

GETTING THE
DEAL THROUGH 

Franchise 2016

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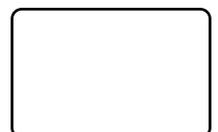


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Overview

1 What forms of business entities are relevant to the typical franchisor?

A corporate structure in the form of an incorporated company in accordance with the Corporations Act 2001 (Cth) is the most common form of business entity used by franchisors in Australia. Foreign franchisors have, in our experience, established wholly owned Australian subsidiary companies to conduct their Australian operations. Although the structure is simple to establish, at a cost of around A\$1,000, there is a requirement that there be at least one Australian-resident director. As a director has significant power in respect of a company's day-to-day operations, the appointed director must be someone who can be trusted and is able to be controlled. Other than this requirement, the structure is relatively easy to establish and can be set up within 48 hours. Other structures include trust structures, partnerships or joint ventures that may be appropriate, depending upon the specific circumstances.

2 What laws and agencies govern the formation of business entities?

In Australia, the Corporations Act 2001 (Cth) governs the formation of corporate entities. The government authority administering the Corporations Act is the Australian Securities and Investments Commission (ASIC), an independent Australian government body reporting to the Commonwealth parliament and the treasurer in respect of the regulation of financial markets, securities and corporations generally.

There has been a trend for franchisors with larger franchised networks (most with aggregated brands and systems) to publicly list. The Australian Stock Exchange (ASX) has traditionally been responsible for the market supervision of publicly listed companies. However, from 1 August 2010, responsibility for market supervision transferred to ASIC.

3 Provide an overview of the requirements for forming and maintaining a business entity.

If the business entity is a company, the establishment process is via incorporation of a company. It is possible to establish a company yourself, and the ASIC website, at www.asic.gov.au, will provide all relevant details in relation to the formation and operational maintenance of a company. It is also relevant to register the trademarks to be used by the company at this early stage. Ongoing annual reporting requirements to ASIC are required by the Corporations Act 2001. The company's financial records must be retained for a period of seven years. The franchisor also needs to apply for a tax file number and register for goods and services tax. An Australian business number is evidence of such registration. Further information regarding setting up an Australian business can be found at the government website www.business.gov.au.

4 What restrictions apply to foreign business entities and foreign investment?

Subject to the foreign investment laws briefly discussed below, foreign business entities are not precluded from operating as a franchise system within Australia provided they comply with Australian law (and particularly, laws governing franchising). A foreign business entity may establish an Australian subsidiary.

If the Australian subsidiary is an Australian private company, at least one director of the company must reside in Australia. If the company is an

Australian publicly listed company, that company must have at least three directors (two of whom must reside in Australia).

Foreign investment is governed by the Foreign Investment Review Board (FIRB). Whether or not foreign investment approval is required depends upon the type of investment and whether the investment is above a monetary threshold. Most residential real estate acquisitions require prior approval of FIRB, as do certain acquisitions of commercial real estate. Acquisitions of shares in or assets of businesses valued at more than the applicable monetary threshold (which as of 1 January 2014 is A\$248 million for all investors, except those from the US and New Zealand) require FIRB approval. For US and New Zealand investors, the free trade agreements (being agreements that liberalise access to international markets for goods and services) between Australia and each of the United States and New Zealand have established different criteria and threshold values depending on whether the investment is within a 'prescribed sensitive sector' of industry. In most instances, these scenarios will not apply to a prospective foreign franchisor unless it proposes to enter the Australian market via an acquisition. Further information can be obtained from the FIRB website at www.firb.gov.au.

5 Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

Taxation legislation in Australia does not distinguish between franchising and other forms of business. The franchise relationship is affected by income tax, capital gains tax, goods and services tax, stamp duties and other federal and state taxes and charges that might apply, depending upon the legal structure chosen by the franchisor.

Income tax laws are integral in selecting the appropriate structure for the franchise network. Relevant acts are the Income Tax Assessment Act 1936 (Cth) and the Income Tax Assessment Act 1997 (Cth). Furthermore, A New Tax System (Goods & Services Tax) Act 1999 (Cth) imposes goods and services tax on all suppliers of goods and services under franchise agreements.

State taxation, stamp duty, payroll tax and workers' compensation are also important considerations in the franchise business.

