NEW FRANCHISING CODE TO COMMENCE IN APRIL

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Australia Franchising Alert

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The Competition and Consumer (Industry Code–Franchising) Regulations 2024 (Cth) (the New Code Draft), which replaces the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (the Old Code), is now in force and will commence on 1 April 2025. While it appears that the Australian Government has proceeded with many of the proposed changes that were contemplated in the Exposure Draft (see our previous update here), it is also important for franchisors to be aware that the New Code contains a number of transitional provisions.

WHEN DOES THE NEW CODE APPLY?

The New Code will apply to:

- Franchise agreements entered into, transferred, renewed or extended on or after 1 April 2025; and
- Conduct engaged in on or after 1 April 2025 in relation to these agreements.

The Old Code will continue to apply to:

- Franchise agreements entered into before 1 April 2025 until those agreements are terminated, transferred, renewed or extended; and
- Conduct relating to those agreements that is engaged in on or after 1 April 2025 (other than conduct relating to the transfer, renewal or extension of those agreements).

However, there are some significant transitional provisions in relation to the application of aspects of the New Code which we have outlined below.

WHAT IS THE POSITION IN RELATION TO COMPENSATION FOR EARLY TERMINATION AND REASONABLE OPPORTUNITY FOR RETURN ON A FRANCHISEE'S INVESTMENT?

Two of the more significant changes introduced by the New Code are the placing of the following new obligations on franchisors:

- A requirement under section 43 to provide some compensation to a franchisee in certain circumstances on early termination of a franchise.
- An obligation under section 44 not to enter into a franchise agreement, unless the agreement provides the franchisee with a reasonable opportunity to make a return during the term of the agreement on any investment required by the franchisor as part of entering into, or under, the agreement.

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However, these sections will not apply to a franchise agreement entered into, transferred, renewed or extended before 1 November 2025. The delayed application of sections 43 and 44 is said to be intended to allow time for franchisors proposing to enter franchise agreements that are not new vehicle dealership agreements to adjust to these new requirements. New vehicle dealership agreements will though be subject to similar obligations in sections 45 and 46 from the commencement of the New Code (which are based on clause 46A and 46B of the Old Code respectively).

WHAT ARE THE IMPLICATIONS FOR DISCLOSURE?

The New Code provides that:

- A disclosure document created before 1 November 2025 is not required to include the information in subitems 14(1A) and (1B) of Schedule 1 of the New Code, which deal with new requirements relating to significant capital expenditure; and
- The obligation to update a disclosure document annually under section 21 of the New Code will not apply before 1 November 2025 in relation to a disclosure document given to a prospective franchisee before 1 April 2025 under clause 9 of the Old Code. This does not affect the requirement to update a disclosure document on request under section 33 and if a financial year ends before 1 November 2025, the franchisor is obliged to update the disclosure document under the Old Code.

Accordingly:

- If a franchise agreement is entered, renewed, extended or transferred prior to 1 April 2025, the Old Code applies to the agreement and disclosure obligations under Old Code apply.
- If a franchise agreement is entered into on or after 1 April 2025, the franchise agreement would need to comply with the New Code, provided however that sections 43 (relating to compensation on early termination) and 44 (relating to reasonable opportunity for return on franchisee's investment) would not have to be complied with in relation to a franchise agreement entered before 1 November 2025.
- If a franchise agreement is entered into, renewed, extended or transferred on or after 1 November 2025 though, sections 43 and 44 would apply and would need to be complied with.
- If a franchise agreement is entered, renewed, extended or transferred on or after 1 April 2025:
    - If a disclosure document has been given to a prospective franchisee before 1 April 2025, this existing disclosure document will be taken to be a disclosure document for the purpose of the New Code.
    - If a disclosure document has not been given to a prospective franchisee before 1 April 2025, a disclosure document compliant with the New Code would need to be given (unless the prospective franchisee is permitted to opt out from receiving the disclosure document and does so). However, the disclosure document is not required to include the information in sub items 14(1A) and (1B) of Schedule 1 of the New Code if the disclosure document is created before 1 November 2025.
    - The prospective franchisee would also need to be given a copy of the New Code (unless the prospective franchisee is permitted to opt out from receiving the New Code and does so).

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- If:
  - the franchisee has, or has recently had, another franchise agreement with the franchisor that is the same or substantially the same as the new franchise agreement; and
  - the business that is the subject of the new franchise agreement is the same or substantially the same as under the other agreement, the prospective franchisee can opt out by written notice from receiving a copy of a disclosure document and the New Code.
- Unless the prospective franchisee opts out from receiving a copy of a disclosure document and the New Code, the obligations in the New Code apply in relation to receiving from a prospective franchisee a written statement that a prospective franchisee has received, read and had a reasonable opportunity to understand the disclosure document and the New Code. Independent advice statements would also need to be received by the franchisor but are not required for renewal or extension of term or scope of a franchise agreement.
- No Key Facts Sheet is required to be given to the prospective franchisee.

