

EXPLANATORY STATEMENT

Select Legislative Instrument 2007 No. 240

Trade Practices (Industry Codes - Franchising) Amendment Regulations 2007 (No. 1)

Issued by the authority of the Minister for Small Business and Tourism.

Trade Practices Act 1974

Trade Practices (Industry Codes - Franchising) Amendment Regulations 2007 (No. 1)

The object of the *Trade Practices Act 1974* (the TPA) is to enhance the welfare of Australians through the promotion of competition and fair trading, and provisions for consumer protection. It aims to protect both businesses and consumers.

The TPA contains provisions that prohibit corporations from engaging in restrictive trade practices and unconscionable conduct, and also provisions for consumer protection. It is administered by the Australian Competition and Consumer Commission (ACCC).

Section 172 of the TPA provides, in part, that the Governor-General may make regulations, not inconsistent with the TPA, prescribing all matters required or permitted by the TPA to be prescribed, or are necessary or convenient to be prescribed for carrying out or giving effect to the TPA.

Section 51AE of the TPA provides, in part, that the regulations may prescribe an industry code, or specified provisions of an industry code, for the purposes of this Part; and declare the industry code to be a mandatory industry code.

The *Trade Practices (Industry Codes - Franchising) Regulations 1998* prescribed the Code as a mandatory industry code under the TPA. The Franchising Code of Conduct (the Code) commenced on 1 July 1998.

The purpose of the proposed Regulations is to amend the Code to increase the transparency, quality and timeliness of disclosure to existing and prospective franchisees. The Code regulates the conduct of participants in the franchising industry towards other participants in franchising. The Code requires the mandatory disclosure of 23 categories of information to existing and prospective franchisees. The Code also provides for the mediation of disputes and a cooling off period. Franchisees have access to the remedies and sanctions available under the TPA.

These amendments are part of the Government's consideration of the Review of the Disclosure Provisions of the Franchising Code of Conduct. They also reflect the outcomes from the Commonwealth's consultation with relevant Government departments and key industry stakeholders.

An overview of the Regulations is set out in [Attachment A](#), details of the policy expressed in the Regulations are set out in [Attachment B](#) and an outline of the consultation undertaken is provided in [Attachment C](#).

The Regulations commence on 1 March 2008.

Attachment A

OVERVIEW OF THE PROPOSED TRADE PRACTICES (INDUSTRY CODES- FRANCHISING) AMENDMENT REGULATIONS 2007

The proposed Regulations contain the following changes:

- The Franchising Code of Conduct (the Code) requires that franchisors provide disclosure documents to prospective franchisees and franchisees requesting or proposing to renew or extend their franchise agreements. Franchisees will be provided with a copy of the franchise agreement in the form it is intended to be executed with the disclosure document. No longer will it be an option to provide only a summary of the franchise agreement.
- Copies of documents relating to the franchise agreement, where available, will be provided at least 14 days before the franchise agreement is signed. Where the documents are not available at that time, the documents are to be provided to the franchisee or prospective franchisee when they become available.
- Details of section 87B undertakings under the *Trade Practices Act 1974* (TPA) by franchisors, will have to be disclosed to franchisees within 14 days which will be more timely than the 60 days previously required. These undertakings are voluntary and legally enforceable undertakings that a party may give to the Australian Competition and Consumer Commission (ACCC) to, for example, settle or avoid proceedings alleging that the party has breached the TPA.
- Franchisors will be required to disclose in their disclosure documents, from whom they receive rebates and financial benefits. This will increase the transparency of the relationship between the franchisor and franchisees.
- Details of the expenses of marketing and other cooperative funds will need to be provided by franchisors to franchisees, and the provision allowing franchisees (if 75 percent of them agree) to choose that annual audits not be undertaken will be continued. However it will be made clear that this decision will have to be renewed every three years.
- The last known particulars of name(s) and contact details of each ex-franchisee will be disclosed, unless the ex-franchisee requests that it be withheld. Franchisors will not be required to update this contact information nor keep it for more than 3 years. This information will provide prospective franchisees with valuable assistance in conducting their due diligence.
- The business experience of all officers of the franchisor ("officers" as defined by the *Corporations Act 2001*) will need to be disclosed. The Code currently specifically excludes an "executive officer" from the class of persons about whom a summary of relevant business experience in the last 10 years must be provided. "Executive officer" is defined through a reference to repealed legislation and thus this term will be removed.
- Financial reports will have to be supplied within 4 months, as opposed to the current 3 months inline with the *Corporations Act 2001*.
- Prospective franchisees to whom Annexure 2 applies (the 'short form' or in other words a less detailed list of items that must be disclosed) will be able to request any of the additional information in Annexure 1 (the 'long form'). Currently franchisors can refuse to provide this potentially important information.
- Disclosure of materially relevant facts to franchisees will have to be provided within 14 days. 60 days, as per the current requirement, is considered to be an unreasonably long period of time.
- Foreign franchisors will no longer be exempt from the Code. It is considered that all franchise systems operating in Australia should be subject to the same rules and protection through the Code and its disclosure requirements should be afforded to those dealing with foreign franchisors. However, foreign franchisors

