

Franchising Tales: e-bikes & the Code; Botox injecting injuncted

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Does the Code apply? Franchise Agreement v Licensing Agreement?

Leon Cycle Pty Ltd v Hi5 Scooters Pty Ltd & Raad

[2025] VCC 191

S 7 Franchising Code – definition of “franchise agreement”

- (b) franchisor grants to the franchisee the right to carry on the business of supplying or distributing goods or services in Australia under a **system or marketing plan** substantially determined, controlled or suggested by the franchisor
- (d) before starting or continuing the business the franchisee must pay or agree to pay to the franchisor **an amount** that:
- does not include (inter alia):
 - goods and services on a **genuine wholesale basis**
 - payment for goods taken on consignment and supplied on a **genuine wholesale business**

Facts of *Leon Cycle v Hi 5 Scooters*

- Leon Cycle was a business which sold, among other things electric bicycles.
- Hi5 Scooters, the defendant sold electric bicycles and related parts and accessories.
- dealer credit facility whereby Hi 5 purchased specific goods and accessories from Leon Cycle
- discussions around a further agreement: Leon Cycle to supply bicycles and spare parts to Hi5 on consignment with no shipping fee. Hi5 to sell those goods and proceeds would be remitted to Leon Cycle. Hi5 Scooters would receive a commission for each scooter sold.
- Licensing Agreement with many references to franchisee/franchisor left in

Application of the Franchising Code to a “franchise agreement”

- S 7(1)(d) requires that the **franchisee pay an amount** to the franchisor, but which excludes:
 - goods taken on consignment and supplied on a **genuine wholesale basis**
- Commission payment structure
- Consignment basis with no upfront fee
- Stock processed through Leon Cycle payment system

Operation of s 7(1)(d) of the Code – flow of funds

- The Court identified that one of the critical differences between the Leon Cycles arrangements and a franchise arrangement was in effect the flow of funds.
- Section 7(1)(d) applies in situations where the franchisee is required to pay money to the franchisor. In effect there is a flow of funds from the franchisee to the franchisor.
- Hi5 Scooters would sell electric bicycles to customers; customers would pay Leon Cycle directly
- every fortnight, Leon Cycles would remit a commission payment to Hi5 Scooters

Operation of s 7(1)(b) of the Code - level of control - marketing

- a marketing plan that was substantially determined, controlled or suggested by the franchisor?
- Hi5 Scooters retained a broad scope to make its own marketing decisions, notably for local advertising and promotions
- Leon Cycle's obligations were limited to providing guidance and training while maintaining a discretion to veto or provide advice on an ad hoc basis when necessary
- obligations to develop public relations and promotional campaigns were held not to detract from Hi5 Scooters' concurrent obligation to promote the brand

Identifying a franchise agreement for the purposes of the Code

- Is the flow of funds from the prospective franchisee to the franchisor?
- Who bears the cost of prospective franchisor's profit, is the franchisee paying fees or is it the end customer?
- Consider the level of control that is afforded to the prospective franchisee to carry out their own marketing or system of providing business

No franchise agreement; damages, accounting, and equitable lien

- Hi5 Scooters was liable to Leon Cycle for \$641,545.66 in damages for unaccounted bicycles and proceeds of sales, plus \$8,185.63 for outstanding debt. Costs of the proceeding were also awarded against Hi5 Scooters.
- Declarations were also made that a constructive trust existed because of Hi 5 Scooter's breaches of fiduciary duty and Leon Cycle was entitled to a equitable lien over remaining goods in Hi 5 Scooter's possession and bank accounts or property into which the sale proceeds can be traced
- Mr Raad, the sole director of Hi5 Scooters was ordered to personally account for the proceeds of sale

Some findings about the agreement drafting journey...and credibility

- Subjective intention of parties not to create a franchise agreement is not determinative; whether a franchise agreement created is to be assessed objectively
- Use of “franchise”, “franchisee” in an agreement
- Comments on draft agreement
- Text messages referring to franchise agreement
- Witness credibility re discussions and negotiations
- Evidence of Mr Rigoli of Leon Cycle preferred