WHAT ARE THE IMPLICATIONS FOR SPECIFIC PURPOSE FUNDS AND MARKETING FUNDS?

Requirements relating to specific purpose funds that are not marketing funds or other cooperative funds have also been delayed. In this regard:

- For a specific purpose fund that is not a marketing fund or other cooperative fund controlled or administered by or for a franchisor or a master franchisor, the requirements in section 31 of the New Code (requiring a franchisor to provide financial statements in relation to specific purpose funds if a franchise agreement requires the franchisee to pay money into such a fund) and section 61 (dealing with payments to and from a specific purpose fund) will only commence on and from 1 November 2025.
- A disclosure document created before 1 November 2025 is not required to include the information in item 15 of Schedule 1 in relation to a specific purpose fund that is not a marketing fund or other cooperative fund controlled or administered by or for a franchisor or a master franchisor (whether the franchisee is a franchisee or subfranchisee of the franchisor or master franchisor). However, this will not affect the requirements to update a disclosure document under section 21 or 33 of the New Code.

Section 100 of the New Code also deems compliance with the Old Code from 1 April 2025 to 31 October 2025 to be compliance with the New Code in relation to a specific purpose fund that is a marketing fund or other cooperative fund controlled or administered by or for the franchisor or a master franchisor (whether the franchisee is a franchisee or subfranchisee of the franchisor or master franchisor), in certain circumstances.

WHAT ARE SOME OF THE KEY TAKEAWAYS FOR FRANCHISORS?

Some of the key takeaways for franchisors in relation to the New Code are:

- Franchisors will need to prepare a form of franchise agreement and disclosure document compliant with the New Code.

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- Franchisors will need to be ready to comply with sections 43 (relating to compensation on early termination) and 44 (relating to reasonable opportunity for return on franchisee's investment) of the New Code on and from 1 November 2025.
- Franchisors will need to prepare for eligible prospective franchisees to be able to opt out from receiving a disclosure document and a copy of the New Code and applicable cooling off periods.
- Franchisors will no longer be required to create, maintain, or provide a Key Facts Sheet to prospective franchises on and from 1 April 2025.
- Franchisors will need to prepare for compliance with the new obligation to advise franchisees of their right to request a disclosure document. A franchisor has two months (instead of 14 days) to provide a disclosure document when it is requested (which request may be made once every 12 months).
- In updating franchise agreements, matters for franchisors to consider would include the following:
  - The New Code has made changes to the provisions relating to termination of a franchise agreement. In particular:
    - For certain kinds of serious breaches, the franchisor would not be able to terminate unless it has provided the franchisee seven days' written notice of the proposed termination and grounds. These include findings by a Court that the franchisee has committed a Fair Work serious contravention of a Fair Work civil remedy provision and/or certain provisions of the *Migration Act 1958* (Cth).
    - For termination in cases where the franchisee voluntarily abandons the franchised business, operates the franchised business in a way that endangers public health or safety, or acts fraudulently in connection with the operation of the franchised business, a franchisor must not terminate the agreement before a notice period of seven days passes without a dispute notice being given. If a dispute notice is given, the agreement cannot be terminated until the end of 28 days after the day the dispute notice is given.
    - A franchisor would also have certain rights to require a franchisee not to operate the business or part of a business if the franchisor is proposing to take action to terminate for these special termination grounds and specified serious breaches.
  - A franchisor will now be prohibited from entering a franchise agreement that includes a restraint of trade clause that is inconsistent with the applicable requirements (as well as restricted from relying on a restraint of trade clause in certain circumstances where a franchise agreement is not extended).
  - The definition of “motor vehicle dealership” in the New Code is expanded to include servicing or repairing of motor vehicles.
- In updating disclosure documents, additional disclosure would need to be made regarding:
  - Proceedings against a responsible franchisor entity or holding company under subsection 558(1) and (2) of the *Fair Work Act 2009* (Cth);
  - “Specific purpose funds” (instead of only marketing funds) from 1 November 2025; and

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- The rationale, amount, timing, nature, outcomes, benefits, and risks of any significant capital expenditure that may be required of the franchisee from 1 November 2025.

HOW WE CAN HELP

We would be very pleased to assist franchisors by:

- Providing advice regarding obligations under the New Code and how the transitional provisions will affect specific franchise networks;
- Assisting existing networks to modify processes to facilitate compliance under the New Code; and
- Preparing amendments to template documentation to comply with the New Code.

KEY CONTACTS



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