Where foreign entities are involved, issues such as withholding taxes in respect of the payment of offshore royalties become relevant. For example, the amount of withholding tax on payment of royalties to the UK, France or US is at the rate of 5 per cent. As this is far less than the corporate tax rate in Australia at 30 per cent, where corporate profit is then paid out as a fully franked dividend, any credit available for the Australian tax paid is dependent on the shareholding and the double tax treaties in the relevant countries.

Careful planning is therefore required to ensure the best outcome for a foreign franchisor expanding to Australia. Further information can be obtained from the Australian Tax Office website at www.ato.gov.au.

6 Are there any relevant labour and employment considerations for typical franchisors? What is the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor? What can be done to reduce this risk?

Workplace relations laws exist at federal and state level and regulate the employment of staff by franchisors and franchisees alike throughout Australia. These laws set minimum wage levels that must be paid to all staff,

minimum and maximum hours that can be worked and when they can be worked, the provision of minimum annual, sickness and long-service leave entitlements and loadings and penalties that must be paid to staff depending on their job classification and spread of hours. Franchisors and franchisees can avoid many of these obligations through the use of an enterprise agreement – a workplace agreement registered with the federal government.

Federal laws also deal with issues such as unfair and unlawful dismissal, discrimination and harassment, union right of entry and transmission of business.

Several state laws continue to operate, including laws in relation to occupational health and safety, long-service leave and workers' compensation.

Depending upon the type of franchise, franchisors must be particularly mindful of their responsibilities in relation to occupational health and safety. Franchisors may be held to have control over a workplace because they dictate the manner in which the franchise business is operated. Franchisors should seek specialist advice regarding their liability in this area.

In certain circumstances, a franchisee may be deemed an employee of the franchisor. A requirement that any franchisee incorporate as a pre-condition to entering into the franchise agreement generally eliminates this risk.

7 How are trademarks and know-how protected?

Trademarks, know-how and trade secrets are all protected by intellectual property laws in Australia. Intellectual property includes patents, designs and copyrights, as well as other forms of recognised proprietary knowledge. Applications to register ownership or an interest in intellectual property must be made through IP Australia (a government agency responsible for administering patents, trademarks, designs and plant breeders' rights). A preliminary search of trademarks can be conducted on the website www.ipaustralia.gov.au. This site also provides detailed information about intellectual property in Australia and the registration process.

8 What are the relevant aspects of the real estate market and real estate law?

Franchisors whose franchise model requires business premises often take a direct head lease from the landlord and grant a sub-lease or licence to occupy the premises to their franchisees. In this way the franchisors are able to control the site in the event of default by the franchisee. Certain disclosure obligations must be made in favour of a sub-tenant or licensee under the various state retail leasing legislation. The disclosure statement required under such legislation usually details the more important aspects of the lease or sublease, including rent outgoings and other obligations. Failure to provide the required disclosure can allow the tenant or sub-tenant to avoid its obligations under the lease in certain circumstances. It is also necessary to provide the head landlord's disclosure statement in most state jurisdictions to ensure full disclosure is made.

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

The Competition and Consumer (Industry Codes - Franchising) Regulation 2014 (the Franchising Code of Conduct), which commenced on 1 January 2015, provides that a franchise agreement may be wholly or partly in writing, wholly or partly oral or wholly or partly to be implied. If the relationship or understanding between the parties contains the following three elements, it will be considered a franchise agreement (irrespective of what it is called or how the parties are defined).

The three elements are:

- Party A (often called the franchisor, but may be called anything) grants to party B (often called the franchisee, but may be called anything) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by party A or an associate of party A.
- The operation of the business will be substantially or materially associated with a trademark, advertising or a commercial symbol owned, used or licensed by party A or an associate of party A, a party specified by party A or an associate of party A; and
- Before starting business or continuing the business, party B must pay or agree to pay money (other than excluded payment) to party A or an associate of party A.

The third element will not be satisfied if the only payments party B must make to party A are all or any of the following:

- payment for goods and services supplied on a genuine wholesale basis;
- repayment by party B of a loan from party A;
- payment of the usual wholesale price for goods taken on consignment and supplied on a genuine wholesale basis; or
- payment of market value for the purchase or lease of real property, fixtures, equipment or supplies needed to start business or to continue business under the franchise agreement.

The following relationships are specifically excluded from the definition of a franchise agreement:

- employer and employee;
- partnership;
- landlord and tenant;
- mortgagor and mortgagee;
- lender and borrower; and
- the relationship between the members of a cooperative registered, incorporated or formed under Australian state and federal cooperative legislation.

