

Franchising (No 4) – Changes to Franchising Legislation Effective 1 March 2008

The Federal government recently introduced the *Trade Practices (Industry Codes – Franchising) Amendment Regulations 2007 (No. 1)*. These amendments came into force on 1 March 2008. In effect, the Franchising Code of Conduct (“the Code”) has been amended.

1. Content of Franchise Agreements

Under Clause 16(1)(b) of the Code, the waiver of any verbal or written representation made by the franchisor is prohibited from any franchise agreements entered into after 1 October 1998. This means that the Code operates retrospectively by nine (9) years. The new wording of franchise agreements needed to be in place by 1 March 2008, that is, franchise agreements entered into from 1 March 2008 must not include any provision waiving the franchisor’s (earlier) verbal or written representations.

2. Disclosure to Franchisees and Prospective Franchisees

According to Clause 10 of the Code, franchisors will now need to provide franchisees and prospective franchisees certain documents at least 14 days before the signing of a franchise agreement (whether signing is for finalisation, renewal or extension of the agreement). These documents are:

- A full copy of the proposed franchise agreement;
- A copy of the Code; and
- Copies of all associated agreements and contracts (if and when available).

The amendments to Clause 6B(1)(b) of the Code also clarify that a copy of the Code and Disclosure Document must be provided for extensions to the scope of franchise agreements, not just extensions to the term or period of the agreement. The scope of the agreement may include expansion of the franchisee’s territory and site operations. Prudent franchisors may already provide this information, but this will become a standard process now that the amended legislation has come into effect.

There are several amendments that provide tighter time frames for franchisors to disclose particular information to franchisees. The new Clause 18 of the Code reduces the time for disclosure from 60 days to 14 days. Therefore, from 1 March 2008, franchisors need to disclose franchisor information regarding materially relevant facts within 14 days.

Materially relevant facts may include changes to majority ownership, certain proceedings, judgments, changes to ownership of intellectual property, and now includes information about franchisor directors. Franchisors should therefore ensure that systems are in place that would allow for timely disclosure (within 14 days) of materially relevant facts to current and future franchisees as circumstances arise.

Franchisors must also disclose to franchisees any formal administrative undertakings with the Australian Consumer and Competition Commission (ACCC) within 14 days through the Disclosure Document.

Another change to the Code is that the franchisor’s obligation to disclose information pertaining to convictions

of serious offences by the franchisor or its directors will be expanded to include a contravention of any provision of the *Corporations Act 2001*. This may include very minor contraventions.

The new regulations also require the franchisor to provide to franchisees the names, locations and last known contact details for all past franchisees, unless the past franchisee has requested those details not be provided. Under current state and federal privacy laws, it would be necessary for franchisors to obtain consent to disclosure from past franchisees in writing. The details of past franchisees (if any) would need to be included in the Disclosure Document.

Other information that now requires disclosure includes:

- The name of any business providing a rebate or financial benefit to the franchisor of an associate of the franchisor.
- The financial statement of any marketing or other cooperative fund must be provided to the franchisee within 30 days of its preparation. If an auditor's report is required for this fund, then this must also be provided within 30 days of its preparation.

3. 'Cooling Off' Period

Under the amendments to the Code, it is now a requirement to show on the front page of the Disclosure Document:

If the franchisee exercised their right to terminate during the 7 day cooling off period the franchisor may deduct reasonable expenses from the refund if provision is made for the calculation of these reasonable expenses in the Franchise Agreement (Annexure 1, paragraph 1.1).

4. Conclusion

In the Media Release from the Federal Government

dated 15 August 2007, it was stated that the goal of the amendments to franchising legislation was to protect current and prospective franchisees and small businesses. Some of the new provisions are onerous (such as the requirement of disclosures within 14 days).

Franchisors may need to review their systems so that they can more promptly disclose relevant information to franchisees.

Comasters is able to advise a franchisor, or a franchisee, on franchising matters. We are also able to set up a franchise business for a franchisor, entailing the production of suitable franchise agreements, disclosure documents and operation manuals.

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Important: This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

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