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# Dealing with litigated claims: matters to be considered

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## 1 Introduction

1.1 Litigation can be intense and stressful, particularly when the litigants are not familiar with the process.

1.2 In this paper, we outline matters that should be considered if you are faced with a claim. We will discuss the anatomy of a dispute, from the initial possibility of a claim to the pronouncement of a judgment in the Federal Court of Australia. We will focus on practical issues that (in particular) franchisors may encounter in litigation, by reference to a hypothetical.

## 2 The litigation team

2.1 Firstly, an introduction to the litigation team, which usually consists of at least one solicitor, at least one barrister and you, the client.

2.2 The solicitor will usually be your first point of contact. They are the ones that have the lion's share of "face time" with a client and will be the interface with the barrister. Solicitors will work on your franchise documentation, gather the evidence, prepare Court documents, advise you on settlement negotiations and strategy and instruct the barrister (including at trial).

2.3 Barristers are expert advocates who are briefed by solicitors to advise in relation to issues that may be raised in a litigation, settle Court documents such as pleadings and affidavits and also appear at the mediation, trial or any appeal.

2.4 The litigation team may also include an independent expert, who is briefed to provide expert opinion (on issues such as quantum or potentially forensic IT issues), and in some instances a 'dirty expert' who does not owe the overriding obligation to the Court and can provide insight on particular topics to the team. Others that may form part of, or interact with, the team include media / public relations consultants and private investigators.

## 3 Commonly raised claims

3.1 Franchise disputes commonly focus on the following causes of actions:

(a) Misleading or deceptive conduct in contravention of s18 of the *Australian Consumer Law* (**ACL**). These claims often relate to allegations that the franchisor overstated the financial performance of the franchised business. The alleged misrepresentations could either be express, implied or by silence;[1]

(b) Breach of the *Franchising Code of Conduct* (**Code**), which is also a breach of s51ACB of the *Competition and Consumer Act 2010* (**CCA**). These claims may include failure to comply with disclosure obligations;

(c) Unconscionable conduct in the supply of goods or services, in contravention of ss 20 or 21 of the ACL, to which a breach of the Code is a relevant factor; or

(d) Breach of an express, or implied, clause of the franchise agreement.[2] This may also include an allegation of breaching the good faith requirement under the agreement or clause 6 of the Code.[3]

3.2 There is no 'one size fits all' in litigation. Each dispute is peculiar to its own issues and the litigation strategy for that particular dispute should be tailored to it. In some instances, the allegations that are raised against the franchisor may be such that it intends to press ahead with the dispute and

[1] See, for example, *Miller & Associates Insurance Broking Pty Ltd v BMW Australian Finance Ltd* (2010) 241 CLR 357, particularly the judgment of French CJ and Kiefel J.
[2] A recent example of a dispute regarding an alleged breach of an implied duty to cooperate and do all things necessary to give the other party the benefit of the contract is the Full Federal Court's decision in *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd* [2015] FCAFC. In that case there was a dispute regarding the conduct of franchised businesses in adjacent territories. The Full Court held that there was an implied obligation, but it did not extend as far as the franchisee contended. Rather, the franchisor was obliged not to take positive steps that would infringe upon or cause a third party to infringe upon the exclusive franchise granted to the franchisee (at [139]).
[3] See, as a recent example *A & A (Sydney) Pty v YUM! Restaurants Australia Pty Ltd* [2014] FCA 678, where the 80 franchisee applicants unsuccessfully sought an interlocutory injunction to retrain the respondent from implementing a *"Reduced Price Strategy"* on grounds that included a lack of good faith. Jagot J held that, if there was a serious question to be tried, it was an *"extremely weak one"* at [28].

obtain a judgment.[4] In other circumstances, it may be that a confidential settlement is the most cost-effective, efficient and least damaging course to pursue.

3.3 We have set out below a broad hypothetical regarding a dispute in a franchise system and have outlined some considerations for you when you are faced with a dispute.

## 4 Pre-commencement – Forewarned / trouble brewing

*Client calls Josh to say that he had been informed that some franchisees within the system are organising get togethers of other franchisees encouraging them to stop paying royalty fees and marketing fund levies and set up competing businesses pursuant to perception that they have been sold a dud because their franchise is not earning what they expected it to be able to earn. Josh is having coffee with Tony and mentions the issues developing.*

4.1 The pre-commencement phase of a litigation can dictate how the case might play out. It is a good idea to assess the conduct and triage it to form a preliminary view as to the likelihood of the dispute escalating. If escalation is possible, steps should be taken as soon as possible to attempt to head-off a potentially expensive dispute or (if litigation seems inevitable) to prepare for the looming claim.

