

Commercial & Property Alert

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FRANCHISING CODE OF CONDUCT AMENDMENTS

Whether you are a Franchisor or a Franchisee, you need to be aware of the amendments that have been made to the Franchising Code of Conduct.

The Regulations are effective from 1 March 2008. This means that Franchisors are required to have available as from 1 March 2008, a disclosure document which complies with the amendments to the Code. A compliant disclosure document must also be given to Franchisees within four months of the end of the 2007/08 financial year that is by 31 October 2008.

The new disclosure documents must comply with Annexure 1 or Annexure 2 of the Code.

This article will summarise only **some** of the changes that have been made and Franchisors and Franchisees should seek legal advice in relation to the amendments and complying with those amendments.

DISCLOSURE DOCUMENT REQUIREMENTS

- There is a warning to Franchisees on the first page of the disclosure document stating that the Franchisor may deduct its reasonable expenses from any payments made by the Franchisee if the Franchisee terminates within the cooling off period, providing the expenses have been set out in the agreement.
- There are certain disclosure requirements for foreign Franchisors.
- Each officer of a franchise must disclose their name, position held and classifications.
- Any proceedings taken against a Franchisor director must also be disclosed, including details of any orders or undertaking that may have been given during the proceedings.
- A Franchisor is required under the existing code to disclose rebates or other financial benefits given in connection with the supply of goods or services to the Franchisor or an association, however in addition, the Franchisor must now provide the names of the parties who provide those rebates and financial benefits.
- A Franchisor must also disclose the name, location and contact details of past Franchisees that have been terminated, transferred or who have otherwise exited a franchise system during the last three years. A Franchisee can request that their details not be provided.
- It is also necessary to disclose details of whether a territory or site to be franchised has been subject to a previous franchised business. Details and history of the site must be provided.
- A Franchisor must provide the Franchisee with a copy of their financial reports and if requested, a copy of a Franchisor's consolidated group's financial reports must also be provided.
- A disclosure document must be signed by a Director, other officer or authorised agent of the Franchisor. It is recommended that a Director sign the document and a standard resolution of the company authorising the Director/s to sign

the disclosure document be created.

OTHER DOCUMENTS TO BE PROVIDED TO A FRANCHISEE

- Franchisors are required to provide Franchisees with a copy of the Franchise Agreement *in the form in which it is to be executed*.
- This must be provided at the same time the prospective Franchisee receives the disclosure document.
- There are practical difficulties with this amendment as it suggests that any further negotiations and amendments to the franchise agreement will no longer be possible.
- A copy of the Code must also be attached to the disclosure document.
- All other documents relating to the franchise such as leases, IP licenses etc must be provided to the Franchisee at least 14 days prior to signing the agreement, or if not available, at the earliest opportunity.

WHEN SHOULD DISCLOSURE DOCUMENTS BE PROVIDED

- Disclosure documents must be provided before entering into a franchise agreement, on renewal or extension of a franchise term and now upon a change in the scope or term of a franchise agreement.

TIMING OF THE DISCLOSURE OF MATERIALLY RELEVANT FACTS

- Any materially relevant fact must be disclosed by a Franchisor within 14 days. Previously, a Franchisor had 60 days to comply.
- Proceedings, judgments or civil proceeding taken by 10% of Franchisees or 10 Franchisees and awards/judgment against Franchisor directors and Franchisors must be disclosed.
- Any undertakings provided under section 87B of the *Trade Practices Act* must be disclosed as soon as possible, but within 14 days of the undertaking being given.
- There are certain provisions relating to the disclosure of serious offences – however, note the provisions of Part VIIC of the *Crimes Act 1914* apply.

CHANGES TO DEFINITIONS

- The terms “associate” and “serious offence” have been amended.
- An associate is someone that is associated and supplies real property to a franchisee such as a landlord or lessee or if applicable, an estate agent.

EXEMPTIONS

- Prior to the amendments, foreign Franchisors were only required to comply with the Code where they granted one franchise or a master franchise, the right to operate in Australia. This exception has now been removed and the Code will apply to foreign Franchisors.

PROHIBITIONS

- A Franchisor is prohibited from requiring a Franchisee to sign a waiver of any verbal or written representations made by a franchisor.
- If an existing franchise agreement includes such a clause, then this is a breach of the code.
- It is possible to sever these clauses from existing disclosure documents if there is a severance clause in the existing document.

FREE ASSOCIATION

- The amendments to the Code allow prospective Franchisees to freely associate. Previously, this only applied to existing franchisees.

MARKETING FUNDS

- Franchisors must prepare financial statements detailing the marketing fund

receipts and expenses within four months of the end of the financial year.

- A copy of the Annual Financial Statement must be provided to all Franchisees within 30 days of preparation.
- Auditing of the accounts of the marketing fund is required within 4 months of the end of the financial year and the auditors report must be provided to Franchisees within 30 days of being prepared.
- Franchisors can opt out of this if:
 - Within five months of the end of the financial year, 75% of the Franchisor's Franchisees who contribute to the fund have voted to agree that the Franchisor does not have to audit the fund; or
 - The future relevant financial year falls within two consecutive years from the end of the relevant year in which a vote was taken.
- If a vote is to be taken, it must be taken within 4 months of the end of the financial year to allow the audit to take place within the 4 month time frame referred to above.
- This amendment is material in that a vote of Franchisees is required whereas previously, an agreement of the Franchisees was all that was necessary.

SUMMARY

The amendments to the Code are important and impose obligations on Franchisors in particular in relation to their disclosure documents. As a Franchisor, your disclosure documents will need to be reviewed to ensure they comply with Annexures 1 or 2, as from 1 March 2008 – ie you must have available a compliant disclosure document 1 March 2008. Another disclosure document will also have to be provided within four months of the end of the 2007/08 financial year.

As a Franchisee, the amendments affect you in that you are entitled to additional information to assist you in making a decision regarding entering into a franchise system or extending your franchise agreement.

If you have any questions about the provisions or require further information, please do not hesitate to contact Christina Sutherland, Partner (Sunshine Coast) on 5413 9204 or Brock Miller, Partner-in-Charge (Commercial and Property Division) on 3223 6400.

The material contained in this publication is general comment only. It is not legal advice and readers should not act on or refrain from acting, on the basis of the information and material contained, without taking professional advice in relation to their particular circumstances.