***Obtaining an injunction in Victoria
against former employee or contractor
breaching restraint of trade clause***

***APPLYING THE RESTRAINTS OF TRADE ACT 1976
(NSW)***

LCA Traralgon Pty Ltd v Ashlee Johnson Pty Ltd

[2024] VSC 612

LCA Traralgon Pty Ltd v Ashlee Johnson Pty Ltd [2024] VSC 612

- Interlocutory decision: Ierodiasconou AsJ
- No final hearing – case settled prior to trial
- First Victorian Supreme Court decision applying the ROT Act s 4 to a restraint clause operating in Victoria
- Restraint clause too wide – read down to enforce it
- Injunction granted: restrained from competing & accepting approaches from clients
- 12 months, 5 kilometres

Restraints of Trade Act 1976 (NSW), section 4

“Extent to which restraint of trade valid”:

(1) Valid to extent not against public policy

- Whether in severable terms or not
- Invalidity on other grounds not affected

*(3) Where on application to the Supreme Court...a restraint of trade is **as regards its application to the applicant** against public policy to any extent [due to]... manifest failure to...make.. a reasonable restraint...Court... may... order...the restraint be as regards...the applicant...altogether invalid...or valid to such extent... [it] is not against public policy as the court thinks fit...*

Just Group Ltd v Peck [2016] VSC 614

- ***Just Group Ltd v Peck*** [2016] VSC 614 (McDonald J)
 - noted ROT Act's potential effect of giving Court capacity to enforce just and reasonable covenants that may be too widely expressed
 - employment contract was not governed by law of NSW
 - found the restraints to be not enforceable on common law principles
 - Court of Appeal [2016] VSCA 334 dismissed appeal

Just Group Ltd v Peck

✓ McDonald J in *Just Group v Peck*:

- “It gives the Court capacity ‘to enforce just and reasonable covenants which may on their face be too widely expressed’... it may permit the enforcement of a covenant which might otherwise be void by operation of the common law doctrine, if its particular application on the facts is reasonable.
- In Victoria, the common law principles governing restraint of trade are not qualified by legislation. Contrary to the position under s 4 of the Restraints of Trade Act 1976 (NSW), a Victorian court cannot ignore the fact that a restraint goes beyond that which is reasonable”.

Application of *Restraints of Trade Act 1976 (NSW)* to the agreement

- Governing law clause: NSW
- Non-exclusive jurisdiction of courts of NSW
- “Agreement” included attachments – Deed Poll naming Key Person was Attachment 1
- Plaintiff’s operations and both defendants and their competing operations located in Victoria
- Strong prima facie case that ROT Act applied was established
- ROT Act applied in WA & Qld decisions
- ROT Act does not have geographical limits
- ROT Act applies if proper law of the contract is NSW

Public policy re restraints of trade: position in Victoria

*Doubts as to public policy in Victoria permitting enforcement via ROT Act
“obiter only”*

- ***Allied Express Transport*** [2022] NSWSC 1298
- ***Label Manufacturers v Chatzopoulos*** [2022] NSWSC 1059
- Factors in favour of application of ROT Act in Victoria include:
 - restraint was not limited to Victoria – there was no geographical limitation
 - Express stipulation law of NSW is the law of contract
 - considerations that govern whether a restraint of trade is contrary to public policy are the same throughout Australia

The restraint and non-solicitation clauses in issue

- Restraint on defendants during Restraint Period in Restraint Area:
 - “Must not engage in a Competing Business”
 - Competing Business: “competes with any part of business of an **LCA Entity**”
 - **LCA Entity**: the Company (Plaintiff) its related bodies corporate, the Franchisor and Franchisees of Laser Clinics Australia
- Non-solicitation clause during Restraint Period: must not
 - solicit, canvas approach or accept any approach from any patient, customer... of an **LCA Entity** with whom the Supplier or the Health Professionals had contact in the course of performing Jobs under the Agreement for the purpose or with the effect of obtaining the custom or business of that person or entity in the Restraint Area for the benefit of a **Competing Business** or detrimentally affected the business of an LCA Entity”.