4.2 **Fact gathering**

(a) Obtaining accurate facts in relation to the conduct is imperative, as it will assist in determining the next steps. These disputes are normally very 'fact heavy' and any resultant litigation will require you, and your legal team, to understand the facts intimately. Is there a friendly franchisee in the system who can give an accurate account of what has been happening? Is there a Franchise Advisory Council representative that can assist or a lead franchise to act as a bridge?

Are there any field managers that can provide information or assistance to defuse the situation that seems to be looming?

[4] Keeping in mind a party's obligation under, in particular, the overarching obligations in civil litigation under s37M of the *Federal Court of Australia Act 1976* (Cth) as well as the 'genuine steps' obligations we discuss below under the *Civil Dispute Resolution Act 2011* (Cth). The States have also have 'overarching obligations' provisions, such as r5 of the *Uniform Civil Procedure Rules 1999* (Qld) and s8 of the *Civil Procedure Act 2010* (Vic).

(b) More broadly, an analysis of complaints received by the franchisor or issues raised by the franchisee across the board, may allow you to put in place pre-emptive steps to head-off or at least defuse some of the issues before hostilities commence.

### 4.3 Default notice

(a) Is there a provision in the franchise agreement to issue a default notice for this type of conduct?[5] If yes, should one be issued? Or will this just enflame the dispute that could otherwise be resolved reasonably amicably?

### 4.4 Termination

(a) Is there an ability to immediately terminate them from the system?

Clause 29 of the Code[6] sets out the special circumstances in which a franchisor may terminate an agreement without complying with clauses 27 (breach notice) or 28 (no breach by franchisee) of the Code. However, it is unlikely that any of those special circumstances apply here.

There is, of course, exposure to the risk of litigation if you terminate without following the procedures set out in the franchise agreement and/or the Code.[7]

### 4.5 Internal / Code dispute resolution

(a) Should the internal (under the franchise agreement[8]) or Code[9] (**OFMA**) dispute resolution procedures be utilised to try and prevent those agitating others within the system and

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[5] Note clause 27 of the Code regarding issuing a default notice.
[6] Clause 29(1) provides:

> ***"29 Termination—special circumstances***
> *(1) Despite clauses 27 and 28, a franchisor may terminate a franchise agreement without complying with either clause if the agreement gives the franchisor the right to terminate the agreement should the franchisee:*
> *(a) no longer hold a licence that the franchisee must hold to carry on the franchised business; or*
> *(b) become bankrupt, insolvent under administration or an externally-administered body corporate; or*
> *(c) in the case of a franchisee that is a company—become deregistered by the Australian Securities and Investments Commission; or*
> *(d) voluntarily abandon the franchised business or the franchise relationship; or*
> *(e) be convicted of a serious offence; or*
> *(f) operate the franchised business in a way that endangers public health or safety; or*
> *(g) act fraudulently in connection with the operation of the franchised business."*

[7] For example, in *National Security Training Academy (GC) Pty Ltd v National Security Training Academy Pty Ltd* [2013] QSC 245, the Court held that the notice of termination was sent by the franchisor at a time when the franchisee was not in default. Therefore, the franchisee was able to successfully obtain a declaration that the agreement had not been duly terminated.
[8] Note that the procedures must comply with division 2 of the Code, which sets out the minimum requirements for the procedure.
[9] See division 3 of the Code. Note that the internal and Code requirements under division 2 and 3 are different in that the Code procedure includes provisions regarding the termination and cost of the mediation.

open communication channels? These relatively informal procedures could be ideal to resolve the dispute early. Even if the matter does not settle at that meeting, it could be useful to try and get closer to a resolution and also narrow the issues. The parties could consider an informal, 'without prejudice' meeting – even without lawyers – to seek to identify the issues in dispute and resolve them.

(b) OFMA mediation processes are clearly explained and enforced. For example, a party must attend or have a duly authorised representative empowered to settle the dispute at the mediation. If the appropriate party is not present, or has not sent an authorised representative, it may raise an issue as to whether that party has complied with the good faith obligation in clause 6 of the Code (to which civil penalties now apply).

(c) A group mediation with all or some of the disaffected franchisees could also be considered. However, there are some practical issues that may arise from negotiating with all of those parties at once. We discuss mediation in more detail, in the context of ongoing litigation, below.

(d) Parties also have an obligation under the *Civil Dispute Resolution Act 2011* (Cth) (**CDR Act**), to take genuine steps to resolve a dispute prior to the commencement of litigation in the Federal Courts. What is a 'genuine step' will depend on the circumstances of the parties as well as the nature and circumstances of the dispute.[10] However, genuinely participating in a mediation is likely to meet those obligations.

