

An updated Franchising Code of Conduct

The Franchising Code of Conduct will be repealed and replaced with a new Code (Code) on 1 January 2015. The Code applies to all franchise agreements that are entered into, renewed or transferred after 1 January 2015 and will affect all businesses that are franchised.

Obligation to act in good faith

The Code imposes an obligation on Franchisors and Franchisees to act in good faith with each other. This cannot be excluded or limited in the franchise agreement. The Code does not define “good faith”. Therefore, the definition will continue to rely on the interpretation of the Australian courts as to its meaning.

Previous decisions of the courts have found parties to not have acted in good faith where the party had an ulterior motive for its actions or acted to deny the other party the benefits under the contract.

Disclosure requirements

Several changes have been made to the disclosure requirements of Franchisors including the obligation of continuous disclosure for the duration of the franchise agreement.

In particular, Franchisors must now keep more detailed records in support of their decision making.

In addition, Franchisors must provide an information statement to prospective Franchisees upon an expression of interest or application to become a Franchisee. This information statement must include a generic statement that highlights all business risks associated with the particular franchised business.

The form of disclosure document has also been amended but the Code allows the use of the old disclosure document until 31 October 2015.

Transparency requirements for funds used on advertising

Funds for marketing must be kept in a separate bank account and can only be spent in the manner it is disclosed in a disclosure document or agreed by the majority of Franchisees.

An important change is that company operated franchise stores must now contribute to the marketing fund in the same proportion to non-company Franchisees.

Change to restraint of trade clauses

The restraint of trade clause for franchise agreements entered into after 1 January 2015 will be unenforceable unless certain conditions are met by the Franchisor. A restraint of trade clause will not apply where a Franchisee has previously requested renewal of the franchise agreement but the Franchisor refused the renewal.

Restraint of trade clauses in franchise agreements entered into prior to 31 December 2014 will continue to have full effect.

Capital expenditure limitations

In certain situations the Code will impose a prohibition on Franchisors requiring the Franchisee to incur significant capital expenditure on the franchised business.

However, there are several exceptions to this rule including:

- where the expenditure has been previously disclosed to the Franchisee in the disclosure document; or
- if expenditure will be incurred by most of the Franchisees and it has been approved by a majority of the Franchisees.

Under the Code, the Australian Competition and Consumer Commission will have greater powers to investigate matters together with the ability to issue infringement notices or instigate court proceedings.

For further information on changes to the Code please contact Meagan O'Connor or Luke Duggan.

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