

Government flags changes to the Trade Practices Act but preserves status quo on good faith obligations

Introduction

The Government's response last week to the report prepared by the Federal Parliamentary inquiry into franchising heralds a number of important changes to the *Trade Practices Act 1974* (Cth) (the **Act**).

The reforms announced by the Minister for Small Business, Craig Emerson, broadly speaking include:

- increased enforcement powers for the ACCC under the Act;
- strengthening of misleading or deceptive conduct and unconscionable conduct provisions (including the introduction of civil pecuniary penalties for contraventions of the provisions); and
- amendments to the Franchising Code of Conduct (**Franchising Code**) relating to franchisees' end-of-term arrangements and the dispute resolution process.

Legislation to enact the proposed changes will be introduced in early 2010.

Significantly, despite intense lobbying by some franchisee activists and academics to introduce a statutory duty of good faith into the Franchising Code, the Government rejected the inclusion of such an obligation. Instead, the Government proposes to amend the Franchising Code to provide that nothing in the Franchising Code limits any common law requirement of good faith in relation to a franchise agreement to which the Franchising Code applies.

This article outlines the reforms announced by the Government last week and reviews the current legal position on the existence of an implied obligation of good faith, its scope and its application to franchise relationships.

Outline of proposed changes

ACCC enforcement powers

The Government announced that it will introduce the following powers under the Act to enforce the Franchising Code as well as other mandatory industry codes:

- The Act will be amended to allow the ACCC to conduct random audits for all prescribed industry codes.
- The ACCC will be granted a power to issue "substantiation notices" requiring businesses to provide information to substantiate claims they have made. This is intended to allow the ACCC to move quickly, and obtain information to assist in determining whether a contravention of any of the industry codes has occurred.
- A power to "name and shame" what the Government calls "rogue or unscrupulous franchisors" will extend the public warning power available under the *Trade Practices Amendment (Australian Consumer Law) Bill 2009*.
- Where a large number of franchisees are harmed by the behaviour of a franchisor in breach of the Franchising Code, the ACCC will be able to apply for a court order providing redress to all the franchisees, without requiring every franchisee to be party to the legal proceeding.

Unconscionable conduct and false or misleading representations provisions

Additional amendments to the Act will strengthen the false or misleading representations and unconscionable conduct provisions. The proposed amendments aim to clarify that protection from unconscionable conduct relates not only to the process of settling a contract, but to the terms and conditions of the contract and the ongoing behaviour of the parties to the contract.

In addition to existing remedies, under the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* currently before Parliament breaches of the unconscionable conduct provisions (including section 51 AC of the Trade Practices Act) and some of the unfair practices provisions (such as section 53 of the Act which prohibits false or misleading representations in specific circumstances) will attract civil pecuniary penalties of up to \$1.1 million for corporations and \$220,000 for individuals.

However, civil pecuniary penalties will not apply to the general prohibition of misleading or deceptive conduct in trade or commerce under section 52 of the Act since civil penalties are directed at specific wrongdoing rather than general behaviour.

The Government also decided not to introduce a statutory definition of unconscionable conduct (preferring to allow the courts to determine its boundaries). However, an expert panel established by the Government is set to consider a range of issues including whether a list of examples of unconscionable conduct or a statement of principles of what constitutes unconscionable conduct should also be incorporated into the Act. In the meantime, the Government has flagged to the ACCC its expectation that the ACCC "*persist in its endeavours to obtain further guidance from the courts on unconscionable conduct under the Trade Practices Act*".

Franchising Code amendments

The Government has also flagged amendments to the Franchising Code relating to end-of-term arrangements and the dispute resolution process.

In particular, the Franchising Code will be amended to require franchisors to:

- disclose to franchisees the process that will apply in determining end-of-term arrangements, including whether or not there is some right of renewal beyond the term of the agreement; and
- inform franchisees, at least six months prior to the end of the franchise agreement, of their decision to renew or not renew a franchise agreement.

These obligations will apply to franchise agreements signed after the date of amendments to the Franchising Code.

