

Franchising Code of Conduct - Proposed Changes.

The Franchising Code of Conduct is proposed to be amended by the *Competition and Consumer (Industry Codes— Franchising) Amendment (Fairness in Franchising) Regulations 2020* (the “**Proposed Regulation**”). It has been issued as an ‘exposure draft’, in respect of which public submissions can be made until December 4 2020.

The key areas of reform include:

- Disclosure;
- Ineffective restraint of trade clauses;
- Termination; and
- Dispute resolution.

Disclosure

The disclosure requirements under the Proposed Regulation are now to include a copy of a facts sheet¹; a copy of the code; and information as to ADR.² In addition, information as to any rebate and how any rebate is to be calculated must be disclosed to the franchisee.³

Further, the Proposed Regulation now imposes increased disclosure as to marketing funds due to increased misuse of those funds within businesses. This includes keeping a separate account for the marketing funds. Penalty units now apply for breach of the marketing fund sections.⁴

The Proposed Regulation does not allow the franchisor to require the franchisee to pay all or part of the franchisor’s legal costs in relation to the preparation, negotiation or executing of a franchise agreement.⁵

Ineffective restraint of trade clauses

Previously, section 23 of Schedule 1 of the *Competition and Consumer (Industry Codes - Franchising) Regulation 2014* (the “**Regulation**”) sets out when a restraint of trade clause has effect in relation to a franchise agreement when the agreement is not extended. Under the Proposed Regulation, a restraint of trade clause will not apply unless the franchisee has committed a ‘serious’ breach, which is immediately before the expiry of the agreement.⁶

Termination

The Proposed Regulation increases the cooling-off period of entering into a franchise agreement from 7 days to 14 days. If the incoming franchisee ceases to be the franchisee, within the cooling off period, any payments made by the incoming franchisee must be repaid to the incoming franchisee, within 14 days of the incoming franchisee ceasing to be the franchisee, except for the franchisor’s reasonable expenses.⁷

Prior to termination of the franchise agreement by the franchisor, the franchisor must now issue a 7 day notice of the termination and any grounds for it.⁸ Grounds for termination include, but are not limited to:

- the franchisee no longer holding a licence;
- the franchisee voluntarily abandoning its franchised business;
- the franchisee being convicted of a serious offence.⁹

¹ This is to meet the requirements of s 9A of the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014*.

² *Competition and Consumer (Industry Codes— Franchising) Amendment (Fairness in Franchising) Regulations 2020, Sch 2, 2.*

³ *Ibid* Sch 2, Annexure 2.

⁴ *Ibid* Sche 5, 4.

⁵ *Ibid* Sch 6, 1.

⁶ *Ibid* Sch 9, 1.

⁷ *Ibid* Sch 3, 8.

⁸ *Ibid* Sch 3, 10.

⁹ *Ibid*.

This notice serves as the first step towards the ADR process mentioned below.

The Proposed Regulation also allows for both franchisees and franchisors to negotiate early termination of the franchise agreement.

Dispute Resolution

The dispute resolution provisions under the Proposed Regulation aim to reduce the cost of dispute resolution by introducing conciliation and voluntary binding arbitration. Whilst mediation is still the first step, this reform attempts to minimise the need to go to Court due to the high costs for smaller franchisors and franchisees.

Where there are two or more franchisees with a dispute against the same franchisor, the Proposed Regulation allows for multi-party dispute resolution. If the franchisor does not agree with the ADR practitioner appointed, the ADR practitioner can undertake the dispute resolution process regardless of the franchisor's distaste towards the ADR practitioner.¹⁰

Finally, the Australian Small Business and Family Enterprise Ombudsman now control the franchising dispute resolution functions including, but not limited to keeping lists of persons who can assist the ADR process and appointing those persons to ADR disputes and resolve disputes.¹¹

These reforms are projected to commence on 1 July 2021, except for the dispute resolution reforms, which are to commence once the Proposed Regulation has been registered.

If we can be of assistance to anyone wishing to make submissions in respect of the exposure draft, please feel free to contact Gregory Ross or your usual **Eakin McCaffery Cox** contact.


Gregory Ross 20 11 2020

*The writer acknowledges the contribution of Connor Barrs, Paralegal, **Eakin McCaffery Cox** to the preparation of the above comments.*

*The above was prepared for and is intended to provide a broad general overview of issues only.
It is not intended, and or must not be relied upon, as definitive legal advice.
(02) 9265 3000*



¹⁰ Ibid Sch 1, 10.

¹¹ Ibid Sch 1, 1.