

Franchising Alert November 2009

Federal Government announces changes to the Franchising Code of Conduct



On 5 November 2009 the Federal Minister for Innovation, Industry, Science and Research announced that the Government will strengthen the Franchising Code of Conduct and the unconscionable conduct provisions of the Trade Practices Act to give small businesses greater protection from anti-competitive behaviour by more powerful businesses.

The long awaited announcement is in response to the report of a Federal Inquiry conducted by the Parliamentary Joint Committee on Corporations and Financial Services.

The Government intends to amend the Code to prevent behaviours that are inappropriate in franchising agreements. The proposed amendments to the Trade Practices Act are intended to make clear that protection from unconscionable conduct relates not only to the process of settling a contract but also to the terms and conditions of the contract and the ongoing behaviour of the parties under the contract.

The Minister has also announced changes will be made to the Code and the Trade Practices Act dealing with:

- > end of franchise term arrangements;
- > dispute resolution;

- > penalties for corporations or individuals engaging in unconscionable conduct or making false or misleading representations;
- > random audits of franchise systems by the ACCC; and
- > the issue of public warnings by the ACCC about rogue franchisors.

An expert panel will be established and will be required to report to the Minister on other specific behaviours that might be considered inappropriate in a franchising arrangement, with particular reference to:

- > end of term arrangements;
- > dispute resolution;
- > unforeseen capital expenditure;
- > unilateral contract variation;
- > attribution of legal costs;
- > confidentiality agreements; and
- > changes to franchise agreements when the franchisee is trying to sell the business.



The panel is to report by the end of January 2010. The Minister will then determine whether it is necessary to further amend the Code.

Below is a link to the Minister's Media Release of 5 November 2009 together with an Additional Information document issued by the Minister.

<http://minister.innovation.gov.au/Emerson/Pages/GOVERNMENTTOSTRENGTHEN-FRANCHISINGCODEOFCONDUCTAND-UNCONSCIONABLECONDUCTLAW.aspx>

Detail of the Amendments

From enquiries late last week of the Department of Innovation, Industry, Science and Research no other details on the proposed amendments are yet available. The actual amendments to the Code are not yet available as they have not been drafted.

Commencement of Amendments

No commencement date of the amendments has been announced.

Our comments

The Minister's announcement is welcome news to franchisors because good faith is not to be defined in the Code, nor will the Code be amended to include a general obligation to act in good faith. Rather the Government is prepared to allow the concept of good faith to continue to evolve in the common law over time. This means that franchisors and franchisees will need to continue to look to the latest (and highest) court authority and be guided by the advice of their lawyers as they continue to grapple with the content and boundaries of the concept of "good faith" both when entering into franchise agreements and in the course of performing them.

It is unlikely that specifics of the proposed amendments to the Code will be available this year. This will give the franchise industry an opportunity to review existing documents. It is to be expected that existing franchising documents will need to be amended once the amendments to the Code are known.

Philip Smith - Partner

+61 2 9020 5755

philip.smith@thomsonplayfordcutlers.com.au

For more information on the Code please contact:



David Gaszner

Partner

+61 8 8236 1354

david.gaszner@thomsonplayfordcutlers.com.au



Sean O'Donnell

Partner

+61 2 9020 5770

sean.odonnell@thomsonplayfordcutlers.com.au

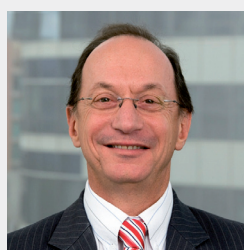


Philip Smith

Partner

+61 2 9020 5755

philip.smith@thomsonplayfordcutlers.com.au



Michael Warren

Partner

+61 3 8080 3562

michael.warren@thomsonplayfordcutlers.com.au