

Franchising Alert June 2010

Federal Government announces amendments to Franchising Code of Conduct will take effect from 1 July 2010.

Federal Minister Dr Craig Emerson has announced that amendments to the Franchising Code of Conduct (the Code) will commence on 1 July 2010.

The amendments made to the Code are consistent with the Minister's prior statements and media releases about the Code changes.

When do the changes begin?

The changes will apply to franchise disclosure documents issued and franchise agreements entered into on or after 1 July 2010.

However two key elements under the new Code, being unilateral contract variation and unforeseen significant capital expenditure provisions, have a stepped introduction to minimise the compliance burden and to provide franchisors with adequate time to collate this information. Franchisors will have to provide information for one financial year after the first year (2010-11) of operation of the provisions, two financial years after the second year (2010-12) of operation and so on. These new provisions will be fully operational by 2013.

Key changes

The key changes to the Code will:

(a) Require franchisors to disclose to prospective franchisees what happens at the end of a franchise agreement, including:

- whether the franchisee will have any options to renew, or extend, or extend the scope of the franchisee agreement;
- whether the franchisee will have any options to enter into a new franchise agreement;

- what processes the franchisor will use to determine whether to renew, extend, or extend the scope of the franchise agreement or enter into a new franchise agreement;
- whether the franchisee will be entitled to an exit payment at the end of the franchise agreement and, if so, how the exit payment will be determined or earned;
- details of the arrangements that will apply to unsold stock, marketing material, equipment, and other assets purchased when the franchise agreement was entered into;
- whether the franchisee will have the right to sell the business at the end of the franchise agreement and, if so, whether the franchisor will have the first right of refusal, and how the value will be determined; and
- whether the franchisor will consider any significant capital expenditure undertaken by the franchisee during the franchise agreement, in determining the arrangements to apply at the end of the franchise agreement.

(b) Require franchisors to inform franchisees six months before the end of the franchise agreement whether or not they intend to renew or enter into a new agreement. Where franchise agreements are for a term less than six months, franchisors will be required to inform franchisees at least one month prior to the end of the franchise agreement of their decision to renew or not to renew a franchise agreement.

(c) Require franchisor disclosure documents to include an express statement that franchising is a business and, like any business, the franchise (or franchisor) could fail.

(d) Include a list of necessary and desirable behaviours to encourage parties to approach the dispute resolution process in a reconciliatory manner (including specific provisions as to parties' attendance at mediations, the manner of participation in mediations, and the conduct of a party during a dispute).

(e) Require franchisors to disclose the circumstances in which unilateral variations to franchise agreements may take place and the circumstances in which the franchisor has unilaterally varied a franchise agreement in the past three financial years.

(f) Require franchisors to disclose whether the franchisor will require the franchisee, through the franchise agreement, the operations manual (or equivalent), or any other means, to undertake significant capital expenditure that was not disclosed by the franchisor before the franchisee entered into the franchise agreement.

(g) Require franchisors to disclose the fact that the franchise agreement could be changed even when the franchisee is trying to transfer or novate the franchise.

(h) Require franchisors to disclose whether the franchisor will attribute their costs, incurred in dispute resolution, to the franchisee.

(i) State what are included within the costs of mediation for the purposes of that Part of the Code that deals with mediations.

(j) Require franchisors to disclose whether franchisees may be subject to confidentiality obligations and, of so, details of the matters that the obligation may cover.

(k) Expressly state that a copy of the franchise agreement, in the form in which it is to be executed, must be attached to the disclosure document.

The Code has also been amended to include an express statement that nothing in the Code limits any common law requirement of good faith in relation to a franchise agreement to which the Code applies.

A number of minor amendments have also been made to the Code to clarify and provide consistency within the Code, and to make it easier to read and understand.

The changes to the Code also include changes to the disclosure document, particularly making changes to the information to be disclosed by franchisors in the disclosure document.

How can you prepare for the changes?

As from 1 July 2010 franchisors and franchisees will need to comply with the amended Code.

For franchisors it means that all disclosure documents issued after 1 July 2010 must comply with the Code amendments, and all franchise agreements entered into by a franchisee after 1 July 2010 must comply with the Code amendments.

In light of the introduction of civil pecuniary penalties and increased investigatory (audit) powers given to the ACCC under changes recently made to the Trade Practices Act, franchisors must not delay taking all necessary steps to ensure their documentation and system is Code compliant. Do not leave it until it is too late.

How can we assist you?

If you would like more information on the Code, or if you wish us to review your current franchise documentation to make it compliant with the Code amendments, please call or email a member of our Franchise Team.

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