4.6 **Commence a Court action**

(a) Has a competing business been commenced and, if so, has the franchisee taken any confidential information (or intellectual property) to do that? This raises a number of issues, including:

(i) Should a forensic IT expert be engaged to analyse electronic material within the franchisor's possession, to ascertain what, if anything, has been taken;[11]

[10] See s4 of the CDR Act. The failure to comply with this Act, may result in adverse costs consequences: s12 CDR Act.
[11] You should consider what, if any, electronic documents you have access to under the franchise system. Note that there may be some privacy issues that may been to be relevant too, if the *Privacy Act 1988 (Cth)* applies.

(ii) Should an injunction application be commenced for either breach of a restraint and/or misuse of confidential information? If an injunction is to be sought, then do not delay. Also, what is the most appropriate type of injunction: interlocutory or potentially a search (Anton Piller) order.

(b) Commencing a Court proceeding is a serious step. If you intend to do so, you must be prepared to see it through to completion as proceedings will generally only cease if there is a settlement, judgment or discontinuance (which may have costs implications).

4.7 **Prepare for the pending action**

(a) The franchisees have telegraphed their complaint as relating to the profitability of the business. It would be prudent to start collating the relevant files and identifying the key witnesses, so that if proceedings are commenced you will be able to quickly instruct a solicitor in a cost effective and efficient way.[12]

## 5 Commencement

*Josh receives a call from the client saying they have just been served with Federal Court of Australia proceedings, which are claiming approximately $150,000 for refund of franchisee fees, $80,000 refund of royalty and marketing fund payments and $45,000 for other losses. This is based on an apparent breach of the franchise agreement, breach of the franchising code, misleading and deceptive conduct by the franchisor, unconscionable conduct by the franchisor as well as assertions of lack of good faith by the franchisor. Parties to the proceedings are the franchisor, each of the directors of the franchisor and a representative franchisee for a group under a group proceeding.*

5.1 **Gathering the information, evidence, first directions hearing, preparing a defence / cross claim**

(a) The commencement of an action is a labour intensive event and requires action to be taken swiftly. The steps include:

[12] Note the requirements under clause 19 of the Code regarding record keeping.

(i) *Identifying, gathering and collating the relevant material to assess the claim and prepare the defence.*

The importance of quickly coming to terms with the facts cannot be overstated. As mentioned above, these cases are usually fact heavy and will often be determined by the Judge on which of the witnesses is more believable.[13] This will require the solicitor to work closely with you in order to identify the relevant documents and witnesses. In some circumstances, it may be appropriate to obtain witness statements at the outset, which is particularly important in a "he said, she said" case. These witness statements can be used to prepare the defence and also to preserve the evidence, as over time a witness' memory can become fallible. If there is cross-over in evidence between witnesses, it is important to appropriately quarantine each witness so that they do not talk to each other about their evidence.

How well a franchise system or a franchisee manages documents and data may determine what facts are quickly and easily at their disposal to plead in proceedings. Ultimately, this may also assist in convincing the other side to settle or even to persuade the Court to find in your favour.

(ii) *Brief a barrister to settle the defence and any cross-claim.*

Given the importance of the litigation to the franchisor, a barrister should be engaged to settle the Court documents. The solicitor will work up the brief (with your input) and commence work on the defence and any cross-claim.

In relation to a misleading conduct claim (for example), the defences may include:

(A) No such representation was made;

(B) The representation was not misleading or deceptive, ie it was true;

[13] See, for example, the Full Federal Court's decision in *Julstar v Hart Trading Pty Ltd* [2014] FCAFC 151. In that case there was a deeply entrenched contest as to the evidence. The trial judge weighed up the evidence and preferred the respondents'. The appellate Court did the same and did not disturb the trial judge's findings.

(C) Even if the representation was misleading or deceptive, as it was to a future matter (such as projected profits) the franchisor had a reasonable basis for making it;[14]

(D) The franchisee did not rely on the representation; or

(E) The loss was not caused by the representation.

The cross-claim will usually relate to a breach of contract by the franchisee and be for damages, such as payments due under the franchise agreement.

(iii) *Prepare for the first directions hearing.*

The Federal Court has a docket system,[15] which means that the proceedings are case-managed by the same Judge who will preside at the trial. Prior to the first directions hearing parties should attempt to agree to directions which may relate to:

(A) Pleadings: the defence and cross-claim is due after the first directions hearing;

(B) Discovery: although an application[16] would need to be made for that;

(C) Evidence: including expert evidence;

(D) Mediation; and

(E) Trial date: although, realistically, the trial date is usually set at a further directions hearing.

