

## Obligations under the Franchising Code of Conduct

The purpose of this document is to outline in general terms the more pertinent aspects of the Trade Practices (Industry Codes – Franchising) Regulations 1998 (Cth) (“**the Code**”) that is prescribed as a mandatory code governing franchise agreements under section 51AE of the *Trade Practices Act 1974* (Cth).

### 1. Application of the Code

The Code applies to all businesses that are bound by the *Trade Practices Act*. The Code came into effect on 1 July 1998 and applies to Franchisors that renew, extend, transfer or have new franchise agreements with a Franchisee on or after 1 October 1998.

### 2. Disclosure Document

Franchisors are required to respond to all items listed at Annexure 1 of the Code. This means that, prior to entering into a franchise agreement, a Franchisor must provide to a Franchisee a disclosure document in a prescribed format, which in essence lists approximately 250 compliance points.

The Code requires a Franchisor to give the prescribed disclosure document to a prospective Franchisee or to a Franchisee proposing to renew or extend a franchise or extend the scope of term of a franchise agreement.

The Franchisor must provide a copy of the Code and the disclosure document: to a prospective Franchisee or Franchisee at least 14 days before the prospective Franchisee or Franchisee (as the case may be):

1. enters into a franchise agreement, renews a franchise agreement or extends to scope or term of a franchise agreement; or
2. pays non-refundable money to the Franchisor or an associate of the Franchisor in connection with the proposed franchise agreement.

### 3. Acknowledgment of receipt

Immediately upon providing to a prospective Franchisee the disclosure document, the Franchisor should immediately obtain an acknowledgment from the prospective Franchisee that it has read, received and understood the franchise documents and Code (This appears as item 23 to the disclosure document).

After the prospective Franchisee has received the disclosure document, it is necessary to wait 14 days before the Franchisee pays non-refundable money or signs a commitment to take a franchise.

### 4. Cooling off

It is important to remember that for a Greenfield operation (ie where no franchise has been granted before) the prospective Franchisee has, in addition to the 14-day consideration period, a further 7 days in which to cool off, being the earlier of:

1. entering into the franchise agreement; or
2. paying any money under the franchise agreement.

The cooling off provisions do not apply to the renewal, extension or transfer of an existing franchise agreement.

If the Franchisee terminates an agreement pursuant to its cooling off rights, the Franchisor must, within 14 days, repay all money paid by the Franchisee to the Franchisor under the franchise agreement. However, the Franchisor may deduct from the amount paid by the prospective Franchisee the Franchisor's reasonable expenses if the expenses or their method of calculation have been set out in the franchise agreement.

## **5. Professional advice**

The Code requires a Franchisor to advise a Franchisee of the right to seek independent legal, accounting and business advice prior to entering into a franchise agreement.

## **6. Dispute resolution**

Part 4 of the Code requires the parties to a franchise agreement to have a dispute resolution procedure in their franchised agreement, or in default to implement the procedure specified in the Code.

## **7. Copy of lease**

If the Franchisee leases premises from the Franchisor or a related entity for the purpose of conducting the franchise business, the Franchisor or the related entity must provide to the Franchisee a copy of the lease within 1 month after the lease or agreement to lease is signed by the parties.

## **8. Association of Franchisees**

A Franchisor must not induce a Franchisee not to form an association or not to associate with other Franchisees for lawful purpose.

## **9. Prohibition on general release from liability**

It is now no longer permissible for a franchise agreement to contain:

1. a clause requiring a Franchisee to sign a general release of the Franchisor from liability towards the Franchisee; or
2. a waiver of any verbal or written representation made by the franchisor.

## **10. Marketing and other co-operative funds**

If a franchise agreement provides that a Franchisee must pay money to a marketing or other co-operative fund, the Franchisor must:

1. within 4 months of the end of the last financial year prepare an annual financial statement of the fund detailing the receipts and expenses and provide this to franchisees within 30 days of it being prepared; and
2. have the annual financial statement audited within 4 months of the end of the financial year by a registered company auditor and provide this to franchisee within 30 days of it being prepared. Seventy-five percent of the Franchisees who contribute to the fund may authorise the Franchisor not to comply with the auditing requirement (10(b)).

## 11. Disclosure – materially relevant facts

During the course of the franchise relationship a Franchisor has an ongoing obligation to advise a Franchisee about a materially relevant fact that comes to its attention within a reasonable time (not exceeding 14 days) of finding out about that fact.

Materially relevant facts are:

1. a change in majority of ownership or control of the Franchisor;
2. proceedings by a public agency, a judgment in a criminal or civil proceedings or an award in an arbitration against the Franchisor or Franchisor director in Australia alleging:
  - 2.1. breach of a franchise agreement;
  - 2.2. contravention of the Trade Practices law;
  - 2.3. contravention of the Corporations Law;
  - 2.4. unconscionable conduct;
  - 2.5. misconduct or an offence of dishonesty;
3. a judgment against the Franchisor other than for unfair dismissal of an employee under a workplace relations Act;
4. civil proceedings in Australia against the Franchisor or a Franchisor director by 10% or ten of the Franchisees in Australia of the Franchisor, whichever is the lower;
5. any judgment that is entered against the Franchisor and is not discharged within 28 days for at least:
  - 5.1. \$100k – small proprietary company; or
  - 5.2. \$1 million – any other company;
6. any judgements entered against the Franchisor or its director relating to:
  - 6.1. a serious offence (minimum 5 years imprisonment); or
  - 6.2. civil proceedings.
7. the Franchisor becoming an externally administrated body corporate;
8. a change in the intellectual property, or ownership or control of the intellectual property, material to the franchise system; and
9. the existence and content of any undertaking or order under s87B of the *Trade Practices Act*.

## 12. Current disclosure document

A Franchisor must give to a Franchisee a current disclosure document within 14 days after written request by the Franchisee. However, a request can only be made once in 12 months.

## 13. Transfer of a franchise

A request for a Franchisor's consent to transfer a franchise must be made in writing. The Franchisor must not unreasonably withhold consent to the transfer. There is significant caselaw on this point. Some of the circumstances in which it is reasonable for a Franchisor to withhold consent are set out in the Code. In some circumstances, which are also set out in the Code, a Franchisor can be deemed to have consented to a transfer.

## 14. Termination – breach by Franchisee

Where a Franchisee breaches a franchise agreement the Franchisor must:

1. give to the Franchisee reasonable notice that the Franchisor proposes to terminate the franchise agreement because of the breach;
2. tell the Franchisee what the Franchisor requires to be done to remedy the breach; and
3. allow the Franchisee a reasonable time (not exceeding 30 days) to remedy the breach.

If the breach is remedied, the Franchisor cannot terminate the franchise agreement because of that breach.

## 15. Immediate Termination – special circumstances

A Franchisor may terminate without notice where a Franchisee:

1. no longer holds a licence to carry on the franchised business;
2. becomes bankrupt, insolvent under administration or an externally-administered body corporate;
3. voluntarily abandons the franchised business or the franchise relationship; or
4. is convicted of a serious offence;
5. operates the franchised business in a way that endangers public health or safety;
6. is fraudulent in connection with operation of the franchised business; or
7. agrees to termination of the franchise agreement.

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