

# scoop

entertaining the law



Dequetteville Chambers  
1 Dequetteville Terrace  
Kent Town South Australia 5067  
phone +61 8 8132 5000  
facsimile +61 8 8363 1633  
admin@baggiolegal.com.au

## scoops

A trap for young players we have come across frequently: **enduring powers of attorney** for trustees/trustee directors of SMSFs.

It is **imperative** that every trustee/trustee director of a SMSF has a binding enduring power of attorney. Without this an SMSF may be left in a position where it cannot satisfy the definition of an SMSF in the law – as experienced practitioners are aware, the consequences of this can be dire.

This is particularly important given our aging population and increasing incidence of mental health issues.



**Andrew Baggio**  
LLB MTax BA GCLP FTIA



**William Chau**  
LLB BCom(Corp. Fin.) GDLP

## New Franchising Code – ‘Tis the Night Before Christmas

A **complete rewrite** of the *Franchising Code of Conduct* has now occurred – this rewrite takes effect from **1 January 2015**. The *Franchising Code* is a mandatory industry code for franchisors under the *Competition and Consumer Act 2010* (Cth).

The *Franchising Code* has been **completely overhauled**. It is not a mere amendment; the changes go much further than the previous amendments that have occurred from time to time.

In broad terms, some of the most important changes are:

1. **Civil Penalty Regime** – Added to the ACCC’s arsenal to penalise offenders is now a civil penalty regime with fines of around \$50,000.
2. **Completely Rewritten Disclosure Document** – The form of the disclosure document that must be provided to franchisees has completely changed. In addition the form of evidence that must be kept has also changed.
3. **New Good Faith Obligation** – In an Australian first, an obligation to act in good faith has now been included directly in the *Franchising Code*. This will be a new minefield for lawsuits – watch this space!
4. **Jurisdiction** – Franchisors are now disadvantaged because they must commence lawsuits in the Courts where the Franchisee is located rather than where the Franchisor is located.
5. **Restraints** – Under certain conditions, Restraints of Trade contained in the franchise agreement become unenforceable. All franchisors should review their restraints so that the repercussions of this change are limited.

Certain **transitional provisions** apply – but these in themselves are **complicated**. It is certainly not the case that previous franchises are grandfathered and unaffected.

### Who is Affected?

- Franchisors
- Master Franchisors/ Franchisees
- Distributors (Often missed!)

Franchising lies at the intersection of multiple areas of law including contract law, property law and State and Commonwealth statutory law. This makes franchising a complex and multi-faceted area of law.

We regularly advise franchisors and franchisees on their documentation, their continuing obligations thereunder and on the Law.

Your franchisor clients will definitely be affected by these changes. They will need to amend their franchise documentation. We can help them do this efficiently and as painlessly as possible. Let us know if we can help.

Liability limited by a scheme approved under Professional Standards Legislation.