

FRANCHISING UPDATE

JULY 2010

UPDATED FRANCHISING CODE OF CONDUCT

In our previous Franchise Updates we drew readers' attention to the Commonwealth Government's progress regarding amendments to the Trade Practices Act 1974 and the Franchising Code of Conduct ("the Code"), in particular with a view to protecting potential Franchisees.

Following the Parliamentary Joint Committee Inquiry into the Code, various reports & issues papers, industry and stakeholder consultation and expert panel recommendations the much anticipated changes to the Code came into effect today.

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The changes to the Code apply to:

- new franchise agreements entered into on or after 1 July 2010; and
- the transfer (assignment), renewal or extension of a franchise agreement on or after 1 July 2010.

The changes to the Code include additional disclosure obligations on the Franchisor, such as disclosure:

- of requirements upon a Franchisee to make 3rd party payments;
- of unforeseen capital expenditure obligations on the Franchisee that the Franchisor did not originally disclose upon the Franchisee entering into the Franchise Agreement;
- as to legal costs to be incurred by the Franchisee related to any dispute resolution process;
- as to the circumstances allowing the Franchisor to unilaterally vary a Franchise Agreement;
- as to whether the Franchisor intends imposing confidentiality obligations and if so details of the matters the confidentiality obligation covers;
- with respect to details of the arrangements that will apply at the end of the Franchise Agreement, such as in relation to:
 - option or renewal terms;
 - exit payments;
 - stock;
 - plant & equipment;
 - fixtures, fittings and other assets;
 - marketing material;
 - Franchisor's right of refusal;
 - Franchisee's rights to sell the business;
 - novation.





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The Franchisor must also now provide a Notice to the Franchisee at least 6 months before the expiry of the term advising the Franchisee whether the Franchise Agreement will be renewed or not or if a new Franchise Agreement is to be entered into.

The Code also acknowledges the common law obligation of good faith, which may be implied into a Franchise Agreement (depending on the circumstances).

In the event of a dispute between the Franchisor and Franchisee the parties must attend the mediation and try to resolve the dispute. The July 2010 change in the Code now sets out a mechanism for determining whether a party is acting in a reconciliatory manner (as opposed to being recalcitrant). The change also deals with the costs in respect of dispute resolution.

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If you are a Franchisee and have entered into either a new Franchise Agreement or renewal term after 01 July 2010 and believe the Franchisor may not have met its obligations under the Code we recommend you contact the writer so we can properly advise you.

If, on the other hand, you are an existing Franchisor or contemplating establishing your own franchise system we recommend you contact the writer so we can make sure you meet your statutory obligations. Please bear in mind any breach of the amended Code not only provides your Franchisee's with certain rights but may result in enforcement action being undertaken by the regulator, the ACCC, which could mean fines, undertakings and court action.

Raymond Duffy, Associate,
Quinn & Scattini Lawyers

If you would like to ask any question about this or any other similar issue Ray may be contacted on 5499 3622 between 8.00am to 5.30pm Monday to Friday or email rduffy@quinnscattini.com.au

This update is for your information and interest only. It is not intended to be comprehensive, and it does not constitute and must not be relied on as legal advice. You must seek specific advice tailored to your circumstances.

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