10 Which laws and government agencies regulate the offer and sale of franchises?

The Franchising Code of Conduct is the only Australian law that deals directly with franchising in Australia.

The Australian Competition and Consumer Commission (ACCC) is the federal agency that administers and enforces the Franchising Code of Conduct.

11 Describe the relevant requirements of these laws and agencies.

The Franchising Code of Conduct is divided up into four parts:

- Part 1, containing definitions and the obligation to act in good faith (discussed at question 36 below);
- Part 2, dealing with disclosure obligations imposed on the franchisor;
- Part 3, dealing with master franchising, lease disclosure, end of term notification obligations, record keeping obligations, prohibited terms in franchise agreements, franchise transfers, termination of franchise agreements, restrictions on imposing significant capital expenditure and rules pertaining to marketing and advertising fees paid by franchisees; and
- Part 4, dealing with dispute resolution.

It also contains 2 Annexures:

- Annexure 1, which proscribes the information that must be disclosed in the franchisor's disclosure document; and
- Annexure 2, which proscribes the form of information statement that must be provided to prospective franchisees as soon as practicable after the prospective franchisee formally applies or expresses an interest in acquiring a franchised business.

The answers to questions 12, 15, 16, 17, 18, 19, 25, 28, 29, 31, 36 and 39 below deal with certain key provisions of the Franchising Code of Conduct and are not repeated here.

In addition the Franchising Code of Conduct mandates that:

- before entering into a franchise agreement, franchisors must also obtain from franchisees a certificate stating whether or not the franchisee has received, legal, accounting or business advice concerning the franchise agreement.
- franchisors must give to the franchisee property occupancy documents (lease, sub-lease or occupancy licence) and details of any financial benefit the franchisor or an associate of the franchisor is entitled to receive as a result of a lease or agreement to lease (including the name of the business providing the incentive or financial benefit), such documents and information to be provided within one month after the lease or agreement to lease is signed or within one month of occupation commencing;
- franchisors must give to the franchisee other leases, agreements under which the franchisee gains the right to use the relevant intellectual property, security agreements; confidentiality agreements or restraint agreements either at least 14 days before the signing of the franchise agreement or, if the document is not then available, as soon as it becomes available;

- post-term restraints (in agreements entered into, varied or renewed after 1 January 2015) will not be enforceable if:
 - the franchisee requests a new agreement but it is declined;
 - the franchisee is not in breach or has not infringed the intellectual property of, or a confidentiality agreement, with the franchisor, during the term of the agreement; and
 - the franchisee has claimed compensation for goodwill because the agreement was not extended but the franchisor declined to pay such compensation or only paid a nominal amount (or the franchise agreement did not provide for an entitlement to such compensation).

The Franchising Code of Conduct also regulates certain terms and conditions of the franchise agreement. This includes, among others, terms associated with the transfer and termination of the franchise agreement, cooling off rights and dispute resolution procedures. The Franchising Code of Conduct also sets out a prescribed procedure for the offer and sale of franchises. Further details are described below.

12 What are the exemptions and exclusions from any franchise laws and regulations?

There are two exemptions or exclusions from the operation of the Franchising Code of Conduct and the Proposed Franchising Code of Conduct:

- where another mandatory industry code, prescribed under section 51AE of the Competition and Consumer Act, applies to the franchise agreement; or
- if the franchise agreement is for goods or services that are substantially the same as those supplied by the franchisee before entering into the franchise agreement and the franchisee has supplied those goods or services for at least two years immediately before entering into the franchise agreement and the sales under the franchise are likely to provide no more than 20 per cent of the franchisee's gross turnover for goods or services of that kind for the first year of the franchise (this is often called the fractional franchise exemption).

13 Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

The Franchising Code of Conduct does not include any operational requirements that a franchisor must meet before it may begin offering franchises for sale. However, it must be solvent. If it were not solvent it would not be able to provide a complying disclosure document and, if the franchisor was a company, it would violate insolvent trading laws contained in the Corporations Act 2001 (Cth).

14 Are there any laws, regulations or government policies that restrict the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers?

No such laws exist in Australia.

15 What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?

A fundamental obligation under the Franchising Code of Conduct is for the franchisor to give a disclosure document to prospective franchisees and franchisees renewing their agreements. The disclosure document requires the franchisor to give disclosure of a number of matters to the franchisee at least 14 days before receiving any non-refundable money from the franchisee, or before the franchisee enters into a franchise agreement. There are 23 key areas of disclosure required. These areas include details of the franchisor and its directors and associates, including their business experience, details of litigation involving the franchisor or its directors, the franchisor's financial information, a summary of the various payments and costs associated with buying, establishing and operating the franchise and a summary of the obligations of the franchisor and franchisee under the relevant franchise agreement.

