

## FRANCHISING CODE OF CONDUCT

On 1 June 2021, the Australian Government made amendments to the Franchising Code of Conduct. These changes are in response to the Parliamentary Joint Committee's report on Fairness in Franchising, handed down more than two years ago.

The amendments to the Code are contained in the [\*Competition and Consumer \(Industry Codes - Franchising\) Amendment \(Fairness in Franchising Regulations 2021 \(Cth\)\*](#)

Most of these changes will affect franchise agreements entered into, renewed or extended on or after 1 July 2021, while changes to the dispute resolution provisions took effect on 2 June 2021.

## SUMMARY OF KEY CHANGES

---

### PROCESS CHANGES

The Australian Small Business and Family Enterprise Ombudsman (ASBFE0) is now specifically named to provide alternative dispute resolution (ADR) assistance under the Franchising Code.

Disputes may now be resolved with conciliation as well as mediation, and the changes note that the ADR process can be conducted online.

Multiple party dispute resolution and voluntary arbitration are also made specific options for resolving disputes.

#### **Multiple party ADR**

Where there are two or more franchisees with similar disputes with the same franchisor, all the franchisees or the franchisor may refer the matter to a single ADR process.

Regardless of confidentiality agreements, for the purpose of deciding whether to agree to resolve their disputes the same way, franchisees with similar disputes may discuss their disputes with one another. Similar disputes is not defined and will therefore take its ordinary meaning.

If the matter is referred to a single ADR process by a group of franchisees, the franchisor is required to attend the ADR process and try to resolve the dispute under the Code.

#### **Voluntary arbitration**

The whole dispute or elements of the dispute may be settled with binding arbitration if there is written agreement from the parties. The agreement may be in the franchise agreement or agreed later. The arbitration process may occur instead of the ADR process or in conjunction with this process. This opens up also the ability to adopt a hybrid med-arb process where within a mediation process elements of a dispute unable to be agreed could be referred to expert arbitration (eg. a valuation issue).

---

## DISCLOSURE & COOLING OFF CHANGES

Franchisors now need to give more information to prospective franchisees at least 14 days before entering into an agreement or paying a non-refundable deposit.

Franchisors must give a key facts sheet to a prospective franchisee that includes important information from the disclosure document. Prospective franchisees must be provided with information about:

- leasing arrangements including whether the franchisor has an interest in the lease;
- number of franchisees that have recently participated in ADR processes or arbitration;
- rebates and other “kickbacks” franchisors receive from suppliers;
- whether the franchisor provides for the arbitration of disputes;
- the process for early termination;
- the franchisees’ rights to any goodwill they generated;
- any restraint of trade obligations;
- details of any capital expenditure outlined in the disclosure statement; and
- earnings information.

The Franchise Disclosure Registry – scheduled for release early 2022 – will also give prospective franchisees vital information needed before entering into a binding agreement.

The cooling off period now extended from 7 to 14 days.

---

## TERMINATION ARRANGEMENT CHANGES

The changes set out how franchisees can now propose an early termination of an agreement. From 1 July 2021, if a franchisee proposes early termination, the franchisor must reply in writing within 28 days. If the franchisor refuses to terminate, it must give reasons why.

A franchisor can terminate an agreement without notice on particular grounds as set out in the franchising agreement (previously called special circumstances terminations). For franchise agreements entered into, extended or renewed on or after 1 July 2021, the franchisor must give seven days’ notice of the proposed termination on specified grounds (eg. franchisee failing to hold relevant licence, being bankrupt/deregistered/conviction of serious offence, abandonment, public health/safety endangerment and fraud).

The franchisee can dispute a proposed termination. If that happens, the franchisor cannot terminate the agreement for 28 days after the notice of termination was given. However, the franchisor can require the franchisee to stop operating the business during this period.

If a dispute is notified in these circumstances, parties can ask ASBFEO to appoint an ADR practitioner (mediator and/or conciliator).

### Marketing funds

The Code now uses the word marketing, instead of advertising, for the sake of clarity. The Code clarifies that marketing fund obligations apply to the fund administrator. This could be:

- a franchisor or a master franchisor; or
- a third party authorised to administer the fund for the franchisor or master franchisor.

### Passing on legal costs

There are changes to improve transparency around legal costs that can be passed onto franchisees. Franchisors can only seek legal costs arising from the preparation, negotiation and execution of the franchise agreement. If a franchisor seeks these costs to be paid by a franchisee without adequately

specifying their fixed amounts, or seeks to recover legal costs beyond those relating to the preparation, negotiation and execution of the agreement, there may be penalties. That is, a franchisor can require the franchisee to pay a fixed amount for particular legal costs so long as they are specified in the franchise agreement and payable before the franchisee starts the business.

### **Retrospective variation**

After a franchise agreement is made, a franchisor can only alter or add terms to the agreement that apply retrospectively if the franchisee gives its consent in writing.

### **Restraint of Trade Clauses**

A restraint of trade clause is ineffective if the franchisee was not in serious breach of the franchise agreement or a related agreement immediately before the franchise agreement expired. This protects franchisees that have breached the franchise agreement in a minor, technical, or procedural manner only.

---

While the information provided above outlines the key changes to the Code and timing for implementation, detailed information about these changes can be viewed in the [Amending Regulations](#) and [Explanatory Statement](#).

Please [contact us](#) if you wish to discuss these changes or to receive additional information.

