

## Franchising Alert

### Franchise Audits by the ACCC

August 2011

Many readers will be aware that the ACCC has been given some significant new powers as a result of amendments to the legislation formerly known as the *Trade Practices Act (TPA)*. Part of the changes introduced by the Federal Government was to rename the TPA, the *Competition and Consumer Act (CCA)*.

Much was written about the ACCC's power to issue substantiation notices, infringement notices, public warning notices and the ACCC's ability to seek civil pecuniary penalties (fines) for certain breaches of the CCA. However, the ACCC was also given a new investigative power to issue franchisors with what broadly can be described as an "audit notice" to compel production of documents. This new power has sailed under the radar given the potentially onerous nature of having to locate and produce large volumes of documents quickly.

#### Audit Notices – s51ADD

The ability to issue an audit notice is found in s51ADD of the CCA. This new section allows the ACCC to compel a franchisor to provide documentation or information that it is required to generate and keep under the *Franchising Code of Conduct (Code)*. Section 51ADD(2) specifies that a franchisor has 21 days to produce the documentation or information being sought by the ACCC, unless extended by the ACCC. Any request for an extension of time must be in writing and made within 21 days of receiving the audit notice.

Importantly, and as a warning to franchisors, the ACCC is not obliged to grant an extension. We consider that it is likely that any extension will be short and only where there are very good reasons explaining why the extension is required. Certainly, reasons such as lack of resources, inability to locate documents, personnel on leave or IT problems may not be looked upon favourably by the ACCC in circumstances where documents, such as a disclosure document or audited marketing fund statement, have been requested for production and should ordinarily be available.

Section 51ADG expressly warns that a franchisor must not provide documentation or information which is false or misleading. Curiously, no penalty provision is expressly found in Division 5 which gives the ACCC power to issue audit notices, but we expect this may be addressed in due course by the government. However, failure to comply with an audit notice would constitute a breach of the CCA act.

#### ACCC Warnings and Recent ACCC conduct

The ACCC has been true to its word and has recently issued audit notices to a number of franchisors. It is worth reiterating what Dr Michael Schaper (Deputy Chair, ACCC) said at the Legal Symposium at last year's FCA National Franchising Conference held on the Gold Coast:

*"The ACCC will be able to compel a franchisor to provide information or produce documents or records that it is required to keep, generate or publish under the Code. This information must be provided to the ACCC within twenty-one (21) days.*

*This investigation power will assist the ACCC in situations where there are significant imbalances in bargaining power between industry participants.*

*Often in these circumstances, less powerful participants are hesitant to report contraventions by more powerful participants, for fear of retaliatory action. Thus the random audit power will help strengthen franchisor compliance with the Code, while relieving franchisees of the fear of retaliation against them for complaining to the ACCC about franchisor behaviour.*

*It will also allow the ACCC to monitor compliance in the franchising sector without relying on complaints by other industry participants. The ACCC will use this power to obtain a range of documents from franchisors, including disclosure documents, franchise agreements, professional advice statements and marketing fund accounts. Using this information we will quickly be able to determine whether franchisors are complying with the Code.*

*So a very important message here is to keep your records and documents up to date. The ACCC will be able to issue notices at any time."*

## Recent Conduct by the ACCC

Some audit notices recently received by franchisors have required the production of all disclosure documents, franchise agreements and property lease agreements for a two year period. The audit notices also called for production of documents such as marketing fund audit statements (as required by clause 17 of the Code), and any notice of proposed termination of a franchisee.

## Things for Franchisors to Consider

The comments of Dr Schaper and the recent audit notices issued by the ACCC to some franchisors serve as a timely reminder that franchisors must diligently keep and archive all documentation and information that they are required to provide to franchisees (and prospective franchisees)

pursuant to the Code. This will include documentation such as disclosure documents, franchise agreements, disclosure document receipts, professional advice statements, marketing fund audited statements (if clause 17(2) doesn't apply), property leases, additional disclosure of materially relevant facts and breach notices issued to franchisees.

There is no legislative time limit on how far back in time the ACCC may ask for documents or information, so conceivably the ACCC could seek documents dating back several years. The obvious question that all franchisor executives should pose to themselves is "Can my system provide such documentation within 21 days, if we receive an audit notice from the ACCC?" If the answer is "no", the next question is "Why not?" and steps should be taken now to ensure a "Yes" answer is achievable if a notice is received.

Franchisors already have obligations to ensure they have a record of all important franchise documentation required to be kept by the Code. The prospect of a notice means you should ensure that documentation can readily be located, has been archived properly and procedures are in place to ensure access to documentation can be obtained in sufficient time to meet the 21 day deadline.

Franchisors should also consider obtaining legal advice quickly if an audit notice is unclear, overly onerous or seems to go beyond what is allowed by s51ADD of the CCA. We strongly recommend obtaining legal advice at the earliest opportunity as any approach to the ACCC about the scope of an audit notice, or an extension of time, should not be left to the dying hours of the 21 day notice period.

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