The disclosure document must be in the prescribed form, not only as to the information to be disclosed but also as to the layout of the document. A copy of the franchise agreement (in the form in which it is to be executed) and the Franchising Code of Conduct must also be included with the disclosure document.

Franchisors must update their disclosure document at least annually within four months of the end of each financial year of the franchisor. However such an update is not required if in the previous year the franchisor did not grant more than one franchise and in the current year it does not intend to grant more than one franchise. But if an existing franchisee in such a network requests a copy of the franchisor's current disclosure document, it will nevertheless need to be updated within 30 days, to meet such a request.

If, during a given year, circumstances arise that might cause the disclosure document to be misleading (for example, deterioration in the franchisor's financial position), the disclosure document should be updated. The underlying test to be considered is whether the disclosure document is sufficient to allow a prospective franchisee to make a reasonably informed decision about the franchise, or whether the disclosure document provides sufficient information for an existing franchisee to have current information for running the franchised business.

16 In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

If a sub-franchisor proposes to grant a sub-franchise to a prospective sub-franchisee, only the sub-franchisor must give a disclosure document to the prospective sub-franchisee. Such disclosure document will need to include certain information concerning the relationship between the franchisor and sub-franchisor.

If the arrangement is tripartite, with the franchisor, sub-franchisor and sub-franchisee being parties to the franchise agreement, the position is unclear. However the explanatory memorandum issued with the Franchising Code of Conduct suggests that in this instance, the franchisor must also provide its disclosure document to the sub-franchisee.

17 What information must the disclosure document contain?

The form of the disclosure document is set out in clear detail in annexure 1 of the Franchising Code of Conduct and includes:

- a proscribed warning statement;
- information pertaining to the franchisor and its associates or directors, including address details and details of business experience;
- litigation history;
- payments to agents for the recruitment of franchisees;
- details of existing franchisees and details of the number of franchises transferred, terminated, not renewed, bought back by the franchisor and franchises that have ceased to operate (including details of past franchisees) for the preceding three financial years;
- in a sub-franchisor's disclosure document, information in relation to the relationship between the franchisor and sub-franchisor;
- intellectual property ownership;
- franchise site or territory information;
- supply of goods and services to and by franchisees;
- details of rights and restrictions in relation to online sales;
- payments due under the franchise agreement and otherwise to establish and operate the franchise;
- marketing or other cooperative funds;
- financing offered by the franchisor;
- circumstances in which the franchisor has unilaterally varied a franchise agreement or one that may be unilaterally varied in the future;
- arrangements to apply at the end of the franchise agreement;
- whether amendments to the franchise agreement will apply on transfer or renewal;
- financial details and earnings information of the franchisor;
- a copy of the franchise agreement in the form in which it is to be executed; and
- any other relevant information that the franchisor wishes to give.

18 Is there any obligation for continuing disclosure?

During any given year, if certain 'materially relevant facts' arise, disclosure of them must be given to all franchisees within 14 days. Materially relevant facts include changes to the majority ownership or control of the franchisor, changes to the intellectual property of the franchise network and certain types of enforcement proceedings by public agencies such as the ACCC judgments against the franchisor, insolvency events and the giving of enforceable undertakings to the ACCC.

Further, if, since the issuance of a disclosure document, a new statement or declaration of solvency has been signed, new financial statements or an audit certificate has come into existence, a franchisor is prohibited from entering into a franchise agreement, unless these documents are provided to the prospective franchisee. This is to ensure that a franchisee receives current financial information, if it is available.

19 How do the relevant government agencies enforce the disclosure requirements?

Violations of the key provisions of the Franchising Code of Conduct now attract civil pecuniary penalties (a maximum of A\$1,000 per offence). Only the ACCC may seek these penalties either by obtaining an order from the Federal Court or by issuing an infringement notice (a maximum of A\$8,500 per offence).

The ACCC relies upon receiving complaints from persons who consider that disclosure requirements have not been met. The ACCC's Compliance and Enforcement Policy can be found at www.accc.gov.au. Having investigated and found a breach of the Franchising Code of Conduct, the ACCC may seek administrative resolution, issue an infringement notice, commence proceedings in the Federal Court, seek enforceable undertakings or instigate court proceedings seeking civil remedies.