will be permitted to use their own country's auditors and accounting standards for their overseas operations.

- Materially relevant facts concerning franchisor directors will need to be disclosed to prospective and existing franchisees and the scope of disclosure will extend from just serious offences (defined as an offence under any Australian law for which there is a jail term of more than 5 years for a first conviction) to also include contravention of any provision of the *Corporations Act 2001*. Such information, about how a franchisor conducts their business, is important to those deciding to buy a franchise as well as those who already own a franchise.
- Franchisors will be forbidden from inhibiting prospective franchisees from communicating with each other or existing franchisees. This will be an addition to the current prohibition on franchisors inhibiting franchisees from communicating with each other for lawful purposes.
- General waivers (i.e. broad disclaimers), regarding prior written or verbal representations, will not be permitted in franchise agreements. The ACCC and the Office of the Mediation Adviser (which is the Government appointed provider of mediation services to the franchise industry) gave strong evidence to support the introduction of this provision. The ACCC argued that the use of general waivers in franchise sales literature to seek avoiding liability under the Code, places a stronger onus on franchisees to verify the information provided to them. The ACCC stated that this onus appeared disproportionate considering that franchisors should be able to provide accurate and detailed information about a potential end existing franchise. In their argument the ACCC cited the *Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd (2005) ATPR 42-075* case. The Office of the Mediation Adviser stated that when general waivers were used by franchisors, this often compromised the ability of franchisees and their franchisor to negotiate resolutions to their conflicts.
- Where the franchisor is part of a consolidated entity required to produce audited financial reports under the *Corporations Act 2001* for that consolidated entity, those reports will need to be provided to franchisees on request. In the case of foreign franchisors, the use of their local accounting standards and auditors will be accepted. This potentially material information about the franchisor is not currently required.
- The details and history of the territory or site to be franchised will need to be provided together with the disclosure document. Currently this critically important information is not required to be supplied together with the disclosure document, but rather is only required to be made available for viewing.
- The definition of "associate" of a franchisor will include a person who supplies real property to a franchisee. This will mean that it will be clear that franchisors will have to disclose information about rental and other property expenses.
- A copy of the Code will have to be provided with the disclosure document. The Code is currently inconsistent with regard to whether or not a copy of the Code needs to be attached to the disclosure document.
- A current disclosure document will need to be provided when either the scope or term of a franchise agreement is proposed to be extended. The Code is currently unclear with regard to this.
- A disclosure document in accordance with Annexure 1 will be required if the annual turnover of the franchised business is expected to be \$50,000 or more at any time during the term of the agreement. This clarifies over what period the annual turnover is to be considered.
- Franchisors will be able to charge a prospective franchisee for reasonable expenses incurred if an agreement is terminated by the prospective franchisee

within the 'cooling off' period. The Code is currently unclear with regard to this. Reasonable expenses will be permitted to be deducted from the amount returned if the expenses or their method of calculation have been set up in the agreement.

- Conditions within the franchise agreement will have to be noted, that deal with obligations for a franchisee regarding site and premises selection and acquisition as well as maintenance and appearance of site and premises, vehicles and equipment. The Code is currently not clear in requiring this potentially important information.

