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FRANCHISING LAW ALERT NEW FRANCHISING CODE OF CONDUCT TO COMMENCE ON 1 JANUARY 2015

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Federal Small Business Minister, Bruce Billson MP, has confirmed that the highly anticipated new Franchising Code of Conduct will commence on 1 January 2015.

There has been much speculation and concern in the franchising sector about the timing of the new Code, given that it has still not been released in its final form.

Speaking at the opening of the National Franchise Convention in Sydney, Mr Billson confirmed that the key elements of the new Code will include:

1. Good faith

Franchisors and franchisees will be required to act in good faith in their dealings with one another. While this change was widely anticipated, the initial Exposure Draft of the new Code had stipulated certain conduct that would be deemed to be good faith. The Minister confirmed that the approach has been softened in the final Code, to simply import the existing common law duty of good faith, with some (non-binding) indicative factors as to what that duty requires.

2. A new Information Sheet requirement

In addition to providing new franchisees with a Disclosure Document, franchisors will be required to issue a new, generic "Information Statement". The purpose of the Information Statement is to inform franchisees about the risks and rewards in franchising before they make the psychological commitment to enter into a franchise agreement.

3. Restrictions on imposing capital expenditure requirements on franchisees

The new Code will limit the circumstances in which franchisors can require franchisees to incur significant new capital expenditure (such as to undertake a new fit-out, or in the case of a system-wide rebranding exercise). While the final detail is yet to be seen, this change is expected to necessitate careful disclosure by franchisors of the types of expenditure that it might require franchisees to incur, including a range of the actual likely costs. Without that disclosure, it will be much more difficult for a franchisor to impose such expenditure requirements on their network going forward.

4. Restrictions on post-agreement restraints of trade

Franchisees who are not permitted to continue operating their franchise at the end of their franchise agreement will be released from any restraint of trade obligations specified in the agreement. However, the Minister sought to allay concerns that the release will be absolute, stressing that the government has “got the balance right” to ensure that franchisors’ intellectual property will remain protected.

5. Financial penalties for breaches of the Code

Breaches of the new Franchising Code will be subject to potential financial penalties for the first time from 1 January 2015. The ACCC will be able to issue infringement notices of up to \$8,500 and seek penalties up to \$51,000 in the Federal Court for contraventions of the Code. While the specific provisions of the new Code that are subject to these penalties has not yet been announced, this will introduce significant new risk for franchisors who do not pay careful attention to Code compliance. The risks are also much more significant than the specified penalty amounts might suggest, as the ACCC will effectively be able to seek multiple penalties for the same conduct (for example, where a Disclosure Document breaches a civil penalty provision, each time that Disclosure Document is provided to a franchisee it will constitute a separate breach attracting an additional potential penalty).

Meanwhile, the ACCC has confirmed that there will be no moratorium on enforcement action under the new Code to allow franchisors additional time to get ready. Speaking at the Franchise Council of Australia’s Legal Symposium, ACCC Deputy Chair, Dr Michael Schaper, said that the ACCC will use its discretion in deciding when to take enforcement action, but this will be of little comfort to franchisors who may be unable to get ready for the new changes by 1 January 2015.

The final form of the new Code is expected to be released within the next two weeks, leaving franchisors less than two months before the Code takes effect on 1 January 2015. Minister Billson sought to allay concerns about this timeframe, revealing that transitional arrangements embodied in the new Code will mean that Franchisors will not be required to update their Disclosure Documents until 31 October 2015 (i.e. until after the end of the 2014/15 financial year). However, there are not expected to be transitional arrangements in relation to other aspects of the Code, which means that any franchisor which enters into new agreements on or after 1 January 2015 will need to update their agreement to reflect the new changes.

Through our involvement in the confidential consultation process with Treasury, Thomson Geer is already aware of the new Code provisions. As soon as the Code is released publicly, we will be issuing a comprehensive briefing. We will also be undertaking seminars nationally later this month to help our franchising clients to prepare for the new regime.

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