20 What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?

Aside from negotiating and reaching an agreement with the franchisor if the violation has caused loss to the affected franchisee, a franchisee may:

- report alleged breaches to the ACCC in the hope that the ACCC will take up the matter with the franchisor; or
- litigate (usually seeking remedies such as a declaration that the franchisor has failed to comply with the Franchising Code of Conduct, orders declaring the franchise agreement void, rescission orders, orders for the refund of money or damages).

If the violation of the disclosure requirements is discovered within seven days of the franchisee entering into the franchise agreement or paying money to the franchisor (whichever is earlier), the franchisee can exercise its statutory cooling-off right to terminate the franchise agreement. Otherwise, the franchisee is unlikely to have the right to terminate the franchise agreement, unless it is specified in the franchise agreement.

21 In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

The sharing of liability for disclosure violations is ultimately determined by the court depending on culpability. The Competition and Consumer Act, which underpins the Franchising Code of Conduct, provides for accessory liability for persons (whether they are directors, employees, contractors or even professional advisers) against whom it can be proved were knowingly concerned in the violation or aided and abetted the violation. Courts have held that for accessory liability to exist, the actions of those said to be accessories must be deliberate and intentional.

22 In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

The offer and sale of franchises is generally affected by the principles of common law and, in particular, contract law. It is also regulated by the Competition and Consumer Act, which contains provisions regarding misleading or deceptive conduct. In some states, there are laws that affect the sale of small businesses, including franchised businesses. For example, in the Australian State of Victoria, the Estate Agents Act 1980 (Vic) requires a vendor's disclosure statement to be provided to a prospective purchaser of a small business if the purchase price is less than A\$350,000 (this statement is commonly known as a 'section 52 statement'), failing which a purchaser may void the purchase contract provided they do so within three months of signing the contract and have not already taken possession of the business.

Franchised businesses are also often affected by local council regulations in the area in which the business is located, particularly planning regulations.

Other industry codes or laws may also apply, depending upon which industry the franchise business is concerned with. For example, where the franchise is a real estate franchise, motor vehicle dealership or building franchise, further industry regulations will apply on a state-by-state basis.

No principle of culpa in contrahendo appears to have been adopted by Australian courts except in the context of the good faith laws which are more fully dealt with in the answer to question 36 below.

23 Other than franchise-specific rules on what disclosures a franchisor should make to a potential franchisee or a franchisee should make to a sub-franchisee regarding predecessors, litigation, trademarks, fees etc, are there any general rules on pre-sale disclosure that might apply to such transactions?

Other than the franchisor's obligation to provide a prospective franchisee with its current disclosure document, a copy of the Franchising Code of Conduct and a copy of the franchise agreement in the form that the prospective franchisee will be required to sign, there are no general obligations for pre-sale disclosure that would apply to franchise transactions.

Depending on the location and purchase price of the business being sold, a purchaser of a franchised business may receive a vendor's statement containing further information about the business being sold including some financial information about the business.

There may also be industry-specific regulations regarding pre-sale disclosure that will apply to franchise transactions if the franchised business being sold operates within a particular industry.

24 What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under franchise sales disclosure laws?

If the franchisor engages in fraudulent or deceptive practices, the franchisee may seek remedies under the Competition and Consumer Act (in particular under the prohibition on misleading and deceptive conduct) and at common law on the grounds of deceit or misrepresentation.

If a breach of the Competition and Consumer Act is involved, franchisees may also seek the intervention of the ACCC.

Under the common law, a right to terminate the franchise agreement may exist where the party has entered into the franchise agreement induced by a false representation. As a practical matter, the affected party must act quickly, otherwise it may be argued that the affected party has affirmed the franchise agreement and the right to terminate will be lost.