Attachment B

POLICY UNDERLYING THE PROPOSED TRADE PRACTICES (INDUSTRY CODES- FRANCHISING) AMENDMENT REGULATIONS 2007

Substantially based on extracts from the,

**REVIEW OF THE DISCLOSURE PROVISIONS OF THE
FRANCHISING CODE OF CONDUCT – OCTOBER 2006**

and

**AUSTRALIAN GOVERNMENT RESPONSE TO THE REVIEW OF
THE DISCLOSURE PROVISIONS OF THE FRANCHISING CODE
OF CONDUCT – FEBRUARY 2007**

Franchising Amendment Regulations and underlying Policy			
Amending regulation	Clause	Policy	Description
1	Clause 2	redundancies	Petroleum Retail Marketing Franchise Act 1980 has been repealed
2	Subclause 3(1)(b)	Q	Clarification of "other payments"
3	Subclause 3(1)	K	Directors to disclose their convictions
4	Subclause 3(2)	Corps. Law has been repealed	Definitions taken from the <i>Corporations Act 2001</i>
5	Subclause 3(2)	U	Definitions of "executive officer" and "officer"
6	Subclause 3(2)	U	Definitions of "executive officer" and "officer"
7	Subparagraph 4(3)(f)(ix)	Corps. Law has been repealed	references to Corporations Law replaced by <i>Corporations Act 2001</i>
8	Subclause 5(3)	J	Application to foreign franchisors
9	Subclause 5(4)	J	Application to foreign franchisors
10	Subclause 6(1)	O	Standardisation of the audit period
11	Subparagraph 6(2)(a)(i)	T	Clarification of the time frame for the measure used to determine the use of the Annexure 1 or Annexure 2 disclosure documents
12	Paragraph 6(2)(c)	U	Definitions of "executive officer" and "officer"
13	Paragraph 6B(1)(b)	S	Clarification of "extend"
14	Clause 6C	H	Opt out clause from providing information requested from Annexure 1
15	Clause 10	A	Requirement to include a complete franchise agreement
16	Clause 15	L	Prospective franchisees communication with existing franchisees
17	Clause 16	M	General waivers of written representations
18	Subclause 16(1)	M	General waivers of written representations
19	Subclause 16(2)	M	General waivers of written representations
20	Subclause 17(1)(a)	E	Auditing of marketing and other co-operative funds
21	Subclause 17(1)(b)	O	Standardisation of the audit period

22	Subclause 17(1)(c)	E	Auditing of marketing and other co-operative funds
23	Subclause 17(2)	E	Auditing of marketing and other co-operative funds
24	Subclause 18(1)	I	Disclosure of materially relevant facts
25	Subclause 18(2)	wording	improved clarity of wording
26	Paragraph 18(2)(b)	K	Directors to disclose their convictions
27	Subparagraph 18(2)(b)(iii)	Corps. Law has been repealed	references to Corporations Law replaced by <i>Corporations Act 2001</i>
28	Subparagraph 18(2)(d)	K	Directors to disclose their convictions
29	Paragraph 18(2)(h)	wording	Correction of grammar
30	Paragraph 18(2)(h)	C	Disclosure of section 87B TPA undertakings
31	Subclause 18(4)	C	Disclosure of section 87B TPA undertakings
	Item (Annexure 1)		
32	Paragraph 1.1(b)	arrangement	Improved layout
33	Paragraph 1.1(d)	V	Termination of the agreement and costs within the 'cooling off' period
34	Item 2.1	arrangement	improved layout
35	Item 2.6	U	Definitions of "executive officer" and "officer"
36	Item 3.1	G	Disclosure of the business experience of all who have or may have management responsibilities
37	Paragraph 4.1(a)	K	Directors to disclose their convictions
38	Subparagraph 4.1(a)(iii)	Corps. Law has been repealed	references to Corporations Law replaced by <i>Corporations Act 2001</i>
39	Paragraph 4.3(f)	C	Disclosure of section 87B TPA undertakings
40	Item 6.5	F	More information about past franchises
41	Paragraph 9.1(j)	D	Rebates and other financial benefits
42	Item 11.3	P	Avoidance of providing the details and history of the territory or site to be franchised together with disclosure documents
43	Item 15.1	A	Requirement to include a complete franchise agreement
44	Paragraph 15.1(a)	wording	Correction of grammar
45	Item 16.1	A	Requirement to include a complete franchise agreement

