

FRANCHISING



LEGAL UPDATE

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Employment contracts need to cover relocation

Where the location of the work to be carried out is a condition of a contract of employment, franchisors seeking to transfer staff between worksites should be aware that such a change in the conditions of employment may constitute a termination of the contract of employment potentially entitling the employee to a redundancy payment.

Key message

To limit the risk of liability for redundancy payments arising from compulsory transfers, employers should address the question of relocation explicitly in employment contracts and in negotiations with prospective employees.

Employers may minimise this risk by ensuring the issue of relocation is explicitly addressed in the contract of employment, including the right of the employer to require such a relocation and under what circumstances.

There is no unfettered right for employers to transfer employees. In determining whether a relocation breaches the contract of employment, courts will consider factors including:

- » the degree to which the location of the work was central to the employment contract as negotiated and understood between employee and employer
- » whether the relocation requires the employee to travel a significantly longer time or distance to work (although this will not be an overriding consideration) and whether the new location is similarly or better serviced by public transport
- » whether similar alternative work is offered at the new location
- » whether and to what extent the transfer will interfere with the employee's family responsibilities
- » the period of notice given to employees about the relocation
- » whether similar or improved facilities are offered at the new location.

For example, in a recent Victorian case, location was a central consideration for the employee in the negotiation of his contract of employment. He accepted a position in Richmond in preference to another in order to be available to his 17 year-old son and 82-year old mother.

He argued successfully that relocation from Richmond to Laverton, a distance of 28 km, would interfere unacceptably with his family responsibilities. The Australian Industrial Relations Commission found that the work he had previously done at the Richmond worksite was no longer required to be done and a redundancy had therefore occurred.

Ultimately, it is a question of degree whether the distance and circumstances of a relocation will be regarded as unreasonable and create a redundancy. Many cases will be ambiguous.

To limit the risk of liability for notice and redundancy payments arising from compulsory transfers, employers should address the question of location explicitly in employment contracts and in negotiations with prospective employees. The employer's right to transfer employees under certain circumstances should be included in the contract of employment and the right exercised fairly and reasonably.



Franchisor must act in good faith and reasonably when terminating a franchise

In Meridian Retail v Australian Unity Retail Network [2006] VSC 223, Justice Dodds-Streeton acknowledged that legal authorities indicate an obligation of good faith may be implied in contracts particularly in the context of a franchise relationship. Accordingly, a franchisor when exercising powers expressly conferred on it in a franchise agreement, must act on it in good faith and reasonably, and not capriciously, or for some extraneous purpose.

Key message

Franchisors must exercise their contractual powers and entitlements in good faith and reasonably and not for some extraneous purpose (legitimate purpose of promoting their commercial interests excepted).

In this proceeding Meridian Retail (Franchisee) sought relief, including declarations and a permanent injunction restraining Australian Unity Retail Network (Franchisor) from acting on a notice of termination issued pursuant to the terms of a franchise agreement signed by the parties. The basis of the Franchisor's termination of the franchise was that a 'significant change' as defined in the franchise agreement had occurred because it was no longer viable to operate the franchise network in the manner contemplated by the franchise agreement.

The Franchisee complained, among other things, that the notice of termination was in breach of an implied term of good faith, because the Franchisor engineered the 'significant change' on which it relied for the ulterior and illegitimate purpose of forcing out the franchisees in the network and resuming control of the network at minimal cost.

The Franchisee argued that the Franchisor engineered 'the significant change' on which the termination notice was issued, by causing a number of franchisees to surrender their franchises early by announcing at a franchise council meeting that at the expiration of the initial term of their franchise agreements, the Franchisor would remove health insurance, general insurance and banking products from the range of products franchisees could provide, leaving only financial planning. The franchised businesses would consequently be unviable in the future, as health insurance

accounted for 80% of the franchisees' revenue. The Franchisor's offer to buy out the franchisees was accepted by all franchisees except for the plaintiff.

The Franchisee submitted that while the Franchisor had in terms, an absolute discretion to add or eliminate products, (including 'essential products' such as health insurance, general insurance and banking), the contractual power was wider than was necessary to protect the Franchisor's legitimate interests and accordingly, it must be exercised in good faith and reasonably and not for an extraneous purpose.

While the High Court is yet to expressly endorse the principle of good faith into commercial contracts, lower courts have recognised the legitimacy of implying a term of good faith into commercial contracts. If a term of good faith is implied, it will require a contracting party to act in good faith and fairly, not only in relation to the performance a contractual obligation, but also in the exercise of a power conferred by the contract.

A term of the contract that requires a party to act in good faith, imposes an obligation upon that party not to act capriciously. However, it does not operate to restrict actions designed to promote the legitimate interests of that party. Accordingly, provided the party exercising the power acts reasonably in all the circumstances, the duty to act fairly and in good faith will generally be satisfied.