[14] This is important to keep in mind and, if relevant, plead. See *SPAR Licensing Pty Ltd v MIS QLD Pty Ltd* [2014] FCAFC, where on appeal the Full Court found that there was no contravention of s52 of the *Trade Practices Act* by the franchisor, as the representations regarding ending the franchise agreement were to a future matter and there were reasonable grounds for making them. This issue was not brought to trial judge's attention, who found that there had been a contravention of the Act.
[15] Further information about the Federal Court's docket system can be found on the Federal Court's website: http://www.fedcourt.gov.au/case-management-services/case-allocation/individual-docket-system. See also practice note CM1 *Case management and the Individual Docket System*.
[16] See r20.12 of the Federal Court Rules.

5.2 **Group proceedings**

(a) *Is this a group proceeding or is it simply a set of franchisees trying to save money on prosecuting the matter by running the one set of proceedings each with disparate claims against the franchisor? Can action be taken to separate the franchisees to the separate actions?*

In the Federal Court, a representative action can be commenced under Part IVA of the *Federal Court Act 1976* (**FC Act**). The procedures relating to a representative action are also governed by Practice Note CM17. Under s33C(1) of the FC Act, subject to some exclusions, where:

(a) 7 or more persons have claims against the same person;[17] and

(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

(c) the claims of all those persons give rise to a substantial common issue of law or fact;

a proceeding may be commenced by one or more of those persons as representing some or all of them.

The benefit of a representative proceeding for franchisees is that they can pool their resources and only run one action, rather than multiple actions individually. Examples include the protracted *Pampered Paws* litigation[18] and *A & A (Sydney) Pty v YUM! Restaurants Australia Pty Ltd*, where 80 franchisees are currently pursuing an action.

[17] There have been some conflicting decisions as to whether all of the applicants in a group must have a claim against all of the respondents. This could be relevant where the directors are joined to the proceedings. In *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 at 514, Sackville J (with whom Spender J and Hill J agreed) said that every applicant must have a claim against each respondent. A different conclusion was reached in *Bray v F Hoffman-La Roche Ltd* (2004) 130 FCR 317. This issue was recently considered in *Gray v Cash Converters International Limited* [2014] FCA 420, where Farrell J at [124] followed *Bray*.

[18] See *Pampered Paws Connection Pty Ltd (on its own behalf and in a Representative Capacity) v Pets Paradise Franchising (Qld ) Pty Ltd (No 10)* [2012] FCA 25 and *Pampered Paws Connection Pty Ltd (on its own behalf and in a Representative Capacity) v Pets Paradise Franchising (Qld) Pty Ltd (No 11)* [2013] FCA 241 for the trial judgments of Mansfield J,

If the requirements of s33C of the FC Act are not met, then serious consideration should be given to making an application to split the proceedings.[19]

There are also other provisions that can be relied upon to split the action.[20] Most relevantly, under s33N of the FC Act, the Court may order that the proceeding no longer proceed as a representative action where it is satisfied that it is in the interests of justice to do so because:

(i) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or

(ii) all the relief sought can be obtained by means of a proceeding other than a representative proceeding; or

(iii) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or

(iv) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

Alternatively, if a number of separate actions are commenced, consideration should be given to seeking to hear the matters together. For example, in 2006 to 2010, 14 separate proceedings were commenced by or against the Bank of Queensland in relation to franchisees in New South Wales, in the Supreme Court of Queensland, Federal Court of Australia, Industrial Relations Commission of New South Wales and the Supreme Court of New South Wales. All of the proceedings were ultimately cross-vested to the Supreme Court of New South Wales.[21]

[19] This occurred in *Pampered Paws Connection Pty Ltd (on its own behalf and in a Representative Capacity) v Pets Paradise Franchising (Qld ) Pty Ltd (No 3)* [2009] FCA 138, but the application was unsuccessful as Mansfield J accepted at [118] that each group member was exposed to the same or similar misrepresentations, exclusive dealing or breach of the Code. However, at [119]-[120], his Honour doubted that a claim of unconscionability under ss51AA or s51AC of the *Trade Practices Act 1974* (Cth) could be brought as a group action as those claims are individual.

[20] Under s33M of the FC Act, if money is claimed in the proceedings and the cost to the respondent of identifying he group members and distributing to them the amounts ordered to be ordered to be paid to them would be excessive having regard to the likely total of those amounts, the Court may either direct the proceeding no longer proceed as a representative action (or stay the monetary claim). However, it seems unlikely that this will apply to many franchise systems.

