



Trade Practices (Industry Codes — Franchising) Amendment Regulations 2010 (No. 1)¹

Select Legislative Instrument 2010 No. 125

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Trade Practices Act 1974*.

Dated 3 June 2010

QUENTIN BRYCE
Governor-General

By Her Excellency's Command

CRAIG EMERSON
Minister for Small Business, Independent Contractors and the
Service Economy for the Treasurer

1 Name of Regulations

These Regulations are the *Trade Practices (Industry Codes — Franchising) Amendment Regulations 2010 (No. 1)*.

2 Commencement

These Regulations commence on 1 July 2010.

3 Amendment of *Trade Practices (Industry Codes — Franchising) Regulations 1998*

Schedule 1 amends the *Trade Practices (Industry Codes — Franchising) Regulations 1998*.

Schedule 1 Amendments

(regulation 3)

[1] Schedule, subclause 3 (1), after definition of *motor vehicle dealership*

insert

novation, in relation to a franchise, means the termination of the franchise and entry into a new franchise with a proposed transferee on the same terms as the terminated franchise.

[2] Schedule, subclause 3 (2)

after

body corporate

insert

consolidated entity

[3] Schedule, after subclause 5 (1)

insert

- (1A) An amendment of this code that commences on or after 1 March 2008 applies to a franchise agreement entered into on or after the date on which the amendment commences.
- (1B) An amendment of this code that commences on or after 1 July 2010 applies to a franchise agreement entered into on or after the date on which the amendment commences.

[4] Schedule, paragraph 6 (2) (c)

omit

a director or other officer of the franchisor.

insert

the franchisor, or a director, officer or authorised agent of the franchisor.

[5] Schedule, paragraph 6B (1) (b)

substitute

- (b) a franchisee, if the franchisor or the franchisee proposes to renew, extend, or extend the scope of the franchise agreement.

[6] Schedule, paragraph 8 (b)

substitute

- (b) a franchisee, if the franchisee or franchisor proposes to enter into, renew, extend, or extend the scope of the franchise agreement.

[7] Schedule, paragraph 10 (e)

substitute

- (e) if the franchisor or franchisee proposes to renew, extend or extend the scope of the franchise agreement — a franchisee at least 14 days before renewal, extension, or extension of the scope of the franchise agreement.

[8] Schedule, subclause 16 (1)

substitute

- (1) A franchise agreement entered into on or after 1 July 1998 must not contain, or require a franchisee to sign, a general release of the franchisor from liability towards the franchisee.
- (1A) A franchise agreement entered into on or after 1 March 2008 must not contain, or require a franchisee to sign, a waiver of any verbal or written representation made by the franchisor.

[9] Schedule, subclause 16 (2)

omit

paragraph (1) (a) does not

insert

subclauses (1) and (1A) do not

[10] Schedule, paragraph 17 (2) (b)

substitute

- (b) that agreement is made within 3 months after the end of the financial year.

[11] Schedule, subclause 17 (3)

substitute

- (3) The agreement referred to in paragraph (2) (a) will remain in force for 3 years, and franchisees must vote, at the end of that time, in accordance with paragraph (2) (a), for the agreement to remain in force.

[12] Schedule, subparagraph 18 (2) (c) (i)

substitute

- (i) Part 3 of the *Independent Contractors Act 2006*; or

[13] Schedule, subclause 18 (5)

omit

18 (2) (i),

insert

(2) (i),

[14] Schedule, clause 20, heading

substitute

20 Transfer or novation of franchise

[15] Schedule, after subclause 20 (4)

insert

- (5) In this clause:

transferee means a franchisee who seeks to acquire a franchise business through either transfer or novation of the franchised business.

[16] Schedule, after clause 20

insert

20A End of term arrangements — notification by franchisor

- (1) If the term of a franchise agreement is 6 months or longer, the franchisor must notify the franchisee, at least 6 months before the end of the term of the franchise agreement, of the franchisor's decision:
 - (a) to renew or not to renew the franchise agreement; or
 - (b) to enter into a new franchise agreement.
- (2) If the term of a franchise agreement is less than 6 months, the franchisor must notify the franchisee, at least 1 month before the end of the term of the franchise agreement, of the franchisor's decision:
 - (a) to renew or not to renew the franchise agreement; or
 - (b) to enter into a new franchise agreement.

[17] Schedule, after clause 23

insert in Part 3

23A Good faith

Nothing in this code limits any obligation imposed by the common law, applicable in a State or Territory, on the parties to a franchise agreement to act in good faith.