Legal restrictions on the terms of franchise contracts and the relationship between parties in a franchise relationship

25 Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

The only franchise-specific law that regulates the ongoing relationship between the franchisor and the franchisee after the franchise contract comes into effect is the Franchising Code of Conduct, which:

- requires the provision of a disclosure document upon renewal of a franchise agreement;
- prohibits franchisors from preventing franchisees from forming an association or associating with other franchisees;
- requires the franchisor to prepare and distribute an annual financial statement detailing all of the marketing fund's receipts and expenses for the financial year within four months of the end of the financial year and have that statement audited (unless 75 per cent of franchisees resolve otherwise within three months of the end of the financial year), and give a copy of the statement and the auditor's report to each franchisee within 30 days after preparing each;
- requires the franchisor to disclose changes in majority control or ownership and certain litigation and judgments within 14 days;
- prohibits the franchisor from imposing significant capital expenditure on a franchisee, unless such expenditure has been disclosed in the pre-contract disclosure document, or has been approved by a majority of franchisees, or is required to comply with a law, or is considered by the

- franchisor as necessary and is justified by a written business case supporting than conclusion;
- requires the franchisor to deposit marketing and advertising fees in a separate bank account;
 - requires franchisor owned units to contribute towards marketing and advertising fees in the name manner as franchisees;
 - prohibits the franchisor from expending marketing and advertising fees received on anything other than expenses disclosed in the disclosure document, legitimate marketing or advertising expenses, expenses agreed to by a majority of franchisees and costs of administering and auditing a marketing fund;
 - prohibits the franchisor from disclosing in its disclosure document a former franchisee's details if the former franchisee has requested that there be no such disclosure;
 - prohibits the franchisor from influencing a former franchisee to request that its details not be disclosed in the disclosure document;
 - requires the franchisor to give a franchisee a current disclosure document within 14 days of a request for same;
 - prohibits the franchisor from unreasonably withholding consent to a transfer, sale or assignment of the franchised business;
 - regulates what steps must be taken before a franchise agreement is terminated; and
 - requires parties to participate in mediation if requested by either party and to approach mediation in a reconciliatory manner.

26 Do other laws affect the franchise relationship?

The franchise relationship is also affected by laws in relation to corporations, intellectual property and other matters that relate to franchising contracts, business relationships and trade practices in general, such as:

- Corporations Act 2001 (Cth);
- Competition and Consumer Act 2010 (and regulations under this Act);
- Income Tax Assessment Act 1936 (Cth) and the Income Tax Assessment Act 1997 (Cth);
- A New Tax System (Goods and Services Tax) Act 1999 (Cth);
- Occupation Health and Safety Acts applicable in each state;
- Fair Work Act 2009 (Cth);
- Property Law Acts applicable in each state;
- Retail Leases Acts applicable in each state; and
- Estate Agents Acts applicable in each state.

In addition, other acts that generally govern commercial and business matters, such as liquor licensing, may also apply, depending upon the particular franchise system.

27 Do other government or trade association policies affect the franchise relationship?

The Franchising Council of Australia (FCA) has endorsed the FCA Member Standards, which is a mandatory code of conduct for its members. This may affect the franchise relationship and the way that members are permitted to behave in a franchise relationship while being members of the FCA.

28 In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

A franchisor may terminate a franchise relationship if a contractual right to do so exists in the franchise agreement. Most franchise agreements provide that a franchisor may terminate a franchise relationship in the following circumstances:

- the franchisee breaches the franchise agreement and does not remedy that breach after being given reasonable notice by the franchisor;
- that it proposes to terminate the franchise agreement because of the breach;
- telling the franchisee what the franchisor requires to be done to remedy the breach; and
- allowing the franchisee a reasonable period of time (which is, however, not required to be longer than 30 days) to remedy the breach.

Most franchise agreements also provide that a franchisor may terminate a franchise relationship immediately if:

- the franchisee no longer holds a licence that it must hold to carry on the franchise business;
- the franchisee becomes bankrupt or insolvent under administration or an externally administered corporate body;
- the franchisee voluntarily abandons the franchised business or the franchise relationship;
- the franchisee is convicted of a serious offence;
- the franchisee operates the franchise business in a way that endangers public health or safety; or
- the franchisee is fraudulent in connection with the operation of the franchised business.

If a franchisee otherwise repudiates the franchise agreement by evincing an intention to no longer be bound by it, the franchisor may accept such repudiation, thereby bringing the franchise agreement to an end.

29 In what circumstances may a franchisee terminate a franchise relationship?

A franchisee may terminate the franchise relationship:

- within seven days of signing the franchise agreement or making a payment under the franchise agreement (the cooling-off period);
- with the consent of the franchisor;
- in accordance with any other rights under the particular franchise agreement; or
- under common law if:
 - the franchisor has repudiated the franchise agreement by indicating that it no longer wishes to be bound by its terms;
 - the franchisor breaches an essential term of the franchise agreement; or
 - the franchisee was induced to enter into the franchise agreement by a false representation or statement and has not, since becoming aware of the falsity of the representation or statement, elected to affirm the franchise agreement.