Restraint and non-solicitation clauses were unreasonable

- Here the restraint and non solicitation clauses each extended further than is reasonable for the legitimate protection of the plaintiff's interest.
- The definitions of Company Premises, Competing Business, “engage in”, and “solicit” mean that the second defendant would not be able to work or even inform the public of the change in her work address for 12 months if this occurs within 5 kilometres of any premises where there is business operated by the plaintiff or an entity appointed as a franchisee with the franchisor (LCA Operations Pty Limited).
- This is the case regardless of whether or not that business provides Injecting Services. It would apply beyond Injectable Services to those not performed by the 2nd defendant (Ashlee Johnson), such as laser treatments.
- This traverses beyond legitimate protection of the plaintiff's interests **to the interests of the franchisor and related entities.**

Impact of the *Restraints of Trade Act 1976 (NSW)* in Victoria

- “However, the ROT Act applies, which, as McDonald J clarified in Peck, **reroutes the course of the analysis regarding reasonableness**”
- **allows... “the court to ignore** the fact that the restraint goes beyond what is reasonable provided the restraint can be enforced to an extent that is reasonable...[and] **permits the court to enforce a covenant whose provision is over extensive as regards area, time or extent**”.
- but “does not extend to rewriting the covenant: “[a]mputation is directed but reconstruction is not.”

Reading down the restraint clause wording

- “Company Premises” to mean the premises specified in item 5 of schedule one only (being the plaintiff’s premises in Traralgon)
- “Competing Business” to mean any business that competes with the plaintiff in performing injecting services, which on the evidence included the third defendant;
- “engage in” by changing it to the present continuous tense so that it became “engaging in”;
- the non solicitation clause, by removing the words “solicit” and “canvas” (leaving accepting an approach as prohibited)

Revised operation of restraint and non-solicitation clauses

“Until 17 July 2025 and within 5 kilometres of shop 1, 81 to 89 Hotham St Traralgon, Victoria, the first and second defendants be restrained from:

- (a) engaging in a Competing Business; and**
- (b) approaching or accepting any approach from any patient, client, or customer of the plaintiff with whom the second defendant had contact in the course of performing the Injecting Services, for the purpose or with the effect of obtaining the custom or business of that person for the benefit of a Competing Business or detrimentally affecting the business of the plaintiff.**

“Competing Business” – Injecting Services only

“Clients” were named in a list in evidence

Nature of the services, client choice and public policy

- the non-solicitation clause directed to all **1902 clients** named on the list tendered in evidence was reasonable
- **NOT contrary to public policy** to enforce a restraint in circumstances where some patients will be denied their **choice of injector**
 - patients could elect to be treated by the 2nd defendant so long as it is at premises more than 5 kilometres from the plaintiffs premises
 - nothing to stop them from being treated by other injectors in that area

Key take outs

- a. Check the governing law clause applying to any restraint of trade clause!
- b. If it is NSW, refer to s 4 of the ROT Act and caselaw;
- c. Does the prohibition on soliciting and canvassing need to be enforced? Is accepting an approach from clients the more important prohibition?
- d. Nature of the services provided: will client connection of the plaintiff be protected by the Court?
- e. Does the conduct breach the clause?
- f. If so, would enforcing the clause only to the extent of the breach occurring be against public policy? [Probably not?]
- g. If not, read down definitions that are too wide, to narrow the restraint to the protection of the legitimate interests of the plaintiff only, and not of any other corporate entities such as a franchisor or related entities.
- h. Seek to enforce the restraint to that more limited extent.

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