[18] Schedule, after subclause 29 (7)

insert

- (8) For subclause (6), a party will be taken to be trying to resolve a dispute if the party approaches the resolution of the dispute in a reconciliatory manner, including doing any of the following:
 - (a) attending and participating in meetings at reasonable times;

- (b) at the beginning of the mediation process, making the party's intention clear as to what the party is trying to achieve through the mediation process;
- (c) observing any obligations relating to confidentiality that apply during or after the mediation process;
- (d) not taking action during the dispute, including by providing inferior goods, services, or support, which has the effect of damaging the reputation of the franchise system;
- (e) not refusing to take action during the dispute, including not providing goods, services or support, if the refusal to act would have the effect of damaging the reputation of the franchise system.

[19] Schedule, after subclause 31 (3)

insert

- (4) In this clause:
 - the costs of mediation under this Part*** includes the following:
 - (a) the cost of the mediator;
 - (b) the cost of room hire;
 - (c) the cost of any additional input (including expert reports) agreed by both parties to be necessary to the conduct of the mediation.

[20] Schedule, Annexure 1, heading

substitute

**Annexure 1 Disclosure document for franchisee
or prospective franchisee**

(subclause 6 (2))

**[21] Schedule, Annexure 1, paragraphs 1.1 (ba), (c)
and (d)**

Reletter as (c), (d) and (e)

[22] Schedule, Annexure 1, paragraph 1.1 (e)

after

serious undertaking.

insert

Franchising is a business and, like any business, the franchise (or franchisor) could fail during the franchise term. This could have consequences for the franchisee.

[23] Schedule, Annexure 1, item 6.5

omit

is taken to comply with item 6.4 if the franchisor supplies,

insert

must supply,

[24] Schedule, Annexure 1, item 12.1, note

omit

[25] Schedule, Annexure 1, after item 13.6*insert*

13.6A For each recurring or isolated payment, that is within the knowledge or control of the franchisor or is reasonably foreseeable by the franchisor, that is payable by the franchisee to a person other than the franchisor or an associate of the franchisor:

- (a) a description of the payment; and
- (b) the amount of the payment or formula used to work out the payment; and
- (c) to whom the payment is made; and
- (d) when the payment is due; and
- (e) whether the payment is refundable and, if so, under what conditions.

[26] Schedule, Annexure 1, item 13.7*omit*

13.6,

insert

13.6 or 13.6A,

[27] Schedule, Annexure 1, after item 13*insert***13A Unforeseen significant capital expenditure**

13A.1 Whether the franchisor will require the franchisee, through the franchise agreement, the operations manual (or equivalent), or any other means, to undertake unforeseen significant capital expenditure that was not disclosed by the franchisor before the franchisee entered into the franchise agreement.

13B Costs of dispute resolution

- 13B.1 Whether the franchisor will attribute the franchisor's costs, including legal costs, incurred in dispute resolution, to the franchisee.

[28] Schedule, Annexure 1, after item 17

insert

17A Unilateral variation of franchise agreement

- 17A.1 If a franchise agreement is entered into in a financial year commencing on 1 July 2011, 1 July 2012 or 1 July 2013 — the circumstances in which the franchisor has unilaterally varied a franchise agreement since 1 July 2010.
- 17A.2 If a franchise agreement is entered into in a financial year commencing after 1 July 2013 — the circumstances in which the franchisor has unilaterally varied a franchise agreement in the last 3 financial years.
- 17A.3 The circumstances in which the franchise agreement may be varied, unilaterally, by the franchisor in the future.

17B Confidentiality obligations

- 17B.1 Whether a confidentiality obligation will be imposed by the franchisor on the franchisee.
- 17B.2 If a confidentiality obligation is to be imposed on the franchisee, details of the matters that the obligation may cover, including the following:
- (a) outcomes of mediation;
 - (b) settlements;
 - (c) intellectual property;
 - (d) trade secrets;
 - (e) particular aspects of individual agreements, such as fees.

17C Arrangements to apply at the end of the franchise agreement

- 17C.1 Details of the process that will apply in determining arrangements to apply at the end of the franchise agreement, including:
- (a) whether the prospective franchisee will have any options to renew, or extend, or extend the scope of the franchise agreement or enter into a new franchise agreement and, if so, the processes the franchisor will use to determine whether to renew, extend, or extend the scope of the franchise agreement or enter into a new franchise agreement; and
 - (b) whether the prospective franchisee will be entitled to an exit payment at the end of the franchise agreement and, if so, how the exit payment will be determined or earned; and
 - (c) details of the arrangements that will apply to unsold stock, marketing material, equipment and other assets purchased when the franchise agreement was entered into, including:
 - (i) whether the franchisor will purchase the stock, marketing material, equipment and other assets; and
 - (ii) if the franchisor is to purchase the stock, marketing material, equipment and other assets — how prices will be determined; and
 - (d) whether the prospective franchisee will have the right to sell the business at the end of the franchise agreement; and
 - (e) if the prospective franchisee will have the right to sell the business at the end of the franchise agreement — whether the franchisor will have first right of refusal, and how market value will be determined; and
 - (f) whether the franchisor will consider any significant capital expenditure undertaken by the franchisee during the franchise agreement, in determining the arrangements to apply at the end of the franchise agreement.

