

### **CHANGES TO THE FRANCHISING CODE OF CONDUCT THAT CAME INTO EFFECT ON 1 MARCH 2008**

The Federal Government has passed amendments to the Franchising Code of Conduct (the "Code"). These amendments came into effect on 1 March, 2008. Franchisors must now comply with the amended Code.

If you are unaware of these changes below is a list of some of the changes and what they will mean for Franchisors:

#### **MAINTAINING DISCLOSURE DOCUMENT**

Under the previous regulations you were required to create a disclosure document within 3 months after the end of each financial year. From 1 March, 2008 ("1 March") you now have 4 months within which to update your disclosure document.

#### **FOREIGN FRANCHISORS**

Previously, a foreign franchisor, who granted only one franchise or master franchise in Australia, did not need to comply with the disclosure requirements under the Code.

From 1 March if you are a foreign franchisor you are required to comply with the disclosure requirements regardless of the number of franchises or master franchises you have granted in Australia.

#### **DISCLOSURE ON EXTENSION OF SCOPE**

A pre March 1 disclosure document needed to be provided not only on the renewal or extension of the term but also the extension of the scope of the Franchise Agreement.

Now disclosure must be provided when the scope of the Franchise Agreement changes such as if the territory is extended or some other change (for example additional entitlements being made available to the franchisee) is made to the franchise agreement.

This can lead to timing issues as it is necessary to redisclose to a current franchisee at least 14 days prior to the scope of the franchise agreement be extended.

#### **PROVIDING COPY OF FRANCHISE AGREEMENT**

A copy of the Franchise Agreement must be provided to the prospective franchisee "in the form in which it is to be executed" at the same time they receive the disclosure document.

This can lead to some issues for franchisors in that:

- (a) at the time of disclosure, the actual franchisee entity will need to be known. A franchisee receiving disclosure will often not know the entity through which it will enter into the Franchise Agreement at that time; and
- (b) the negotiation of the terms of the Franchise Agreement between the parties may be hindered.

This could lead to the requirement for further disclosure to the franchisee. They may receive an initial disclosure and once the franchisee entity has been decided and the terms of the franchise agreement have been negotiated a further disclosure attaching the franchise agreement “in the form in which it is to be executed” provided subsequently.

### **DISCLOSURE OF RELATED DOCUMENTS**

A further requirement is that all related agreements be provided to the franchisee at least 14 days prior to signing or at the earliest opportunity if not available. This may include leases or licence agreements, charges, bills of sale and other related documents.

### **PROHIBITION AGAINST WAIVER**

The franchise agreement must not contain “a waiver of any verbal or written representation made by the franchisor”. This is a common provision in franchise agreements and as this provision takes affect from October, 1998 some franchise agreements may not be compliant with the Code.

A franchise agreement may contain a clause which allows invalid clauses to be severed however franchise agreements need to be reviewed urgently to ensure compliance.

### **MARKETING FUNDS**

Four months will be allowed to prepare the financial statement outlining the income and expenses of the fund and finalising any audit however these must now be given to all franchisees within 30 days of the auditor’s report being prepared.

75% of franchisees contributing to the fund may vote to agree that you do not have to comply with the audit provisions.

### **MATERIALLY RELEVANT FACTS**

Disclosure of materially relevant facts pursuant to clause 18 of the Code must be made within 14 days of those matters occurring and not the 60 days which the Code previously provided.

Undertakings by a franchisor under Section 87B of the Trade Practices Act must be disclosed within a reasonable time but in any event no later than 14 days of that undertaking being given.

### **REBATES AND FINANCIAL BENEFITS**

If a rebate or financial benefit is given to the Franchisor or their associate in connection with the supply of goods or services you will be required to disclose the names of the parties who provide it. You do not have to disclose the amounts or method of calculation of those rebates or financial benefits.

### **DETAILS OF PAST FRANCHISEES**

You must now disclose the name, location and contact details of past franchisees that have been terminated, transferred to the Franchisor or have otherwise exited the system during the past 3 years if that information is available.

If the franchisee requests that the information is not disclosed then you are not required to disclose it. This will apply to those franchisees who have exited the system in the 3 years prior to 1 March, 2008.

Please note this is not a summary of all of the changes to the Code. It is important that Franchisors consider the affect this will have on their documents and way of business.

Ferguson Cannon Lawyers are happy to discuss these changes with you and assist you in ensuring your franchise documents comply with the amended Code.