

Delay May Be Dangerous

"You may delay, but time will not" Benjamin Franklin

Many if not most persons involved in franchising will be aware that the Senate referred an inquiry into the operation and effectiveness of the *Franchising Code of Conduct* to the Parliamentary Joint Committee on Corporations and Financial Services ("Committee"). A report is to be provided by the Committee on 6 December 2018. The Committee's powers include the power to make recommendations to Parliament for changes to legislation, regulation and government policy.

Persons involved in franchising, particularly franchisees with legal claims against franchisors, need to keep in mind that the Committee is not able to resolve individual disputes, investigate individual legal claims or grant remedies. Parties need to be aware that legal claims must be resolved between the parties themselves through negotiation, mediation, or another form of alternative dispute resolution, or by obtaining a remedy from a Court.

It is important that parties be aware that legal claims have limitation dates. A limitation date is the last day on which a claim may be commenced in a Court. A limitation period is the period that starts when a cause of action (facts giving rise to a legal claim) accrues and ends after the expiration of a certain period of time from the accrual of the cause of action. Different causes of action accrue on different dates and the limitation period is not always the same.

There is a risk in waiting to act for something to come out of the recommendations that will be made by the Committee. It is to be hoped that the recommendations made by the Committee will result in changes to legislation, regulation or government policy that are of benefit to the franchising industry as a whole, and to franchisors and franchisees.

This is not helpful to parties who are currently involved in a dispute and have suffered damage because of some conduct of a franchisor or franchisee that gives rise to a legal claim or need to quickly resolve the dispute. The need to resolve a franchise dispute quickly may be acute and arise from one or more of several factors caused by a dispute including financial distress, risk of insolvent trading, family stress or emotional anxiety.

While parties wait for inquiries to finish their work, the clock is ticking, and parties may find that a limitation date by which a legal action must be commenced has expired. This puts the party even in a weaker or hopeless legal position without resolving any of the problems arising from the dispute.

The same risk of delay arises from waiting for other parties to start a class action. In franchise disputes we have seen that one or a few franchisees may be active in promoting a class action. Other franchisees wait to see what will happen. The class action may not start at all because of legal advice not to start it, or because the active franchisee promoting the class action resolves their own dispute with the franchisor or because there is no funding for the class action.

It should be recognised by franchisees that there have been few class actions commenced in Australia by franchisees. In our experience, most claims by franchisees against franchisors involve allegations of conduct and causation that are specific to the relationship between the franchisee and the franchisor. Class actions require claims that arise out of the same, similar or related circumstances and which give rise to at least one substantial common issue of law or fact.

Parties who are interested in a class action should always consider obtaining legal advice on the issue of time limits because other parties may never commence the class action. If they sit back and wait for someone else to act the time to start a court action may slip by and be lost.