[21] See *Traderight (NSW) Pty Ltd v Bank of Queensland Ltd* [2015] NSWCA 94 for the Court of Appeal's judgment in relation to a franchisee group that consisted of 36 persons and companies.

5.3 **Other tactical considerations – security for costs**

(a) A matter that should always be considered by a franchisor faced with such a claim is an application for security for costs.[22] Security is required where there are concerns that the applicant (or group of applicants, as in this case) will be unable to meet any adverse costs order. There are two limbs:

(i) Whether security is payable: which is in the Court's discretion and will depend on a number of factors. In a class action, the factors may include:[23]

(A) Whether there is reason to believe that the applicants will be unable to pay the respondents' costs if so ordered, that is, whether the applicants are impecunious?

(B) Whether the applicants' insufficiency of means is caused by the conduct which is the foundation for the action?

(C) The promptness of the application and the stage of the proceedings at which an application for security is brought;

(D) Whether the proceeding has become bogged down with "interminable and expensive interlocutory applications" for which the applicants bear responsibility?

(E) The strength and bona fides of the applicants' claim for relief from the respondents;

[22] See r19.01 of the Federal Court Rules in relation to the making of an application for security for costs. Note that an application for security can also be made in an Appeal, which occurred in *Julstar Pty Ltd v Hart Trading Pty Ltd* [2014] FCA 355.
[23] See Hollingworth J 's judgment in *Hall v Australian Finance Direct Ltd* [2005] VSC 306 at [107] and also *Madgwick v Kelly* [2013] FCAFC 61 at [7].

In *Madgwick*, which involved a class action commenced by investors in forestry plantation schemes that failed, the Full Federal Court held that security should be provided. Allsop CJ and Middleton J said at [99]:

> *"Here, as we have already said, the applicants and group members entered commercial transactions for their own reasons. They had sufficient assets or income to warrant the decision to enter the arrangements and receive the hoped for commercial and fiscal advantages. The commercial or other advantages of the investments have not materialised. The applicants on behalf of themselves and the group members wish to engage in commercial litigation to repair the position they find themselves in. Some of those group members are persons of significant means. Some invested a lot; some invested little. All made a choice of a commercial character to enter arrangements to advance their asset or income position. It seems entirely fair that those standing to benefit from such litigation make a real, but not oppressive, contribution to a fund to secure the costs of the respondents. The most obviously fair and appropriate approach would be rateable by reference to the investments. There would be a need, in setting the amount, not to risk stifling the action. Given, however, the nature of the underlying claims and proved ability of at least a not insignificant number of group members to contribute, an order for some security is appropriate*."

(F) Whether the applicants have been deliberately selected as "persons of straw", in order to immunise from costs orders group members of substantial means?

(G) Whether the proceeding is essentially defensive in nature?

(H) Whether the applicants are suing for someone else's benefit?

(I) The characteristics of the group members. For example do they include corporations or natural persons, and are they rich or poor?

(J) Whether someone who stands to benefit from the litigation is funding the applicants?

(K) Whether security would have been ordered if separate actions had been brought by the group members?

(L) Whether an order for security would stifle the action and shut the applicants out from pursuing an arguable claim?

(ii) The amount of security.

This is usually set out in an expert costs consultant's affidavit, calculated on the Court scale.

5.4 **Insurance**

(a) Some insurance policies, including D&O policies for the directors, may respond to such a claim. Therefore, consider the application of any such policies and give notice.

(b) Prepare your client also for the insurer potentially wanting to use their own panel firm solicitors rather than you and how you will/can remain engaged.

5.5 **Statement to the system / ongoing disclosure**

(a) Consider whether a statement about the commencement of the litigation should be issued through the system. Any such statement will be closely scrutinised by your opponent, so it

is important for you to run it past your legal advisors. The statement should be factual, accurate and not emotive. You should keep in mind that this statement may be used in any cross-examination of your witnesses.

(b) The commencement of proceedings by a private party (c/f a regulator) is not a materially relevant fact that requires disclosure under clause 17 of the Code.

5.6 **Settlement**

(a) Settlement should be on your mind throughout the life of the litigation. There are some points in a dispute that naturally favour one party more than another. For example, after delivery of a statement of claim the applicant is notionally in a stronger position. That may change after the delivery of a defence and cross-claim.