30 May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

There is no obligation to renew unless a contractual right is granted in the franchise agreement. A franchisor may refuse to renew the franchise agreement with a franchisee, provided circumstances exist that, under the terms of the expiring franchise agreement, entitle the franchisor to refuse to renew the franchise agreement.

31 May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchise entity?

The Franchising Code of Conduct provides that the franchisor may not unreasonably withhold consent to a transfer. It further provides that it would be reasonable for the franchisor to withhold consent to a transfer in certain circumstances, including where:

- the proposed transferee is unlikely to be able to meet the financial obligations that the proposed transferee would have under the franchise agreement;
- the proposed transferee does not meet a reasonable requirement of the franchise agreement for the transfer of a franchise;
- the proposed transferee has not met the selection criteria of the franchisor;
- agreement to the transfer will have a significantly adverse affect on the franchise system;
- the proposed transferee does not agree in writing to comply with the obligations of the franchisee under the franchise agreement;
- the franchisee has not paid or made reasonable provision to pay an amount owing to the franchisor; or
- the franchisee has breached the franchise agreement and has not remedied that breach.

Further obligations may be imposed upon the transfer under the franchise agreement. A common obligation is the requirement that a transfer fee be paid. Transfer of ownership interest or change of control in a franchisee entity are often deemed to be an assignment or transfer by the franchisee and may thus trigger the transfer provisions.

32 Are there laws or regulations affecting the nature, amount or payment of fees?

There are no laws or regulations affecting the nature, amount or payment of fees.

33 Are there restrictions on the amount of interest that can be charged on overdue payments?

Unless the interest clause constitutes a 'penalty clause' (that is, something that goes beyond what would be a genuine pre-estimate of the loss a franchisor would suffer by reason of a non-payment of money), then there are no restrictions on the amount of interest that can be charged on overdue payments. A rate of 3-4 per cent above the overdraft rate charged to the franchisor by its bankers would be unlikely to constitute a penalty.

34 Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

There are no such restrictions on a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency, other than compliance with the relevant withholding tax obligations referred to in question 5.

35 Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants in franchise agreements are enforceable provided they are drafted in sufficiently clear language.

36 Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

The Franchising Code of Conduct provides that:

- each party or prospective party to a franchise agreement must act towards each other with good faith within the meaning of the unwritten (common) law;
- In considering whether a party has contravened this good faith obligation a court may have regard to whether the party acted honestly and not arbitrarily and whether the party cooperated to achieve the purposes of the franchise agreement;
- The obligation to act in good faith does not prevent a party to a franchise agreement, or a prospective party, from acting in his, her or its legitimate commercial interests; and
- The failure to grant an option to renew a franchise agreement does not mean the franchisor has breached its good faith obligation.

37 Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

The Competition and Consumer Act imposes various consumer guarantees in respect of goods or services provided up to A\$40,000, regardless of purpose or use. In other words, franchisees may be treated and have the same protection as consumers in respect of supplies of goods or services by the franchisor if the value of the transaction is less than A\$40,000.

Consumer guarantees include (but are not limited to) those in respect of goods, provided that goods are:

- of an acceptable quality;
- reasonably fit for a represented or disclosed purpose; and
- free from undisclosed encumbrances.

Also, in respect of services (they include but are not limited to):

- that they will be rendered with due care and skill; and
- that they will be supplied within a reasonable time (when no time is set).

Further information is available from www.consumerlaw.gov.au.

38 Must disclosure documents and franchise agreements be in the language of your country?

Disclosure documents and franchise agreements must be written in English.

39 What restrictions are there on provisions in franchise contracts?

The Franchising Code of Conduct:

- prohibits provisions in franchise agreements requiring a franchisee to sign a general release of the franchisor from liability towards the franchisee and a general waiver of representations;
- prohibits litigation or arbitration venue clauses in franchise agreements entered into from 1 January 2015 that require litigation or arbitration to take place at a venue outside the state or territory in which the franchisee's franchised business is located;
- prohibits clauses in franchise agreements entered into from 1 January 2015 requiring a franchisee to pay the franchisor's costs of dispute resolution; and
- requires that the complaint handling and dispute resolution procedure specified therein be included in the franchise agreement.

There are other restrictions on provisions in franchise contracts that apply at law and by virtue of statute. For example, the Competition and Consumer Act prohibits provisions that provide for certain anti-competitive conduct, such as price collusion, third-line forcing, resale price maintenance and other forms of exclusive dealing.