17C.2 If a franchise agreement is entered into in a financial year commencing on 1 July 2011, 1 July 2012 or 1 July 2013 — details of whether the franchisor has, since 1 July 2010, considered any significant capital expenditure undertaken by franchisees, in determining the arrangements to apply at the end of franchise agreements between the franchisor and those franchisees.

17C.3 If a franchise agreement is entered into in a financial year commencing after 1 July 2013 — details of whether the franchisor has, in the last 3 financial years, considered any significant capital expenditure undertaken by franchisees, in determining the arrangements to apply at the end of franchise agreements between the franchisor and those franchisees.

17D Amendment of franchise agreement on transfer or novation of franchise

17D.1 Whether the franchisor will amend (or require the amendment of) the franchise agreement on or before the transfer or novation of the franchise.

[29] Schedule, Annexure 1, item 20.2

substitute

20.2 Financial reports for each of the last 2 completed financial years in accordance with sections 295 to 297 of the *Corporations Act 2001*, or a foreign equivalent of that Act applicable to the franchisor, prepared by the franchisor.

20.2A If:

- (a) the franchisor is part of a consolidated entity that is required to provide audited financial reports under the *Corporations Act 2001*, or a foreign equivalent of that Act applicable to the consolidated entity; and
- (b) a franchisee requests those financial reports; financial reports for each of the last 2 completed financial years, prepared by the consolidated entity.

[30] Schedule, Annexure 1, item 20.3

omit

Item 20.2 does not apply

insert

Items 20.2 and 20.2A do not apply

[31] Schedule, Annexure 1, item 22.1

omit

Copy of proposed franchise agreement

insert

A copy of the franchise agreement, in the form in which it is to be executed,

[32] Schedule, Annexure 2, paragraph 1.1 (e)

after

serious undertaking.

insert

Franchising is a business and, like any business, the franchise (or franchisor) could fail during the franchise term. This could have consequences for the franchisee.

[33] Schedule, Annexure 2, item 6.1, note

omit

[34] Schedule, Annexure 2, after item 7.6

insert

7.6A For each recurring or isolated payment, that is within the knowledge or control of the franchisor or is reasonably foreseeable by the franchisor, that is payable by the franchisee to a person other than the franchisor or an associate of the franchisor:

(a) description of the payment; and

- (b) amount of the payment or formula used to work out the payment; and
- (c) to whom the payment is made; and
- (d) when the payment is due; and
- (e) whether the payment is refundable and, if so, under what conditions.

[35] Schedule, Annexure 2, item 7.7

omit

7.6,

insert

7.6 or 7.6A,

[36] Schedule, Annexure 2, after item 7

insert

7A Unforeseen significant capital expenditure

- 7A.1 Whether the franchisor will require the franchisee, through the franchise agreement, the operations manual (or equivalent), or any other means, to undertake unforeseen significant capital expenditure that was not disclosed by the franchisor before the franchisee entered into the franchise agreement.

7B Costs of dispute resolution

- 7B.1 Whether the franchisor will attribute the franchisor's costs, including legal costs, incurred in dispute resolution, to the franchisee.

[37] Schedule, Annexure 2, after item 9

insert

9A Unilateral variation of franchise agreement

- 9A.1 If a franchise agreement is entered into in a financial year commencing on 1 July 2011, 1 July 2012 or 1 July 2013 — the circumstances in which the franchisor has unilaterally varied a franchise agreement since 1 July 2010.
- 9A.2 If a franchise agreement is entered into in a financial year commencing after 1 July 2013 — the circumstances in which the franchisor has unilaterally varied a franchise agreement in the last 3 financial years.
- 9A.3 The circumstances in which the franchise agreement may be varied, unilaterally, by the franchisor in the future.

9B Confidentiality obligations

- 9B.1 Whether a confidentiality obligation will be imposed by the franchisor on the franchisee.
- 9B.2 If a confidentiality obligation is to be imposed on the franchisee, details of the matters that the obligation may cover, including the following:
- (a) outcomes of mediation;
 - (b) settlements;
 - (c) intellectual property;
 - (d) trade secrets;
 - (e) particular aspects of individual agreements, such as fees.