(b) In a group proceeding, there are special requirements under the FC Act and also clause 11 of Practice Note CM17 for settlement of the entire action[24] or an individual claim in the action.[25] In essence, the Court will need to approve the settlement. Note that in some circumstances, the regulator may intervene, as occurred in the *Storm Financial* dispute, where ASIC intervened in the proposed settlement with Macquarie Bank.[26] The ACCC also has this power.[27]

(c) Consider any statutory obligations such as s312 *Legal Profession Act 2007* (Qld) (as we discuss below) if settlement is being considered.

## 6 Mediation - during proceedings

*The Defence has been filed by the franchisor and the franchisor's directors and pleadings have closed. The court has ordered a mediation by the Registrar of the matter. The franchisee wishes to bring along support people in addition to its lawyers being other franchisees of the*

[24] Under s33V of the FC Act:

> *"(1) A representative proceeding may not be settled or discontinued without the approval of the Court.*
> *(2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court."*

[25] Under s33W of the FC Act, a *"representative party may, with leave of the Court, settle his or her individual claim in whole or in part at any stage of the representative proceeding"*.
[26] *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89.
[27] Section 87CA of the *Competition and Consumer Act 2010* (Cth) grants this power. Also, the ACCC has the power under s871B of that Act to commence a representative proceeding, which occurred in its action against Allphones, see: *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd* [2011] FCA 538.

*representative group. The mediator has sought your views on this. How do you respond to this and generally prepare for mediation?*

## 6.1 Preparing for the mediation

(a) In many cases, a mediation represents the best chance to resolve the dispute as all of the litigants and their legal advisors are focused on settlement, with the assistance of an impartial third party.

(b) You could obtain an advice on prospects from your legal team prior to the mediation. You should also ask for an estimate as to your total exposure and also what your total legal costs may be.[28]

(c) With this information, litigants are usually armed with the information they need to work out what they can 'live with' in order to resolve the dispute. Mediations are different to a judgment – there is no winner or loser. Rather, the parties are trying to reach a point that is acceptable to both of them. You should also consider creative offers, as in some circumstances it may not just be about money.

(d) If you are attending the mediation on behalf of the franchisor and/or directors, you should also ensure that you have the appropriate authority to negotiate and settle the dispute. The prudent way to do this is to execute a limited power of attorney.

## 6.2 Who can attend at the mediation

(a) Mediations are without prejudice and confidential. The usual parties who are permitted to attend (provided that an appropriate mediation agreement is executed) are the litigants, their advisors and the mediator. Others may be able to attend, but only with the consent of all the parties.

[28] Indeed, lawyers are required to provide estimates as to the legal costs in relation to the settlement of litigious matters. In Queensland, s312 of the *Legal Profession Act 2007* (Qld) provides:

> *"**312 Additional disclosure—settlement of litigious matters***
> *(1) If a law practice negotiates the settlement of a litigious matter on behalf of a client, before the settlement is executed, the law practice must disclose the following to the client—*
> *(a) a reasonable estimate of the amount of legal costs payable by the client if the matter is settled, including any legal costs of another party that the client is to pay;*
> *(b) a reasonable estimate of any contributions towards those costs likely to be received from another party."*

(b) The admittance of support people to the mediation will depend on who that person is and the purpose for which they are admitted. If the party is represented by a lawyer, then that would usually be sufficient. However, if you consider that a support person may increase the chance of a reasonable settlement, then you should consider consenting. If a support person attends, they should also be required to be bound to the confidentiality obligation.

(c) In mediations where there are a number of different parties, such as in this instance, each party may have different positions and expectations. This can make negotiations difficult.

(d) In group proceedings, it is possible that not all of the parties may attend the mediation. However, they will still be bound by the settlement if it is approved by the Court, as we discuss above.

6.3 **Negotiations at mediation**

(a) Mediations can be run in a number of different ways. The traditional approach is for a joint session to occur first where the Mediator will set the ground-rules for the mediation, each party (usually through their barrister) will give an opening, the clients will be given an opportunity to make a statement and then the parties will break into separate rooms. The mediator will shuttle between them trying to facilitate a settlement.

(b) Some mediators favour an approach where there is no opening session and the mediation will commence in the separate rooms.

(c) At the mediation, your legal team will advise you about the terms of a proposed settlement. However, a negotiation can take a number of different forms and will depend on many different variables. In relation to the dollar amount, in order to make the amount as compelling as possible, a logical explanation as to how it is calculated should be given.

6.4 **Settlement**

(a) If an agreement can be reached, it should be documented into a deed of settlement. Consideration should be given to the following types of clauses:

(i) Payment of any settlement sum;

(ii) Undertakings not to engage in particular conduct;

(iii) Release and indemnity;

(iv) Determination of the proceedings;

(v) Confidentiality and non-disparagement (which may be particularly important given there are multiple applicants);[29]

(vi) Public announcements relating to the dispute and/or its resolution.

