

Franchising Code Changes Alert: 1 July 2010

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Franchising Code of Conduct Amendments

1. Introduction

The Australian Franchising Code of Conduct (the “Code”) regulates the conduct of franchising participants and aims to ensure that prospective franchisees are sufficiently informed about a franchise before entering into it. The Code provides a minimum standard of disclosure and conduct for both franchisors and franchisees.

This alert outlines key changes to the Code, which will take effect from **1 July 2010**.

Franchisors need to take care that their disclosure documentation is reviewed and amended to be compliant with the new legislation when it commences on 1 July 2010.

2. Application

These amendments will apply to any franchise agreement entered into, renewed, transferred or extended on or after 1 July 2010. Consequently all documentation provided to prospective franchisees for franchise agreements to be entered into after 1 July 2010 must incorporate the latest changes to the Code.

As a result of the changes, franchisees will be in a better position to understand the risks of franchising by getting clearer and more certain information up front about the terms and conditions on offer. There will be a greater burden of disclosure on franchisors who offer new franchise agreements or who renew or extend existing agreements.

While the Code works to ensure transparency in all dealings between franchisees and franchisors, it is not intended to replace the need for franchisees to seek independent legal, business or other advice before entering into a franchise agreement.

3. Key Change to Disclosure Requirements

Franchisors will now bear even greater disclosure responsibilities across a number of key areas.

By way of summary, a franchisor must now disclose the following:

- **Failure of Franchise:** An express statement (in a prescribed format) that, like any business, the franchise (or franchisor) could fail, and that this could have consequences for the franchisee.

- **Payments to third parties:** Details of any recurring or isolated payments that are within the franchisor's knowledge or control, or which are reasonably foreseeable by the franchisor, which are payable by the franchisee to persons other than the franchisor or its associates.

Previously, the franchisor was only required to disclose payments payable by the franchisee to the franchisor or its associate, or to be collected by the franchisor or its associates for another person.

- **Significant capital expenditure:** Whether it will require the franchisee, through the franchise agreement, operations manual or any other means, to undertake "unforeseen significant capital expenditure".
- **Attribution of legal costs:** Whether the franchisor will attribute the franchisor's costs incurred in dispute resolution (including legal costs) to the franchisee.
- **Confidentiality:** Whether they will impose a confidentiality obligation on a franchisee and, if so, details of the matters the obligation may cover, such as fees.
- **Arrangements to apply at the end of the franchise agreement:** Details of exit arrangements applicable at the end of the agreement, including renewal, exit payments, unsold stock, marketing material, equipment and other assets purchased when the franchise agreement commenced. Any right of franchisee to sell the business at the end of the agreement, and any right of first refusal of the franchisor, must also be detailed.

Notice of renewal

A franchisor is now required to notify a franchisee at least six months before the end of the term of the franchise agreement of the franchisor's decision regarding renewal. If the term of a franchise agreement is less than six months, the franchisor must notify the franchisee of its decision at least one month before the end of the agreement.

Dispute resolution

The Code now places more of an emphasis on dispute resolution and states that if either party refers a dispute to a mediator, both parties must attend the mediation and try to resolve the dispute. The changes include a list of necessary and desirable behaviours to encourage parties to approach a dispute resolution process in a reconciliatory manner.

...And more...

In addition to the Code changes, the ACCC has certain powers to conduct random compliance audits of franchisors. The updated Code will create more onerous obligations for franchisors than anticipated. As a result of the changes, franchisors will need to make comprehensive amendments to their disclosure documents, and will be required to consider and provide additional, franchise specific, information each time a disclosure document is issued to a prospective franchisee. Bespoke Law can assist you with implementing the changes to the Code.

Dedicated resource

Bespoke Law (www.bespokelaw.com) was formed in 2009 by **Jeremy Szwider**. Jeremy is an experienced intellectual property and commercial lawyer with a broad range of private practice and industry experience. In the 5 years prior to establishing Bespoke Law, Jeremy was General Counsel for the FTSE 100 Carphone Warehouse (Europe's largest independent mobile phone retailer with over 1,700 retail stores). For several years prior to that, he worked as an IP specialist at some of the largest global law firms, including several years at DLA Piper and


also Phillips Fox, and has worked on numerous franchising arrangements and retail projects.



Contact Us

If you would like any further information, please contact Jeremy Szwider on:

 jeremy.szwider@bespokelaw.com

 +61 (0)418 988 212

[www](http://www.bespokelaw.com) www.bespokelaw.com

Otherwise, Bespoke Law can be contacted as follows:

Melbourne: contact.melb@bespokelaw.com

Sydney: contact.sydney@bespokelaw.com

London: contact.london@bespokelaw.com

Twitter: @bespokelaw