INTELLECTUAL PROPERTY I Issue No. 5 I *New franchising code of conduct*

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Speculation about what further changes might be made to the Franchising Code was put to rest on 30 October 2014 when the Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (New Code) received assent from the Governor General. The New Code will commence on 1 January 2015 and will address conduct which occurs after that date. The changes were largely identified in April when a draft Code was published. Many franchisors have been familiarising themselves with the proposed changes in readiness for the commencement of the New Code. However, now that the New Code has been finalised, we thought it timely to note some of the key changes.

Exemptions

The New Code applies to conduct which occurs after 1 January 2015 and will cover all agreements made after that date. The New Code will also apply to agreements entered into before 1 January 2015, (unless varied or transferred). However, certain provisions will not apply to existing agreements, including:

- Provisions regarding venue for dispute proceedings and mediation (see Jurisdiction below);
- Costs of disputes (see below);
- Restraint of trade clauses (see below).

Franchisor's disclosure requirements increased

Franchisors are required to provide prospective Franchisees with an 'Information Statement' after receiving a formal application or expression of interest. The information statement must be given in a prescribed form.

There are additional requirements in relation to disclosure, including:

- Detail in relation to online sales (by Franchisors);
- Transparency regarding marketing funds;
- Disclosure on renewal of agreements.

The requirement for "double disclosure" by both Franchisors and Master Franchisees has been removed, so that disclosure will only need to be made by a Master Franchisee to its (sub)-Franchisee. Franchisors must also remind Franchisees of their right to have disclosure on renewal of agreements.

The obligation to maintain a current disclosure document is retained (with limited exceptions) and Franchisees have the ability to request disclosure on short notice.

Copies of agreements to be entered into by third parties (such as a security agreement or guarantee by directors or partners of a Franchisee) must be provided to a Franchisee prior to entry into an agreement.

Disclosure of Lease documents

Greater obligations exist in relation to lease documents including a requirement that the Franchisor provide the Franchisee with details of any incentive or financial benefit that the Franchisor (or its associate) is entitled to receive as a result of the lease.

Capital Expenditure

The circumstances in which Franchisors will be able to require Franchisees to undertake significant capital expenditure will be limited. However, Franchisees will be required to pay capital expenditure if it was set out in the disclosure document, if the Franchisee agrees, if required by legislation, or if the Franchisor considers it necessary and has provided a written statement to each Franchisee addressing certain matters (which demonstrate the business benefits).

Obligation to act in good faith

The New Code introduces an obligation on all parties to act in good faith, which applies (to prospective

Franchisees) prior to entering into a proposed franchise agreement as well as in the conduct of the franchise. The obligation includes requirements to act:

- honestly, not arbitrarily; and
- in a cooperative manner to achieve the purposes of the agreement.

Franchisor's record keeping

New record keeping requirements have been imposed on Franchisors. Importantly, Franchisors must keep proper records of agreements and any documents which are relied upon to make a statement or claim in the disclosure document, for a minimum of six years.

Jurisdiction

Franchisors cannot compel Franchisees to conduct litigation or mediation outside of the state or territory in which the franchised business is based.

Costs of disputes

Franchisors cannot recover costs incurred in relation to settling a dispute from the Franchisee.

End of Term and Restraint of Trade clauses

The New Code has retained the requirement that Franchisees be given six months notice of the Franchisors intention to renew (or not renew) the franchise agreement (or one months notice if the term is less than six months).

New restrictions are placed on the circumstances in which a Franchisor can enforce a restraint of trade clause against a Franchisee following expiration of an agreement, where the Franchisee gives notice seeking to extend the term.

Privacy

Of course, all Franchisors and Franchisees will be required to comply with the changes to the Privacy Act which were implemented in March, if they are subject to that Act.

In addition, former Franchisees may now provide written notice that they do not wish to have their details disclosed by a Franchisor (including in a disclosure document) to a prospective Franchisee.

New civil penalty provisions

Last but not least, one of the most significant changes embodied in the New Code is the ability of the ACCC to investigate and issue infringement notices. The New Code also provides additional tools for enforcement and compliance such as the introduction of Civil Penalty Provisions. A breach of a Civil Penalty Provision can incur a fine of up to 300 civil penalty units ($51,000), where there has been a breach of certain provisions of the New Code, including:

- Failure to provide and maintain a disclosure document;
- Failing to act in good faith;
- Failing to update the disclosure document;
- Failure to provide disclosure prior entry into an agreement, or on renewal, or at (the Franchisees) request within the term;
- Failure to provide certain lease information;
- Failure to provide copies of other agreements;
- Failure to provide marketing fund details and to have the fund audited;
- Failing to notify a Franchisee of end of term arrangements within the prescribed timeframe;
- Failing to repay all payments made by a Franchisee (where an agreement is terminated in the cooling off period (less the Franchisor's reasonable expenses if set out in the franchise agreement);
- Termination not in accordance with the Code;
- Failing to comply with a request by a former Franchisee that its details not be disclosed to a prospective Franchisee, or influencing a former Franchisee to make such a request;
- Restraining or impairing Franchisees from forming an association; or
- Failing to attend a mediation.

The changes are intended to improve the transparency in franchising agreements, enhance positive working relationships between parties and provide enforcement and compliance tools where that does not occur.

All parties to franchise agreements should be preparing for implementation of the changes on 1 January 2015 and familiarising themselves with the New Code, now that it has been proclaimed.

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