to see you there*!
- 31 October 2014 – Last day to update your franchise disclosure document including addition of company financials or audit report for year ending 30 June 2014.
- 1 January 2015 – Be Ready! Introduction of penalties for Code breaches. Date proposed for introduction of new form of disclosure document.

SPOTLIGHT ON

Corinne Attard

Corinne's approach is outcome based and combines practical commercial advice with legal solutions. She helps her clients to achieve their goals - whether they are new to franchising or have established franchising systems.

Areas of Expertise: Business, Corporate and Commercial, Franchising and Property - Corinne is a franchising and retail specialist with over 10 years of franchising industry experience. Her clients include some of Australia's most recognisable brand names.

Industry Experience: Corinne's wealth of experience in franchising and retail is highly sought-after by some of our better-known producers of food, household services, business to business services, bankers and financiers, health and aged care providers and retailers of a vast array of services and products on the market.

Corinne acts for retailers, franchisors and master franchisees and offers advice in:

- setting up procedures and systems,
- commercial contracts and terms,
- franchise agreements and licensing,
- leasing,
- brand protection strategies and intellectual property,
- enforcement of trade marks,
- copyright,
- purchases and sales of retail, wholesale and manufacturing businesses,
- supplier contracts,
- food safety and recalls,
- ACCC investigations and media relations,
- risk management,
- trade practices,
- sponsorships and retail lease, and
- franchise and intellectual property dispute resolution.

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