46	Paragraph 16.1(a)	W	Relevance of "site" and "premises"
47	Paragraph 16.1(j)	W	Relevance of "site" and "premises"
48	Section 17	A	Requirement to include a complete franchise agreement
49	Item 17.1	A	Requirement to include a complete franchise agreement
50	Item 18.1	B	Requirement to include copies of all associated agreements and contracts
51	Item 20.2	N	Financial details
52	Paragraph 20.3(a)	J	Application to foreign franchisors
53	Item 22.1	A	Requirement to include a complete franchise agreement
54	Item 22.2	R	Consistency with regard to attaching a copy of the Code to the disclosure document
	Item (Annexure 2)		
55	Paragraph 1.1(b)	arrangement	Improved layout
56	Paragraph 1.1(e)	V	Termination of the agreement and costs within the 'cooling off' period
57	Item 2.1	arrangement	improved layout
58	Item 2.6	U	Definitions of "executive officer" and "officer"
59	Paragraph 3.1(a)	K	Directors to disclose their convictions
60	Subparagraph 3.1(a)(iii)	Corps. Law has been repealed	references to Corporations Law replaced by <i>Corporations Act 2001</i>
61	Item 8.1	A	Requirement to include a complete franchise agreement
62	Paragraph 8.1(a)	wording	Correction of grammar
63	Item 9.1	A	Requirement to include a complete franchise agreement
64	Paragraph 9.1(a)	W	Relevance of "site" and "premises"
65	Paragraph 9.1(i)	W	Relevance of "site" and "premises"
66	Sections 10 and 11	A	Requirement to include a complete franchise agreement

A. Requirement to include a complete franchise agreement

The Code requires a franchisor to give a current disclosure document to a prospective franchisee. According to Annexure 1 of the Code this must include summary conditions of the franchise agreement (see items 15,16 and 17). Some submissions to the Review of the Disclosure Provisions of the Franchising Code of Conduct (the Review) reported that franchisors provided incomplete franchise agreements at the time the disclosure document was provided. In some instances the franchisee was given the complete document at the time of signing the franchise agreement and consequently insufficient time was allowed for them to consider the document. It was reported that in some cases the document provided for signing may have included additional provisions or changed provisions from those in the original draft. The Review Committee considered that whilst the 7 day cooling off period provided some protection, the protection afforded was not adequate.

The Review Committee considered that it is appropriate for prospective franchisees to receive the franchise agreement in the form in which it is intended to be executed at the same time as they receive the disclosure document.

The Review Committee noted that such a requirement is consistent with a number of the foreign franchising disclosure laws reviewed (Italy, France and United States – Federal being examples).

Implementation: The Regulations amend the Code to require the franchisor to provide the franchise agreement in the form it is intended to be executed with the disclosure document.

B. Requirement to include copies of all associated agreements and contracts

Item 18 of Annexure 1 requires the franchisor to provide a summary of any requirements under the franchise agreement for the franchisee to enter into other agreements as a result of signing the franchise agreement. These include leases and sub-leases for premises, chattel leases or hire purchase agreements, guarantees, mortgage security deposits, confidentiality agreements and agreements not to carry out business in the area for a time after the franchise agreement is terminated.

The Review Committee was advised that the final form of such documents, sometimes is not provided until after the franchise agreement is signed and their existence is only alluded to briefly during preliminary meetings or brushed off as not being of any significance. However, the Review Committee advised that such agreements often have a major impact on the viability of the franchise and therefore need to be treated appropriately.

The Review Committee noted that the 7 day cooling off period does not provide adequate protection as the signing of these documents in their final form, under the current arrangement, may take place some time beyond the expiration of the cooling off period.

In the interest of full disclosure and to allow the franchisee to seek advice on these agreements and their ramifications, the Review Committee considered that complete copies of such documents should be provided to the franchisee at least fourteen days before they are expected to sign the franchise agreement. This they advised would provide the franchisee sufficient time to assess these documents before making a commitment.

It was noted by the Review Committee that a similar provision is a requirement of the *Federal Trade Commission Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures*¹ in the USA.

The Government is aware that in some cases, not all documents required by the franchise agreement are available 14 days before the franchise agreement is expected to be signed.

Implementation: The Regulations amend the Code to require the Franchisors to provide copies of all documents, where available, at least 14 days before the franchise agreement is signed; and where the documents are not available at that time, for the documents to be provided to the franchisee or prospective franchisee when they become available.

