Comasters
LAW FIRM AND NOTARY PUBLIC

FRANCHISING (NO. 2) - RIGHTS AND OBLIGATIONS OF THE FRANCHISOR AND FRANCHISEE

In 1998 a mandatory Franchising Code of Conduct ("the Code") was introduced. The aim of the Code is to promote minimum standards of ethical conduct and offer alternative dispute resolution throughout the industry.

A. INTRODUCTION

The Code is applicable to franchise agreements. A franchise agreement is where a person (the franchisor) grants to another person (the franchisee) the right to carry on a business offering, supplying or distributing goods or services in Australia. In the agreement the marketing plan is substantially determined, controlled or suggested by the franchisor (or an associate) and the operation of the business is associated with a trade mark or commercial symbol.

B. DISCLOSURE REQUIREMENTS

Both the franchisor and franchisee are required to disclose information to the other party in a number of circumstances.

A franchisor is required to give a **disclosure document** to a prospective franchisee or a franchisee renewing or extending a franchise. A franchisor must provide the franchisee (or prospective franchisee) with a copy of **the Code** and the disclosure document at least 14 days before an agreement is entered into or the non-refundable money paid, or at least 14 days before the renewal or extension of the franchise.

The information in the disclosure document must cover a number of issues relating to the commercial viability of the franchise. These issues include:

- details of the franchise territory;
- franchisor details, including the business experience of the people running the franchise;
- details of criminal, trade practices and other litigation;
- a summary of the conditions of the agreement;
- the franchisor's obligations;
- the franchisee's obligations;
- details of marketing and other cooperative funds;
- financial details; and
- other relevant disclosure information.

The franchisor must not enter into, renew or extend a franchise agreement unless the franchisor obtains a written statement that the franchisee has received, read and had a reasonable opportunity to understand the Code and the disclosure document. Also, the franchisor must have received from a prospective franchisee signed statements that advice has been received on the proposed franchise agreement from an independent legal adviser, business adviser and / or accountant.

The Code also imposes obligations on a franchisee who proposes to transfer the business. The proposed transferee should be given a disclosure document which provides for both the required disclaimer statement and an acknowledgment of receipt.

C. CONDITIONS OF FRANCHISE AGREEMENTS

The Code provides for a cooling-off period of seven days where a franchise agreement is entered into or money is paid under the franchise agreement, whichever is earlier. If the franchisee terminates the agreement within this period, they are entitled to a refund, less the franchisor's reasonable expenses, within 14 days.

If you are a franchisee, your franchisor may be required to provide you with lease documentation and details of marketing cooperative funds. Where the franchisee is required to pay money into a marketing or cooperative fund, the franchisor must prepare an annual financial statement for the fund.

Franchisors are prohibited by the Code from seeking a general release from liability as part of a franchise agreement. This prohibition does not preclude the franchisee seeking a settlement of claim against the franchisor once the agreement has been entered into by the parties.

The franchisor must also provide notification to the franchisee when certain circumstances develop. Matters which the franchisor is required to disclose include:

- a change in majority ownership or control of the franchisor;
- proceedings by a public agency, or a judgment in civil or criminal proceedings; and
- a judgment against the franchisor under specific legislation dealing with unconscionable conduct.

By requiring disclosure of these matters as they occur, the Code imposes a limited form of continuous disclosure on franchisors.

A franchisor must not unreasonably withhold consent for a transfer of the franchised business. In certain circumstances it can be considered to be reasonable to withhold consent. This includes where the proposed transferee is unlikely to be able to meet the financial obligations under the franchise agreement and where the transferor continues to be in breach of the franchise agreement.

The franchisor may terminate the franchise agreement when a breach of the agreement has occurred, provided that reasonable notice of the termination is given, the franchisor has indicated what is necessary to remedy the breach and reasonable time is allowed to remedy the breach. In very special circumstances the franchisor may terminate the agreement when no breach has occurred.

D. RESOLVING DISPUTES

The Code requires that an internal complaint handling procedure be included in the franchise agreement.

Mediation has been adopted as the alternative dispute resolution process under the Code. Mediation of franchising disputes is now mandatory. The aim of the inclusion of mediation in the Code is to provide a low cost and user friendly mechanism to solve disputes.

Your right to take legal proceedings under the franchise agreement has not been affected by the Code provisions. Where you believe the franchisor / franchisee has been in serious breach of the Code you may be entitled to damages, court orders to stop breaches of the code, or other orders such as changes to the agreement.

Comasters is able to advise a franchisor, or a franchisee, on franchising matters. We are also able to set up a franchise business for a franchisor, entailing the production of suitable franchise agreements, disclosure documents and operations manuals.

CONTACT US

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