9C Arrangements to apply at the end of the franchise agreement

- 9C.1 Details of the process that will apply in determining arrangements to apply at the end of the franchise agreement, including:
- (a) whether the prospective franchisee will have any options to renew, extend, or extend the scope of the franchise agreement or enter into a new franchise agreement and, if so, the processes the franchisors will use to determine whether to renew, extend, or extend the scope of the franchise agreement or enter into a new franchise agreement; and
 - (b) whether the prospective franchisee will be entitled to an exit payment at the end of the franchise agreement and, if so, how the exit payment will be determined or earned; and
 - (c) details of the arrangements that will apply to unsold stock, marketing material, equipment and other assets purchased when the franchise agreement was entered into, including:
 - (i) whether the franchisor will purchase the stock, marketing material, equipment and other assets; and
 - (ii) if the franchisor is to purchase the stock, marketing material, equipment and other assets — how prices will be determined; and
 - (d) whether the prospective franchisee will have the right to sell the business at the end of the franchise agreement; and
 - (e) if the prospective franchisee will have the right to sell the business at the end of the franchise agreement — whether the franchisor will have first right of refusal, and how market value will be determined; and
 - (f) whether the franchisor will consider any significant capital expenditure undertaken by the franchisee during the franchise agreement, in determining the arrangements to apply at the end of the franchise agreement.

9C.2 If a franchise agreement is entered into in a financial year commencing on 1 July 2011, 1 July 2012 or 1 July 2013 — details of whether the franchisor has, since 1 July 2010, considered any significant capital expenditure undertaken by franchisees, in determining the arrangements to apply at the end of franchise agreements between the franchisor and those franchisees.

9C.3 If a franchise agreement is entered into in a financial year commencing after 1 July 2013 — details of whether the franchisor has, in the last 3 financial years, considered any significant capital expenditure undertaken by franchisees, in determining the arrangements to apply at the end of franchise agreements between the franchisor and those franchisees.

9D Amendment of franchise agreement on transfer or novation of franchise

9D.1 Whether the franchisor will amend (or require the amendment of) the franchise agreement on or before transfer or novation of the franchise.

[38] Schedule, Annexure 2, items 10 and 11

substitute

10 Financial details

10.1 A statement as at the end of the last financial year, signed by at least 1 director of the franchisor, whether in its directors' opinion there are reasonable grounds to believe that the franchisor will be able to pay its debts as and when they fall due.

10.2 Financial reports for each of the last 2 completed financial years in accordance with sections 295 to 297 of the *Corporations Act 2001*, or a foreign equivalent of that Act applicable to the franchisor, prepared by the franchisor.

- 10.3 If:
- (a) the franchisor is part of a consolidated entity that is required to provide audited financial reports under the *Corporations Act 2001*, or a foreign equivalent of that Act applicable to the consolidated entity; and
 - (b) a franchisee requests those financial reports; financial reports for each of the last 2 completed financial years, prepared by the consolidated entity.

- 10.4 Items 10.2 and 10.3 do not apply if:
- (a) the statement under item 10.1 is supported by an independent audit provided by:
 - (i) a registered company auditor; or
 - (ii) if the franchisor is a foreign franchisor — a foreign equivalent for that franchisor; within 12 months after the end of the financial year to which the statement relates; and
 - (b) a copy of the independent audit is provided with the statement under item 10.1.

11 Other relevant disclosure information

- 11.1 A copy of the franchise agreement, in the form in which it is to be executed, must be attached.
- 11.2 A copy of the code must be attached.
- 11.3 Any other information that:
 - (a) the franchisor wants to give; and
 - (b) does not contradict information required to be given.

[39] Further amendments

<i>Provision</i>	<i>omit</i>	<i>insert</i>
Schedule, paragraph 4 (2) (a)	renewal or extension	renewal, extension, or extension of the scope
Schedule, paragraph 6A (a)	renew or extend	renew, extend or extend the scope of

<i>Provision</i>	<i>omit</i>	<i>insert</i>
Schedule, subclause 11 (1)	renew or extend	renew, extend, or extend the scope of
Schedule, paragraph 11 (3) (a)	renewal or extension	renewal, extension or extension of the scope
Schedule, subclause 13 (2)	extension	extension, extension of the scope
Schedule, clause 20	transfer	transfer or novation
Schedule, Annexure 1, paragraph 1.1 (e)	extension	extension, extension of the scope
Schedule, Annexure 1, paragraph 16.1 (f)	operating	operations
Schedule, Annexure 1, paragraph 17.1 (c)	renewal or extension	renewal, extension or extension of the scope
Schedule, Annexure 1, paragraph 17.1 (d)	renew or extend	renew, extend or extend the scope of
Schedule, Annexure 2, paragraph 1.1 (e)	extension	extension, extension of the scope
Schedule, Annexure 2, paragraph 9.1 (f)	operating	operations

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.