C. Disclosure of section 87B TPA undertakings

Undertakings given by a party under TPA section 87B are voluntary and legally enforceable undertakings that the party may give to the ACCC in many different

¹ *Federal Trade Commission Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures (FTC Rule) §436.*

circumstances, including to settle or avoid proceedings alleging that the party has breached the TPA.

Currently the Code in item 4.3 Annexure 1 requires the franchisor to disclose, in their disclosure document, the date of order or undertaking under section 87B of the TPA. However the franchisor is not required to advise franchisees of subsequent undertakings as they are for other proceedings by way of Part 3 clause 18(2) requirements. Since timely knowledge of the existence and content of 87B undertakings may be material to the ability of the franchisees to make informed decisions (whether prior to or after the franchise agreement is entered into), the Review Committee considered that such information should be included in the disclosure document and should also be disclosed within a reasonable time (but not more than 14 days) after the undertaking is given.

Implementation: The Regulations amend the Code to require the disclosure of details of section 87B TPA undertakings within 14 days.

D. Rebates and other financial benefits

The current item 9.1(j) of Annexure 1 of the Code requires franchisors to disclose whether the franchisor or an associate of the franchisor, will receive a rebate or other financial benefit from the supply of goods or services to franchisees, and whether any rebate or financial benefit is shared, directly or indirectly, with franchisees.

The Review Committee received submissions requesting that this clause be extended to include details of the rebate or other financial benefit. The Government supported the view that the disclosure of information about financial arrangements provides greater transparency in the relationships between the participants in franchising.

Implementation: The Regulations amend the Code to require franchisors to disclose from whom they receive rebates and financial benefits.

E. Auditing of marketing and other co-operative funds

The Review Committee noted concerns expressed in submissions about the operation and management of marketing and other co-operative funds. The concerns related to the lack of transparency in the management and application of such funds and the fate of the franchisees' contributions in the event of franchisor failure. The Review Committee also noted that franchisors have an option to seek approval from 75 per cent of their franchisees to avoid the requirement to have such funds audited. It was

considered that this option sent the wrong messages to industry participants. The Review Committee recommended mandatory auditing of marketing and other co-operative funds to deal with these concerns.

The Government supported the recommendation. It also supported amending the Code so that the franchisees are provided with a full account of marketing and other co-operative funds and with the auditor's reports.

Implementation: The Regulations amend the Code so that more detail will be required in financial reports for marketing and other co-operative funds. The provision, allowing 75 per cent of franchisees to choose that annual audits need not be undertaken will be continued, but it will be made clear that this decision will have to be revisited every three years.

F. More information about past franchises

Concern about the availability of information regarding past franchises was expressed in a number of submissions.

The Review Committee considers that such information is an important element in the disclosure process because it may assist a prospective franchisee to obtain information regarding the viability of the franchise, practical issues in running the franchise business, and assistance provided by the franchisor. Further, the level of movement in and out of the franchise system and the reason for that movement is also likely to be relevant to a prospective franchisee.

In disclosing past franchisee details it is vital that the privacy of those franchisees who did not want their details disclosed be protected. The disclosure of information about past franchisees would need to comply with the *Privacy Act 1988* and confidentiality obligations.

The Review Committee considered that the onus should be on the franchisor to seek the approval of past franchisees to release their contact details to prospective franchisees. Where consent was not forthcoming, the franchisor should disclose the number of franchisees that declined to give consent.

The Committee recommended that, subject to compliance by the franchisor with Privacy Laws and obtaining relevant consents to disclosure, the Code be amended to require not just the numbers but also names, location and contact details relating to the franchisees corresponding to events listed in item 6.4 of Annexure 1.

The Government supported the Committee's recommendation to amend the Code to allow franchisors to provide names, location and contact details where consent has been obtained and where that information is available to the franchisor. For reasons of enforcement and administration, this provision will operate prospectively.

Implementation: The Regulations amend the Code to require that the franchisor provide, corresponding to each franchise location, the last known particulars of name(s), location and contact details of each ex-franchisee corresponding to events listed in item 6.4 of Annexure 1, unless the ex-franchisee requests that it be not disclosed. Franchisors will not be required to update the contact information that they gather nor keep it for more than 3 years.

