



The Franchising Code of Conduct

Presented by:
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Foley's List

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[Glen Pauline introduction]

- Glen Pauline first signed the Bar Roll in 2001 and practices in commercial and workplace relations disputes and mediation, including employment law, industrial relations, franchising disputes and commercial contract disputes.
- Glen is experienced in all facets of litigation including drafting complex pleadings, witness statements and submissions, and appearing at interlocutory applications, mediations, conciliations, trials (alone and led) and appeals.
- Glen is a Nationally Accredited Mediator and a panel mediator for:
 - The Office of the Franchising Mediation Adviser (OFMA);
 - The Australian Small Business and Family Enterprise Ombudsman (ASBFEO);
 - The Victorian Small Business Commissioner (VSBC).

[Synopsis]

- Glen discusses Franchising and focuses on the New Franchising Code of Conduct, some case law concerning breaches of the Code, and key take outs from those decisions.

[The Franchising Code of Conduct]

- What are the purposes of the Code?
- When does the Code apply?
- Mediation under the Code
- What approach do the Courts take to interpreting provisions of the Code?
- What is the effect of a Code breach by a franchisor?
- What kind of remedies have the Courts given for breaches of the Code?
- Can post-termination restraint clauses imposed on franchisees be valid under the Code?

[The 2015 major changes to the Code]

- Introduced **obligation to act in good faith** (clause 6), that is subject to a civil penalty of 300 penalty units (\$54,000)
- Introduced 20 civil penalty provisions
- Introduced infringement notices
- Compulsory attendance at mediation, subject to civil penalty of \$54,000

[The New Code civil penalty provisions]

There are 20 civil penalty provisions in the New Code, that broadly relate to failures by a franchisor:

- to act in good faith
- **create** a Code compliant **disclosure document**
- **update** the **disclosure document** or provide it upon request
- provide **pre-entry disclosure documents**
- provide **lease documents and information**
- **Failure to disclose a materially relevant fact**
- Failure to provide reasonable written **notice** of proposed **termination** for breach

*[Obligation of
good faith under
the
New Code: clause
6]*

- (1) Applies to each party in respect of anything arising in relation to:
 - ✓ The franchise agreement
 - ✓ The Code
- (2) Applies to prospective franchisees, including:
 - ✓ Any dispute relating to the proposed agreement
 - ✓ the negotiation of a franchise agreement
 - ✓ The Code
- (3) Good faith essentially means:
 - ✓ Acting honestly and not arbitrarily
 - ✓ cooperating to achieve the purposes of the agreement

[*Disclosure*]

In relation to **disclosure** of information to prospective franchisees, **clause 8** (of the New Code) provides that the purposes of a disclosure document are:

- to give to a prospective franchisee, or a franchisee proposing to enter, renew or extend the scope of a franchise agreement, information from the franchisor to **help the franchisee make a reasonably informed decision** about the franchise; and also
- to give a franchisee **current information** from the franchisor that is material to the running of the franchised business.

[Cases discussed]

Master Education Services Pty Ltd v Ketchell [2008] 236 CLR 101

Dorrian v Rushlyn Pty Ltd [2013] FMCA 101

Workplace Safety Australia Pty Ltd v Simple OHS Solutions Pty Ltd

Wang v HACCP Cleaning Australia Pty Ltd [2016] SASC 161

Spar Licensing Pty Ltd v MIS Qld Pty Ltd [2014] FCAFC 50

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