(b) If the matter is a group proceeding, you should also consider the issues we discuss in paragraph 5.6 above, in relation to approval by the Court.

6.5 **Offer if no settlement**

(a) If settlement cannot be reached at the mediation, it does not mean that the matter is precluded from settling at a later date.

(b) One strategy that is commonly deployed is that after the mediation a party will reduce its best, final offer to a *Calderbank* offer or make a formal offer under part 25 of the *Federal Court Rules.* This strategy may put pressure on the other party as the failure to accept an offer can, in certain circumstances, have adverse costs consequences.[30]

## 7 Unresolved – push on to trial

*Regrettably mediation was unsuccessful and the Registrar has made orders to progress the matter for trial. A directions hearing to set the trial date has been scheduled for one month's time. One franchisee keeps making public statements about the litigation, some of which are inaccurate. You suspect that this franchisee is also providing information to the media.*

7.1 The pre-trial preparation is one of the most important phases of the litigation. It involves obtaining an advice on evidence and/or prosects, preparing documentary evidence, witness statements /

[29] In some circumstances, a contractual obligation to not disparage a party can be enforced by way of injunction, see (for example) *Fitness First Australia v McNicol* [2012] QSC 296. Such an approach can avoid the difficulties in bringing an action in defamation.
[30] See r25.14 of the Federal Court Rules.

affidavits (which may be exchanged with the other parties), issuing subpoenas (if necessary), preparing a trial brief, preparing a tender bundle, preparing submissions and relevant authorities.

7.2 Given the amount of work to be completed, the Court will usually give a reasonable lead-time so that these steps can be completed. However, ultimately, it will depend on the estimated trial length, Judge's calendar and the ability of the parties to prepare the matter in the time available.

7.3 **Evidence**

(a) In the Federal Court, directions are often made for the parties to provide evidence in chief by way of affidavit. If this occurs, a substantial amount of work may be required in relation to interviewing a witness and preparing an affidavit (which incorporates relevant documentation).

(b) Prior to undertaking that step, it is useful to obtain an advice on evidence (and/or prospects) from Counsel. This is, in essence, a road-map to the evidence that you need in order to prove your case. An advice on evidence should ensure that there are no 'holes' in the case, which may allow your opponent to succeed.

(c) Each witness will need to be prepared for cross-examination. They should be tested, both by the solicitors and with Counsel, on their evidence. It may be possible, in certain circumstances, for a witness to appear by video-link,[31] even from another country.[32]

(d) As discussed in paragraph 2.4 above, it may also be necessary to obtain expert evidence on topics like quantum. If required, relevant documents should be collated in a brief to a forensic accountant to prepare the opinion. At trial, many Judges have embraced the concept of concurrent evidence – whereby the opposing experts give evidence concurrently. The expert should be prepared for that, if it is intended that their evidence be received in this way.

[31] Section 47A of the FC Act confers the power to allow testimony to be given by video link, audio link or "other appropriate means".
[32] See, for example, *Joyce v Sunland Waterfront (BVI) Ltd & Anor* (2011) 281 ALR 54, where the Full Federal Court found that the taking of evidence by video-link from witnesses who could not leave Dubai, UAE would not breach that country's sovereignty.

(e) Consideration will need to be given to the documentary evidence, including documents obtained by third parties on subpoena or otherwise, and how those documents may be admitted into evidence.

### 7.4 Trial preparation

(a) The immediate lead-up to trial primarily relates to ensuring the case is ready to be presented to the Judge.

(b) Depending on the pre-trial directions, it may be necessary for the legal team to prepare opening submissions as well as objections to the applicant's evidence.

(c) Again, consideration should be given to settling the dispute.

### 7.5 Public statements made by franchisee

(a) Sometimes litigants attempt to prosecute their claim in the Court as well as the Court of public opinion. If the matter is of interest to the media, it is possible that the public statements made by the franchisee may be reported.

(b) There are a few legal issues that may arise from this:

(i) *Cross-examination*: Any public statement is likely to be seen by the other party and, if possible, used in cross-examination;

(ii) *Implied undertaking:* Some material that is compulsory produced under Court processes is subject to an implied undertaking[33] that it only be used for the litigation. To use the material in any other way, even in other Court actions against related parties,[34]may be a contempt of Court;

[33] While it is known as the implied undertaking, it is an obligation of substantive law: *Hearne v Street* (2008) 235 CLR 125 at [106]-[108].
[34] See, as an example, *Bedshed Franchising Pty Ltd –v- Battersby* [No 2] [2015] WASC 281, where Beech J refused an application by the plaintiff for leave to use certain documents produced on subpoena to cross-examine witnesses in proceedings involving related parties in the Victorian Supreme Court.