G. Disclosure of the business experience of all who have or may have management responsibilities.

The current item 3.1 of Annexure 1 of the Code specifically excludes an executive officer from the class of persons about which a summary of relevant business experience in the last 10 years must be provided. The Review Committee was of the view that knowledge about the business experience of an executive officer is relevant to prospective and existing franchisees and consequently that the executive officer exemption should be deleted from item 3.1 of Annexure 1.

The *Corporations Act 2001* does not define the term "executive officer" but the previous definition of that term (as used in the Corporations Law) referred to the concept of a person who is concerned in, or takes part in, the management of a body (regardless of the person's designation and whether or not the person is a director of the body). The position of "executive officer" is adequately covered by the term "officer" as defined in the *Corporations Act 2001*.

Implementation: The Regulations amend the Code to require the business experience to be listed of all officers of the franchisor. The definition of officer will be according to the *Corporations Act 2001* definition.

H. Opt out clause from providing information requested from Annexure 1

In accordance with item 11.1(a) of Annexure 2 of the Code, franchisors are required to give a statement to the effect that the prospective franchisee may ask for information referred to in various sections of Annexure 1.

Clause 6C of Part 2 obliges franchisors to provide this information "unless, in the circumstances, it is reasonable to withhold the information". The Review Committee considered that if any of the additional information required under Annexure 1 is requested in accordance with clause 6C, then it should be provided.

The Review Committee recommended that the opt-out provision in clause 6C, as described above, should be deleted.

The Government supported the Committee recommendation, noting that all disclosure information in Annexure 1 can be of importance to franchisees, and if requested by them, should be provided.

Implementation: The Regulations amend the Code so that prospective franchisees to whom Annexure 2 applies may request any of the additional information in Annexure 1.

I. Disclosure of materially relevant facts

The Review Committee received a number of submissions in relation to the time given to a franchisor to disclose "materially relevant facts" under the provisions of Part 3 clause 18(1) of the Code. The Review Committee supported a change from 60 days to 14 days, as had been previously recommended by the first review in 2000.

The Government supported the Committee recommendation, noting that franchisees require timely disclosure of information that is materially relevant to the operation of their franchise.

Implementation: The Regulations amend the Code to require franchisors to disclose materially relevant facts within 14 days after becoming aware of them.

J. Exemption from application of the Code (Application to foreign franchisors)

The following exemption to the application of the Code is provided at clause 5(3)(a)(i) and (ii) of the Code:

"5 (3) However, this code does not apply to the franchise agreement:

(a) if the franchisor:

(i) is resident, domiciled or incorporated outside Australia; and

(ii) grants only 1 franchise or master franchise to be operated in Australia”.

The Review Committee had received submissions on the problems that have arisen from foreign franchisors reselling the one franchise. The Committee considered that franchise arrangements referred to in clause 5(3)(a)(i) and (ii) should be subject to the same disclosure requirements as other franchise arrangements. Therefore, the Committee recommended that the exemption to the application of the Code referred to in Part 1 clause 5(3)(a)(i) and (ii) be removed from the Code.

The Government supported the Committee recommendation, noting that all franchisee systems operating in Australia should be subject to the same rules.

Implementation: The Regulations amend the Code to require disclosure at the point of entry to Australia, e.g. foreign franchisor to Australian master franchisee. In addition, the Code will be amended to allow foreign franchisors to use their own country's auditors and accounting standards for their overseas operations. The Regulations remove Part 1 clause 5(3)(a)(i) and (ii) from the Code.

K. Directors to disclose their convictions

Awareness that a director of a franchisor company has been convicted of an offence under corporate law may be relevant to existing and potential franchisees making informed business decisions. Therefore, the Review Committee recommended that the Code be amended to require disclosure of this information.

The Committee recommended that Part 3, clause 18(2)(b) and (2)(d) and Annexure 1 item 4 of the Code be amended to include franchisor directors in the class of persons about whom materially relevant facts must be disclosed and the scope of disclosure be extended to criminal convictions for non serious offences. The Government supported the Committee's recommendation.

Implementation: The Regulations amend the Code to include franchisor directors in the class of persons about whom materially relevant facts must be disclosed and the scope of the disclosure is extended to criminal convictions for non serious offences.

L. Prospective franchisees communication with existing franchisees

The Committee received a number of submissions indicating that there are occasions when franchisors exert pressure on prospective franchisees not to communicate with past franchisees.

