

## **Is your Franchise Agreement valid? Franchisors beware!**

The Franchise Code prohibits the Franchisor from entering into, renewing, extending or receiving payment under the Franchise Agreement until the Franchisee had been given both the disclosure documents and a copy of the Franchise Code.

What happens if the parties enter into a Franchise Agreement regardless of the Code? Will the contract still be valid?

### **The Cheesecake Shop**

Prior to 19 July 2007, any Franchise Agreement that had been made without complying with the disclosure requirements of the Franchise Code is still valid.

*The Cheesecake Shop* case is the authority for this proposition and looks at the mandatory industry code for the purposes of the Trade Practices Act (TPA) as a whole rather than individually on the specific disclosure provision of the Franchise Code.

It was held that the TPA does not intend to invalidate agreements that contravene the Franchise Code. Firstly, the code is designed only to regulate and prohibit certain conducts, not the make contract illegal. This concept is implied from the intention of the TPA as a whole.

Secondly, remedies are available which include the power to declare a contract void. The argument that a contravention of the Franchise Code makes the contract illegal is inconsistent with the presence of such remedy, therefore it is not logical to conclude that non-compliance with the Code results in an illegal contract.

### **Ketchell v Master of Education Services**

*The Cheesecake Shop* had been overruled recently by *Ketchell v Master of Education Services* ("*Ketchell*"). This means that any Franchise Agreement made after 19 July 2007 is deemed to be invalid if the disclosure requirements had not been met.

The general rule held that where the legislature prohibits the making of a contract, that contract is illegal. By analogy, the Franchise Code prohibits the entry into a Franchise Agreement without satisfying the disclosure requirements and will invalidate any contract which infringes this prohibition.

What are the justifications for the ruling in *Ketchell*?

There are no provisions in the Code for the court to either relief non-compliance or for the general rule to be negated. Further, it was held that the remedies available from the TPA do not repeal the common law of contractual illegality.

Therefore a Franchise Agreement is illegal where disclosure had not been made.

### **Conclusion**

Franchise Agreement made before 19 July 2007 will still be valid regardless of failure to disclose the documents required by the Franchise Code. After 19 July 2007, any such non-compliance will make the Franchise Agreement illegal - this means you are prohibited from entering into, renewing, extending or receiving payment of non-refundable deposits under the illegal contract.