(iii) *Injunction*: If the publication is an inaccurate account of the issues in the proceedings, it may be possible to seek an injunction restraining the conduct (as a contempt of Court).[35]

## 8 Trial

*Day 1 of the five day trial has arrived. The parties are walking up the steps of the Court.*

8.1 Trials are the forum where the parties' evidence is tested under cross-examination and then submissions are made to the Judge as to the ultimate result. They can be intense, stressful and logistically challenging. You will work with the solicitors in order to ensure that all of your witnesses are present and that the trial runs smoothly.

8.2 **Settlement**

(a) A trial can settle up to just before a Judge pronounces judgment. Therefore, again, consideration should be given to settling the dispute.

(b) Normally there is a flurry of settlement activity prior to a hearing. Sometimes this leads to resolution and sometimes it does not. It can also sometimes reach a point where it becomes more economical to risk an adverse decision at trial, than to settle.

8.3 **Opening**

(a) Usually the trial commences with housekeeping issues and also deals with objections regarding evidence. Once those have been resolved, the franchisee, as applicant will usually open its case.

8.4 **Evidence**

(a) As applicant, the franchisee puts forward its case first. Its witnesses are called and cross-examined by your Counsel. Your Counsel, with assistance from the solicitors, works up the cross-examination prior to the commencement of the hearing.

[35] See *Microsoft v Ezy Loans* (2003) 57 IPR 509.

(b) In misleading conduct cases, there is often a contest as to the conduct: what was said to whom. In such cases, witnesses are often ordered to leave the Court until called upon to give evidence.[36]

(c) Once cross-examination is completed, the witness may be re-examined. However, this is a limited right.

(d) At the end of each day, your legal team will debrief with you, review the transcript of the day's hearing and prepare for the next day's hearing. They may also require instructions from you overnight. However, care should be taken not to contact a witness who is still under cross-examination, as such contact may be a contempt of Court.

(e) Once the applicants have closed their case, the respondent can open its case and call witnesses or seek to tender documents. In certain circumstances, a respondent may not seek to admit any evidence.

### 8.5 Closing submissions

(a) Once evidence has been completed, the parties will normally give closing submissions. This may occur shortly after evidence has been completed, or on another date/s to be set by the Court.

(b) The closing submissions are usually comprehensive and stitch together the factual issues, including concessions made in cross-examination, the legal position and the conclusion that each party submits the Court should reach.

### 8.6 Judgment

(a) Judgment is usually reserved at the end of closing submission, to allow the Judge to review the evidence and submission and prepare reasons.

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[36] s26 of the *Evidence Act 1995* (Cth) provides:

> *"**26 Court's control over questioning of witnesses***
> *The court may make such orders as it considers just in relation to:*
> *(a) the way in which witnesses are to be questioned; and*
> *(b) the production and use of documents and things in connection with the questioning of witnesses; and*
> *(c) the order in which parties may question a witness; and*
> *(d) the presence and behaviour of any person in connection with the questioning of witnesses."*

(b) Judgment is usually delivered within 3 – 12 months after the closing submissions are delivered and the hearing ends.[37] Judgment is pronounced at a separate mention, where the Court may give the parties time to make any further submissions in relation to costs (which may be relevant if a *Calderbank* offer or offer made under the *Federal Court Rules* had been made).

8.7 **Post-judgment issues**

(a) It is prudent to conduct a 360° review after judgment to ensure that any issues that were found to be unlawful are remedied.

(b) Further, if necessary, appropriate disclosures should be made under clause 17(3) of the Code regarding the judgment.

(c) A judgment is a public document and, in some cases, the Court may make findings about a witnesses' credit. This can have reputational consequences.

(d) Any money order is likely to be enforced. Further, costs will be assessed.

## 9 Concluding remark

9.1 To be forewarned is to be forearmed and we hope that our paper de-mystifies some of the litigation procedure, so that if a claim is looming, you know what to do with it.

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[37] Under clause 6 of Interim Practice Note NCF1:

> *"6 .1 The Court aims to deliver judgment as soon as is reasonably practicable. In the ordinary course (and subject to the size and complexity of the matter) the Court will endeavour to deliver judgment within 3 months of the receipt of the final submissions. If a judgment is not forthcoming within 6 months, the Court will inform the parties of the anticipated time for delivery of judgment."*