Clause 15 of the Code prohibits franchisors from inducing franchisees not to associate with other franchisees for a lawful purpose. However this clause does not expressly prohibit franchisors from inducing prospective franchisees not to associate with current or past franchisees. Thus the interests of prospective franchisees are not currently protected by clause 15.

The Review Committee considered that as the interests of current or past franchisees cannot be distinguished from those of prospective franchisees in this respect, clause 15 should also protect prospective franchisees. The Committee recommended that part 3, clause 15 of the Code be amended to include a reference to prospective franchisees after the references to franchisees. The Government supported the Committee recommendation, noting that it would better enable prospective franchisees to conduct their due diligence.

Implementation: The Regulations amend the Code to include prospective franchisees in clause 15.

M. General waivers of written representations

The Review Committee considered the recent Full Federal Court decision *Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd* (2005) where the disclaimers, exclusion clauses and requirement to seek independent advice were sufficient to place the franchisees on notice that further investigation and qualification was required of representations regarding sales, profitability, site quality and other matters.

It could be argued that this determination may place franchisees in a vulnerable and disadvantageous position, as the decision of many prospective franchisees to purchase a franchise is influenced by prior written representations.

This decision may encourage franchisors to use broad disclaimers in franchise sales literature to seek avoiding liability under the Code and the TPA, while placing a stronger onus and obligation on franchisees to verify information provided. The onus could be disproportionate considering that

franchisors should be able to provide accurate and detailed information about a potential and existing franchise.

The Government supported amending the code, after further consideration of the issue following the Review, to prohibit the use of general waivers in franchise agreements regarding prior written or verbal representations.

Implementation: The Regulations amend the Code to prohibit the use of general waivers in franchise agreements regarding prior written or verbal representations.

N. Financial Details

In some instances the franchisor belongs to a consolidated entity comprising a number of legal entities. Clause 20 requires disclosure of financial details in respect of the franchisor but not, where applicable, the financial details of the consolidated entity to which it belongs.

The Review Committee considered that as financial information in respect of both the franchisor and, where applicable, the consolidated entity is relevant to prospective and existing franchisees, this information should be disclosed as part of the requirements under item 20 of Annexure 1. Therefore, the Committee recommended that item 20 of Annexure 1 be extended to include the financial reports for the consolidated entity to which the franchisor belongs. The Government supported this recommendation.

Implementation: The Regulations amend the Code such that where the franchisor is part of a consolidated entity required to produce audited financial reports under the *Corporations Act 2001* for that consolidated entity, those reports shall be provided to franchisees on request. In the case of foreign franchisors the use of their local accounting standards and auditors will be accepted.

O. Standardisation of the audit period

The Review Committee was of the view that the audit period referred to in clause 6(1) should align with the standard *Corporations Act 2001* audit period, so as to improve consistency with other statutory requirements.

Implementation: The Regulations amend the Code to require audits to be completed within 4 months after the end of each financial year.

P. Avoidance of providing the details and history of the territory or site to be franchised together with the disclosure documents

Annexure 1 item 11.2 requires details and history of the territory or site to be franchised to be provided in the disclosure document. Annexure 1 item 11.3

states that "The details mentioned in item 11.2 may be in a separate document and may be made available for inspection at a time and place mentioned in the disclosure document."

Whilst accepting that the required information may be provided by way of a separate document the Review Committee's view is that the information should be provided with the disclosure document.

Implementation: The Regulations amend the Code to require the details and history of the territory or site to be franchised to be provided together with the disclosure documents.

Q. Clarification of "other payments"

Property payments can be major expenses to franchisees. A number of submissions received by the Review Committee commented on the failure to provide adequate information about rental and other property expenses.

The Review Committee saw the need to clarify that the "other payments" (which must be disclosed pursuant to the current Annexure 1 item 13.6) include lease related payments. The Review Committee recommended that this should be done by stating that the definition of "associate" in the current clause 3(1)(b) also applies to persons who supply real property to franchisees.

Implementation: The Regulations amend the Code to include in the definition of "associate", for a franchisor, a person who supplies real property to a franchisee.

R. Consistency with regard to attaching a copy of the Code to the disclosure document

As a result of its study of the Code, the Review Committee noted an inconsistency with regard to instructions for a copy of the Code to be supplied together with the disclosure document. Item 22.2 of Annexure 1 currently reads "Copy of the Code may be attached." This is inconsistent with clause 10 of the Code, which requires that a copy of the Code "must" be attached.