In this case, Dodds-Streton J found that the evidence did not establish that the Franchisor planned to eliminate the franchisees by threatening the future removal of health insurance products. Dodds-Streton J accepted the Franchisor's account of its evolving commercial aims and plans of action and its

strategy to facilitate an orderly transition, consistent with the rights of the franchisees. The Franchisor was therefore entitled to serve and rely on its notice of termination and the Franchisee's claims were dismissed.

Emily Kishida | Solicitor

Damages payable for failing to comply with Franchising Code

Franchisors must ensure they issue a prospective franchisee with a disclosure document and a copy of the Franchising Code at least 14 days before a prospective franchisee signs a franchise agreement or makes a non-refundable payment to the franchisor. Franchisors must also ensure that they obtain a signed written statement from a prospective franchisee in relation to obtaining advice about the proposed franchise agreement.

Key message

A director of a Franchisor knowingly involved in contravening the Franchising Code will be liable to pay damages.

In *O'Connor v Roadrunner Mobile Video Pty Ltd and Ors [2006] FMCA 150*, the plaintiff, O'Connor (Franchisee) claimed, among other things, that they were not provided with a disclosure document before entering into a franchise agreement with the first defendant, Roadrunner Mobile Video (Franchisor) as required by the Franchising Code.

The *Trade Practices Act 1974* (Cth) imposes a positive obligation on a franchisor to comply with an industry code.

The Franchising Code states that the purpose of a disclosure document is to give a prospective franchisee information about the franchised business to enable the franchisee to make a reasonably informed decision about the franchise.

In his judgment, Federal Magistrate, Phipps, noted that as the Franchisee had never operated a mobile video rental business (Franchised Business) compliance with the requirement to give information about the Franchised Business required a level of description, which enabled the Franchisee to understand what they were receiving.

Phipps FM held that if the Franchisee had been given a disclosure document and a copy of the Franchising Code and been informed that they would have to sign a document about independent advice as required under the Franchising Code, they would not have entered into the franchise agreement with the Franchisor. Phipps FM ordered payment of damages in favour of the Franchisee including interest and costs.

Emily Kishida | Solicitor

TPA update

On 19 October 2006, the Senate passed the *Trade Practices Legislation Amendment Dawson Bill* (No 1) 2005 (Bill). The Bill introduced major changes to the *Trade Practices Act 1972* (Cth) (TPA), including:

- » exemption of related parties from third line forcing provisions
- » increased penalties for companies for breaches of the TPA.

Court warns franchisors preparing franchise documents

*The recent decision of the Federal Court of Australia in **Leafbusters Pty Ltd v Four Seasons Gutter Protection Pty Ltd** [2006] FCA 1056 involved an interlocutory injunction application by Leafbusters against Four Seasons, the owners and operators of Four Seasons and an associated company of Four Seasons (Four Seasons).*

Key message

Copyright may exist in a Franchise Agreement and normal copyright protection can be afforded to such an agreement.

The dispute between the parties was in relation to Four Seasons' alleged use of franchising documents in which copyright ownership was claimed by Leafbusters. The franchise documents in question were:

- a) the Four Seasons Flip Chart Manual Presentation
- b) the Four Seasons Specification Manual
- c) the Disclosure Statement
- d) the Franchise Agreement.

The judgment notes that the Leafbusters franchise documents were prepared by a law firm at a cost of \$50,000.

Leafbusters sought an interlocutory injunction to prevent Four Seasons from reproducing, publishing, distributing or otherwise communicating the above franchising documents.

In his judgment, Heerey J stated that with several of the Four Seasons franchise documents there were obvious signs that substantial parts were copied from the Leafbusters franchise documents. Evidence of such copying included:

- a) in the Four Seasons Flip Chart Manual Presentation the name 'Leafbusters' was mistakenly left in the document instead of 'Four Seasons'

- b) in the Specification Manual, the table of contents in the Four Seasons' document and the corresponding Leafbusters' document was word for word the same
- c) the Franchise Agreement was a straight word for word copy of a Four Seasons Franchise Agreement.

Heerey J acknowledged that Four Seasons' use of the allegedly infringing documents would give it an advantage and a head start compared with the time and expense that would be taken to develop such documents from scratch; accordingly, an interlocutory injunction was granted restraining Four Seasons from reproducing, publishing, distributing or otherwise communicating in any manner the infringing documents.

Heerey J found the solicitors that prepared the franchising documents retained copyright ownership in those documents. Franchisors should be aware of the risks involved in preparing their own franchising documents based on another franchise system and should seek professional advice and assistance when preparing franchise documents.

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