

June 2010

Franchising reforms in force 1 July 2010: Franchisors face increased disclosure obligations

Summary

As fore-shadowed in our March 2010 Newsletter, franchisors will face increased disclosure requirements under reforms to the *Franchising Code of Conduct*, [\[1\]](#) released by Small Business Minister Dr Craig Emerson on 4 June 2010. [\[2\]](#)

The regulatory changes to the Franchising Code of Conduct take effect from **1 July 2010** and will apply to all Franchise Agreements entered into on or after **1 July 2010**.

Non-compliance with the *Franchising Code of Conduct* is a breach of the *Trade Practices Act*, [\[3\]](#) which could result in legal action being taken by the ACCC or the franchisee. Franchisors will need to review and amend their Franchise Agreements and Disclosure Documents to ensure compliance by **1 July 2010**.

In addition to the amendments to the *Franchising Code of Conduct*, the ACCC has been given new **powers to conduct random audits of franchisors**. These audits will focus on ensuring franchisors comply with the law. The ACCC will have the power to name franchisors that do not comply. This is likely to have a significant impact on a franchisor's ability to recruit new franchisees and reduce the value of existing franchises when franchisees seek to sell.

Background to Reforms

The amendments substantially implement the recommendations detailed in the report released by the Expert Panel on *Franchising and Unconscionable Conduct in February 2010*. [\[4\]](#) In March 2010, Small Business Minister Dr Craig Emerson outlined the Government's intended response to the Panel's recommendations. The current reforms are largely consistent with the key changes signaled for reform earlier this year. Dr Emerson has emphasised that increased franchisor disclosure requirements were needed "to provide greater protection and certainty" for franchisees. [\[5\]](#)

For an overview of the Government's response to the Expert Panel Report, please see our March 2010 newsletter [Franchising Reforms Extend Franchisor Disclosure Obligations](#) .

Overview: Key Changes

Disclosure Obligations

For all franchise agreements entered into on or after **1 July 2010**, the franchisor's disclosure documents must now provide additional information regarding:

- **End of term arrangements**

- 6 months before the end of the franchise term, franchisors must provide franchisees with notice of their decision to renew an existing franchise agreement, or enter into a new agreement. [\[6\]](#)
- Information must be provided about the processes that will apply at the end of the franchise term, such as arrangements for unsold stock. [\[7\]](#)
- **Information on dispute resolution costs**
 - Franchisors must disclose which party will pay costs, should dispute resolution processes be required. [\[8\]](#)
- **Unforeseen significant capital expenditure**
 - Details must be provided regarding whether franchisees will be required to undertake unforeseen significant capital expenditure, which was not disclosed by the franchisor before the franchise agreement was entered into. [\[9\]](#)
- **Unilateral variations to franchise agreements**
 - Franchisors will be required to provide information detailing the circumstances (from 1 July 2010 onwards) where the franchisor has unilaterally varied the franchise agreement. [\[10\]](#)
- **Changes to franchise agreements when a franchisee is trying to transfer (or novate) their franchise**
 - Franchisors must disclose whether they will amend franchise agreements before a franchisee transfers or novates the franchise. [\[11\]](#)
- **Reoccurring or isolated payments**
 - Franchisors must provide details about any foreseeable reoccurring or isolated payments prospective franchisees may incur. [\[12\]](#)

Other Amendments

The amendments to the *Franchising Code* will also affect:

- **Confidentiality obligations**
 - Franchisors must inform franchisees about the scope of their confidentiality obligations. [\[13\]](#)
- **Franchisors extending the scope of existing franchise agreements**
 - Franchisors will now be required to provide disclosure documents when an existing franchise agreement is extended in scope, before the agreement is amended. [\[14\]](#)

The Department of Innovation and Small Business has also released a **comprehensive Fact Sheet - [Regulatory Changes to the Franchising Code of Conduct](#)** - which is a useful guide for franchisors to the amendments.

The Expert Panel had also recommended that the Government develop a short "plain English" document to be provided to franchisees to inform them of 'the key costs, benefits and risks of the franchise system'. Despite flagging their intention in March 2010 to do so, the Government has made no further move to implement this recommendation.

Implications

The changes to the *Franchising Code of Conduct* will affect all franchise agreements entered into from **1 July 2010**. Franchisors must ensure that they meet the extended disclosure requirements under the reformed Code. Under s 51AD of the *Trade Practices Act*, the ACCC can take legal action against any franchisor who fails to comply with the new amendments to the Code.

Stephens Lawyers & Consultants have a high level of expertise in trade practices and franchise law.

Our lawyers represent leading companies and individuals in both litigious and commercial matters. We can assist franchisors with *Franchising Code* compliance

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[1] The *Franchising Code of Conduct* is a mandatory industry code, prescribed under the *Trade Practices Act* and is administered by the ACCC, Section 51AE *Trade Practices Act 1974* (Cth).

[2] [*Trade Practices \(Industry Codes - Franchising\) Amendment Regulations 2010 \(No. 1\)*](#) .

[3] Contravention of industry codes - Section 51AD *Trade Practices Act 1974* (Cth).

[4] *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct: Report to the Hon Dr Craig Emerson MP*, February 2010, available at:
http://www.innovation.gov.au/Section/SmallBusiness/Documents/ExpertPanelReportUCC_FCCFinal100302.pdf.

[5] Minister for Small Business, *Media Release*, "GREATER CERTAINTY AND BETTER PROTECTION FOR FRANCHISEES", 4 June 2010, at
<http://minister.innovation.gov.au/Emerson/Pages/GREATERCERTAINTYANDBETTERPROTECTIONFORFRANCHISEES.aspx>

[6] [*Trade Practices \(Industry Codes - Franchising\) Amendment Regulations 2010 \(No. 1\)*](#) clause 16.

[\[7\]Trade Practices \(Industry Codes - Franchising\) Amendment Regulations 2010 \(No. 1\)](#) clause 28.

[\[8\]Trade Practices \(Industry Codes - Franchising\) Amendment Regulations 2010 \(No. 1\)](#) clauses 18, 19.

[\[9\]Trade Practices \(Industry Codes - Franchising\) Amendment Regulations 2010 \(No. 1\)](#) clauses 27, 36.

[\[10\]Trade Practices \(Industry Codes - Franchising\) Amendment Regulations 2010 \(No. 1\)](#) clause 28.

[\[11\]Trade Practices \(Industry Codes - Franchising\) Amendment Regulations 2010 \(No. 1\)](#) clause 28.

[\[12\]Trade Practices \(Industry Codes - Franchising\) Amendment Regulations 2010 \(No. 1\)](#) clauses 25, 34.

[\[13\]Trade Practices \(Industry Codes - Franchising\) Amendment Regulations 2010 \(No. 1\)](#) clause 28.

[\[14\]Trade Practices \(Industry Codes - Franchising\) Amendment Regulations 2010 \(No. 1\)](#) clauses 5, 6, 7.