In addition, the Government proposes to amend the Franchising Code to include a list of behaviours aimed at facilitating the dispute resolution process under the Franchising Code. This list will include: attending and participating in meetings at reasonable times; making intentions clear at the outset of the mediation (eg whether the aim is to negotiate an arrangement whereby the franchisee exits the franchise system); observing confidentiality obligations during and after the mediation process; and not damaging the franchise brand during the dispute including by providing inferior goods, services and support.

Obligations of good faith and the common law

Significantly, the Government has rejected the inclusion of a general obligation of good faith in the Franchising Code, accepting the Franchising Council of Australia's submission that to do so would increase uncertainty in franchising. The Government noted that such a change might cause banks and other financiers to be more reluctant to provide credit to franchisees and franchisors, and felt the best way to proceed was to identify specific inappropriate franchising behaviours and implement policies to address those behaviours (including the

above amendments to the Franchising Code relating to franchisees' end-of-term arrangements and the dispute resolution process). However, the Government will amend the Franchising Code to provide that nothing in the Franchising Code limits any common law requirement of good faith in relation to a franchise agreement to which the Franchising Code applies.

This begs the question as to whether there is a common law requirement of good faith in relation to franchise agreements. Although the High Court has not yet expressly endorsed the automatic implication of a term of good faith into commercial contracts¹, various State Courts and the Federal Court have been prepared to do so². As a result of these decisions, since the late 1990s lawyers acting for parties to franchise agreements generally considered their clients to be bound by the implied duty of good faith and fair dealing.

However, in 2005 the decision of the Court of Appeal in *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL*³ called this assumption into question in determining that no general duty of good faith arises in commercial contracts. Instead, such a duty only arises where it is necessary to protect a vulnerable party from exploitative conduct.

The application of the Esso decision to a franchise relationship was considered in the Victorian Supreme Court in *Meridian Retail Pty Ltd v Australian Unity Retail Network Pty Ltd*⁴. In *Meridian*, the Court⁵ recognised that a good faith term may validly operate to protect a vulnerable or disadvantaged party from exploitative conduct which subverts the original purpose for which the contract was made. The Court also stated that the implication of an obligation of good faith may be particularly appropriate in the context of a franchise relationship because it frequently embodies a significant disparity of bargaining power. Ultimately, however, it was unnecessary for the Court in the *Meridian* case to determine whether a term requiring good faith was implied as it found on the facts that there had been no breach of such an obligation.

The issues considered in the Esso and *Meridian* cases have not yet been expressly addressed by the High Court. However, Justice Kirby has previously commented on the question of whether an implied term of good faith exists in every commercial contract in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*. He stated:

*"... in Australia, such an implied term appears to conflict with fundamental notions of caveat emptor [ie, buyer beware] that are inherent (statute and equitable intervention apart) in common law conceptions of economic freedom. It also appears to be inconsistent with the law as it has developed in this country in respect of the introduction of implied terms into written contracts which the parties have omitted to include."*⁶

It is unclear, however, as to whether the High Court will adopt the same positions expressed in the Esso and *Meridian* cases.

In the wake of the Government's announcement last week, it seems we are no closer to understanding the requirement of good faith. Only a decision by the High Court, it seems, will bring some certainty to the existence of the duty, its scope and its application to franchise relationships. In the meantime, the Esso and *Meridian* cases leave room for arguments to be made that a party should not automatically be determined to be relevantly vulnerable or disadvantaged (eg, if the party is powerful or well resourced) and therefore not entitled to the

¹ *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289.

² *Renard Constructions Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; *Alcatel Australia Ltd v Scarsella* [1998] 44 NSWLR 349.

³ [2004] VSC 477

⁴ June 2006 - Unreported BC200605745 of Dodds-Streeton J.

⁵ At paragraphs 210 – 214.

⁶ (2002) 186 ALR 289 at para 88.

benefit of an implied term of good faith and fair dealing. Ultimately, without further judicial guidance, each case is likely to be determined in accordance with its own facts.

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