



**FRANCAST**

Australia: more regulation from down under

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The Australian Federal Government has announced major changes to the Franchising Code of Conduct (Code) and the Trade Practices Act of 1974 (Act).

The aim of the changes, which were announced in early November, is to provide greater protection to franchisees. The changes will occur in two stages, and will require franchisors both to revise their practices and to reconsider their agreements.

While some of the new obligations will affect only those agreements signed after the amendments come into effect, all franchisors will need to examine their practices in light of the announcement.

### **The First Stage**

In early 2010 the government will introduce amendments to the Code and the Act. Those amendments, when adopted, will:

Address end-of-term arrangements by requiring agreements to state explicitly whether renewal is provided for (and, if so, under what circumstances); and to inform the franchisee at least six months before the end of the term whether the franchisor intends to permit renewal. (It is important to note that in the document released simultaneously, the government sets out the issues a franchisor should consider and, if applicable, disclose. Among them: whether there is any “exit payment”; how unsold stock or equipment will be handled; whether the franchisor will have a right to sell the business, and whether the franchisor will have a right of first refusal.)

Elaborate upon the process of dispute resolution contemplated to comply with the Code, including the obligations of the parties to a mediation.

Enhance the powers of the Australian Competition and Consumer Commission (ACCC) in several significant respects. They include increased penalties for both corporations and individuals; the power to conduct random audits and to require franchisors to substantiate claims; the power to “name and shame” franchisors considered unscrupulous or “rogues”;

and the important new power to seek redress on behalf of “classes” of franchisees injured by a violation of the Code.

## **The Second Stage**

The government will establish an expert panel, which will inquire into and report on the need to go further than these initial steps. Principally, the panel will be charged with the responsibility of considering whether there is a need for explicit treatment in the Code or the Act of other facets of the franchised relationship. Among the issues addressed will be unforeseen capital expenditures, unilateral revisions of the Agreements, and franchisor revisions of the agreements when a franchisee is trying to sell the business.

### **Good Faith Obligation; Unconscionable Conduct**

There has been an extensive background of review of and debate about the regulation of franchising in Australia almost from the moment the Code was enacted. Much of that has related to the relationship between the parties, and the standard to which the franchisor would be held. The most recent review recommended imposing an obligation of good faith, and the government’s pre-election statement appeared to support that recommendation. The government now recognizes, however, that “the law on good faith” is still evolving, and that the imposition of a generalized obligation will both in all likelihood toughen the terms explicitly included by a franchisor and make financing more difficult. It will therefore proceed with much greater caution, by legislating at this juncture only with respect to end-of-term arrangements and dispute resolution; by making it clear that nothing in the Code limits any common law requirement of good faith, and that the unconscionable conduct prohibited by the Act relates not only to the settling of a franchise agreement but also to its terms and the ongoing behavior of the parties. Beyond that, it will turn to the expert panel for recommendations as to whether other conduct should be explicitly regulated.

While there is obviously potential for further and perhaps significant limitation on the rights of franchisors, it is clear that the government has, for the moment, stepped back from the full reach of legislative amendments which were urged upon it. That must be viewed as a victory for franchisors who opposed that further step.

It should also be noted that, at this stage at least, the government has resisted other recommendations, including an online registration system for franchisors and the inclusion of an automatic right of termination for franchisees in the event of the failure of the franchisor. The latter proposal reflects a concern triggered by the rising number of franchisor failures, but the government is also concerned about franchisees’ awareness of their own risks: it will require the Disclosure Document to be amended to include an additional and prominent statement that a franchise, like any other business, could fail during the franchise term.

### **What Will Franchisors Need to Do?**

Ensure that their records are always complete and accurate, because they could be subjected to a compliance audit at any time.

Ensure that they are able to substantiate any representations relating to their goods and services, as they may be subjected at any time to a notice requiring substantiation.

Amend their Disclosure Documents to include a warning that the franchisee could fail.

Amend their Disclosure Documents and Franchise Agreements to deal specifically with end-of-term arrangements.

Notify franchisees no later than six months before the end of the franchise term whether they will permit renewal of the agreement.

Follow the behavior to be set out in the Code regarding dispute resolution.

## **Timing**

The Amendments will be introduced in “early 2010.”

The expert panel to be appointed will have a very tight schedule: it will be expected to consult with franchising and other groups, deliberate and report by the end of January 2010. It thus may well be that its recommendations will inform the initial legislative proposals, rather than follow them.

Because of a recognition that the franchising sector has been subjected to a steady barrage of inquiries, proposals and legislation and regulatory amendments, there will be no further review until 2013. In other words, a brief respite.

**In the meantime, franchisors will have their work cut out for them to prepare for the changes to come – those which are known, and those which can reasonably be anticipated.**

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