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FRANCHISING LAW ALERT NEW FRANCHISING CODE OF CONDUCT FINALLY RELEASED

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On 3 November 2014, the new Franchising Code of Conduct (**New Code**) was finally made public, following months of confidential consultation with stakeholder groups. In a significant change from the Exposure Draft of the New Code, franchise agreements entered into prior to 1 October 1998 are exempted from compliance with the New Code altogether.

With effect from 1 January 2015, the current Franchising Code of Conduct (**1998 Code**) will be repealed, and the New Code will apply to all franchise agreements. Subject to some limited exceptions, this will include franchise agreements entered into prior to 1 January 2015.

The New Code is the most significant reform for the sector since the introduction of the 1998 Code. It has major implications for all franchised businesses. Additionally, with the introduction of significant financial penalties, businesses currently operating 'licence' or 'distribution' networks will need to carefully consider if they are in fact entering into 'franchise agreements' within the meaning of the New Code.

All franchisors will need to understand the effect of the New Code on their networks and adjust their franchise documentation and practices accordingly. This is especially important given the enhanced enforcement powers of the ACCC to deal with breaches of the New Code, including the introduction of monetary penalties for breaches of the New Code.

The New Code will apply to all existing 'franchise agreements' and all new 'franchise agreements', from 1 January 2015, subject to some limited exceptions (including the exception for franchise agreements entered into prior to 1 October 1998 described above). The New Code contains a transitional provision that specifies that a franchisor will not need to update its Disclosure Document until 31 October 2015. Thereafter, franchisors must update their disclosure document for the first time under clause 8(6) in respect of the financial year commencing on or after 1 January 2015 (e.g. from 1 May 2016 for franchisors with a 31 December year end, or 1 October 2016 for franchisors with a 30 June year end).

The significant changes implemented in the New Code include:

- 1. Civil Penalties** : Breaches of particular provisions of the New Code will be subject to potential financial penalties of up to \$51,000 per breach.
- 2. Infringement Notices** : As an alternative to seeking a civil penalty through the Courts, the ACCC can issue an 'infringement notice' where a CPP Provision is breached. An infringement notice results in a liability of up to \$8,500 per breach.

- 3. Information Statement** : Franchisors must provide a generic 'Information Statement', to a prospective franchisee as soon as practicable after the prospective franchisee *'formally applies or expresses an interest in acquiring a franchised business'*.
- 4. Good faith** : The New Code introduces a statutory obligation to act in good faith. This statutory obligation is a CPP Provision, such that a failure to act in good faith in breach of this provision gives rise to liability for a civil pecuniary penalty.
- 5. Disclosure Obligations** : The New Code prescribes one new form of disclosure document to be used by all franchisors. There are some significant changes in relation to the requirements for preparing, updating and providing disclosure documents.
- 6. Master Franchising** : The New Code simplifies the disclosure obligations in relation to master franchisors, removing the requirement for separate disclosure documents or a joint disclosure document to be provided to franchisees.
- 7. Ongoing requirement to disclose materially relevant facts** : The New Code includes some significant changes to the ongoing disclosure requirement placed on franchisors. In addition to disclosing information regarding events affecting the franchisor, a number of these provisions have been expanded to include events affecting 'associates' and 'associate directors'.
- 8. Restrictions on the imposition of significant capital expenditure requirements** : The New Code includes a prohibition on franchisors requiring franchisees to undertake 'significant capital expenditure' during the term of the franchise agreement. This will include renewal or extension of the term of the franchise agreement.
- 9. Marketing Fees and Advertising Fees** : For franchisors that operate advertising or marketing funds, there are a number of significant changes that will impact on their conduct under the New Code. This includes a requirement for franchisors to maintain a separate bank account for marketing fees and advertising fees contributed by franchisees from 1 January 2015.
- 10. Dispute resolution** : The New Code requires a franchise agreement include an internal complaint handling procedure that meets certain specified criteria. This internal complaint handling procedure can be used as an alternative to the Code complaint handling procedure (which is essentially unchanged from the 1998 Code).
- 11. Franchisor's costs associated with dispute resolution** : The franchise agreement can no longer require the franchisee to bear any costs incurred by the franchisor in relation to settling a dispute under the agreement, and if it does, the clause is of no effect.
- 12. Termination for 'special circumstances'** : The New Code makes a significant change in relation to termination for special circumstances. Franchise agreements will need to be carefully drafted to give the franchisor a contractual termination right where any of those circumstances exist. The New Code also introduces a new special circumstance ground, that arises should the franchisee *'in the case of a franchisee that is a company – become deregistered by the Australian Securities and Investment Commission'*.
- 13. Restraints of Trade** : One of the most controversial aspects of the New Code is a provision which prevents franchisors from relying on restraint

of trade provisions in certain circumstances. The exclusion applies where a franchise agreement expires and the franchisor refuses to extend the agreement, and does not provide reasonable 'compensation' for the franchisee's loss of goodwill.

14. Record keeping obligations : The New Code imposes new record keeping obligations on franchisors.

15. Disclosure of former franchisee details : Franchisors are required under the New Code (as was the case under the 1998 Code) to supply the name, location and contact details of particular former franchisees in their disclosure document. However, franchisors will be obligated *'not to do, or omit to do, anything with the intention of influencing a former franchisee to make such a request'*.

16. Jurisdiction : The New Code prohibits franchise agreements from including a clause that requiring a party who wishes to bring an action or proceeding in relation to a dispute under the agreement, or to refer a dispute under the agreement to mediation, to do so other than in the State or Territory where the franchised business is based. Under the New Code any such clause will be void.

Thomson Geer has prepared a detailed analysis of these and other provisions of the New Code for the benefit of franchisors. If you would like a copy, please let us know.

For further information, please click [here](#) to contact our national Franchising team or contact our office directly:

SYDNEY

Level 25
1 O'Connell Street
Sydney NSW 2000
+61 2 8248 5800

MELBOURNE

Level 39
Rialto South Tower
525 Collins Street
Melbourne VIC 3000
+61 3 8080 3500

MELBOURNE

Level 20
385 Bourke Street
Melbourne VIC 3000
+61 3 9670 6123

BRISBANE

Level 16
Waterfront Place
1 Eagle Street
Brisbane QLD 4000
+61 7 3338 7500

ADELAIDE

Level 7
19 Gouger Street
Adelaide SA 5000
+61 8 8236 1300

www.tglaw.com.au

FOR MORE INFORMATION PLEASE CONTACT:

Josh Simons | Partner | +61 8 8236 1122 | jsimons@tglaw.com.au

Stephen Voss | Partner | +61 8 8236 1305 | svoss@tglaw.com.au

David Gaszner | Partner | +61 8 8236 1354 | dgaszner@tglaw.com.au

Matthew Prescott | Partner | +61 8 8236 1147 | mprescott@tglaw.com.au

Philip Smith | Partner | +61 2 9020 5755 | psmith@tglaw.com.au

Paul Noonan | Partner | +61 3 9641 8603 | pnoonan@tglaw.com.au

Tony Conaghan | Partner | +61 7 3338 7502 | tconaghan@tglaw.com.au

Ben Coogan | Partner | +61 7 3338 7503 | bcoogan@tglaw.com.au