Implementation: The Regulations amend the Code to make consistent throughout the code the requirement to attach a copy of the Code to the disclosure document.

S. Clarification of "extend"

The Review Committee received a number of submissions that sought clarification as to whether the word "extend" in this clause refers to an extension in "term" only or term and "scope". The current Part 2 clause 6B (1) uses the phrase "a franchisee proposing to renew or extend a franchise agreement." The Review Committee formed the view that this should be

clarified because “extend” is used in a number of clauses, eg, clauses 10 and 11. The Review Committee favoured the inclusion of “scope” in order to define the provision in a broader sense than “term”.

Implementation: The Regulations amend the Code to make clear that a current disclosure document will need to be provided when either the scope or term of a franchise agreement is proposed to be extended.

T. Clarification of the time frame for the measure used to determine the use of the Annexure 1 or Annexure 2 disclosure documents

The Review Committee received concerns about the meaning of the time frame in the current Part 2 clause 6(2) of the Code. The Review Committee saw the need to make clear the time frame that is used to determine the scale of franchised business according to which the required disclosure document is determined.

Implementation: The Regulations amend the Code so that disclosure according to Annexure 2 will be required if the annual turnover expected of a franchised business over the term of the franchise agreement is less than \$50,000.

U. Definitions of "executive officer" and "officer"

Part 1 clause 3(2) directs the reader to consult "the *Corporations Law*" for a definition of the term "executive officer" and other terms is dated since the *Corporations Law* has been repealed and replaced by the *Corporations Act 2001*. The *Corporations Act 2001* does not use or consider the term "executive officer" nor does it provide a definition for this term.

Implementation: The Regulations amend the Code so that titles of positions held by franchisor staff mirror those defined by the *Corporations Act 2001*.

V. Termination of the agreement and costs within the 'cooling off' period.

The Code is inconsistent regarding the cost to a prospective franchisee who terminates the agreement within the 'cooling off' period. The current item 1.1 (d) of Annexure 1 and item 1.1 (e) of Annexure 2 both allow for the prospective franchisee to "terminate the agreement without cost" if this is within the "7 day 'cooling off' period after signing the agreement" while the current Part 3 clause 13 (4) states that "the franchisor may deduct from the amount paid under subclause (3) the franchisor's reasonable expenses if the expenses or their method of calculation have been set out in the agreement".

Implementation: The Regulations amend the Code to make consistent throughout the code the ability of a franchisor to charge a prospective

franchisee for reasonable expenses incurred if an agreement is terminated by the prospective franchisee within the 'cooling off' period.

W. Relevance of "site" and "premises"

The Review committee noted that some confusion had arisen in relation to inconsistent language in the Code. The Review Committee was of the view that the scope and clarity in the current Annexure 1 item 16.1(a) and 16.1 (j) should be improved in relation to the terms "site" and "premises".

Implementation: The Regulations amend the Code to require the provision of references to the conditions within the franchise agreement that deal with obligations of a franchisee for site and premises selection and acquisition as well as maintenance and appearance of site and premises, vehicles and equipment.

Attachment C

OUTLINE OF THE CONSULTATION UNDERTAKEN

IN PREPARATION OF THE TRADE PRACTICES (INDUSTRY CODES - FRANCHISING) AMENDMENT REGULATIONS 2007

The Trade Practices (Industry Codes – Franchising) Amendment Regulations 2007 have been prepared in answer to the Review of the Disclosure Provisions of the Franchising Code of Conduct. This review was undertaken independently by Mr Graeme Matthews and submitted to the Minister of Small Business and Tourism in October 2006. The review committee advertised nationally, consulted with stakeholders, received 75 submissions, was supported by expert legal advice and took into account overseas experiences.

In February 2007, after consultation with other Government departments, the Government issued the Australian Government Response to the Review of the Disclosure Provisions of the Franchising Code of Conduct.

Two rounds of extensive consultation were undertaken to refine the Government response. Consultation was carried out with key stakeholders: peak industry bodies, representatives of the legal fraternity, academics, professional service providers to the industry, franchisors and franchisees. In addition, the Office of Small Business held two rounds of Inter-departmental Committee meetings with the Department of the Prime Minister and Cabinet, the Treasury and the Australian Competition and Consumer Commission.