A detailed explanation of these terms is beyond the scope of this chapter. Further information regarding the restrictions on the provisions in franchise contracts can be found on the ACCC website at www.accc.gov.au.

40 Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

Competition law in Australia is contained in the Competition and Consumer Act. Relevant parts of the Competition and Consumer Act to franchising are:

- the requirement to comply with the Franchising Code of Conduct;
- the prohibition of misleading and deceptive conduct;
- the prohibition of unconscionable conduct;
- the prohibition of price collusion between competitors and other forms of cartel conduct between competitors;
- the prohibition of resale price maintenance; and
- the prohibition of third line forcing or other forms of exclusive dealing.

In relation to the last three prohibitions referred to above, exemption from the prohibition may be sought from the ACCC through the process known as authorisation or notification or both.

Further information regarding the competition law that applies in Australia can be found on the ACCC website at www.accc.gov.au.

41 Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

There are state and federal courts in Australia. Federal court jurisdiction is limited to matters where a breach of federal laws is alleged (for example, the Franchising Code of Conduct and the Competition and Consumer Act). State courts can generally hear most matters, with the exception of certain claims under the Competition and Consumer Act and under the Corporations Act.

In most states, there are three levels of court, with the lower two levels having monetary limits on their jurisdiction. The highest court in each state is called the Supreme Court. Each state Supreme Court and the Federal Court has appellate jurisdiction.

The highest appellate court in Australia is the High Court of Australia. This court hears constitutional matters and (subject to special leave to appeal being given) appeals from the state and federal appellate courts.

The most common form of dispute resolution process in franchising is mediation. The Franchising Code of Conduct requires dispute resolution provisions to be inserted into all franchise agreements. It is common for franchise agreements to make mediation mandatory prior to litigation.

42 Describe the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction.

Adjudication of disputes via arbitration is not common in Australia, save where an international party is involved. This is because:

- civil litigation in Australia is adjudicated by judges only (not juries);
- the processes and cost of court proceedings are often more favourable than the arbitration process; and

Update and trends

The Australian government has announced that it will extend the unfair contract protections currently available to consumers to cover small business contracts. The draft legislation defines a small business contract as one where one party is a small business and where either, the upfront payment under the contract is less than A\$100,000 or, in the case of contracts with a term of more than 12 months, the upfront payment under the contract is less than A\$250,000. A 'small business' is defined as one that employs less than 20 employees.

The proposed law will apply to 'standard form' small business contracts and will deem unfair terms to be void. Three tests will need to be satisfied to establish that a term is unfair:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

The proposed law presumes that a contract is a standard form contract unless the other person proves otherwise (a reverse onus) and provides

that a court may take account of the following in determining whether a contract is a standard form contract:

- whether one of the parties has all or most of the bargaining power relating to the transaction;
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- whether another party was, in effect, required to either accept or reject the terms of the contract in the form they were presented;
- whether another party was given an effective opportunity to negotiate the terms of the contract; and
- whether the terms of the contract take into account the specific characteristics of another party or a particular transaction.

The real issue for franchisors doing business in Australia will be whether franchise agreements will be regarded as standard form contracts or, more importantly, whether a franchisor can establish they were not standard form contracts.

In Australia, franchise agreements are usually in a standard form and are provided to franchisees on a 'not negotiable' basis, so it is likely that the new laws will extend to franchise agreements.

- mediation tends to result in a high proportion of disputes being resolved.

In reality, the only significant advantage for foreign franchisors who include clauses in their franchise agreements that require arbitration to be conducted in Australia is the confidential nature of the process and the outcome (compared to courts).

Other than this there are no other significant advantages because:

- the arbitration process is not necessarily faster than court processes;
- the arbitration process is not necessarily more cost-effective than court processes;
- there is a higher risk of a decision not being strictly in accordance with law; and
- there are more limited rights of appeal against an arbitrator's award.

The Franchising Code of Conduct prohibits litigation or arbitration venue clauses in franchise agreements entered into from 1 January 2015 that require litigation or arbitration to take place at a venue outside the state or territory in which the franchisee's franchised business is located.

43 In what respects, if at all, are foreign franchisors treated differently from domestic franchisors?

The Franchising Code of Conduct does not differentiate between foreign franchisors and domestic franchisors.



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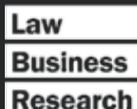
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