

I am pleased to report the FCA's detailed submission in relation to the Exposure Draft of the Franchising Code of Conduct has been welcomed by the Department of Treasury. On Monday 12 May Kym De Britt and Stephen Giles flew to Canberra at the invitation of the Department to discuss our submission in detail, and continue the ongoing consultation and collaboration between the FCA and the Department. The FCA has also met with representatives of the Minister for Small Business, Bruce Billson on several occasions.

I am now able to provide a little more clarity in relation to what we see as the likely changes to the Code, and the implementation timetable. *Please note that these are our expectations, as opposed to the official communicated view of the Government.*

1 Structure and commencement

The implementation date of 1 January 2015 is firm, and an earlier date is not possible given the need to enact legislation and then produce a new regulation in terms of the new Code. The final version of the Code is likely to be produced in October or November 2014. Interestingly, the major problem is s51xxi of the Constitution, which prohibits a Government from legislating to remove existing property rights without just compensation. The rights under a franchise agreement are considered to be property rights, and Code changes that affect a franchise agreement would be considered to change intellectual property rights. So there is no fear of retrospectivity either in relation to these changes, or indeed any future changes.

The Government are still working to try and ameliorate the impact of any changes, pointing out that the Regulatory Impact Statement will be affected if there are unforeseen compliance costs. However it seems likely that:

- (1) The old Code and the new Code will need to coexist, so there will be multiple regulatory regimes in operation. The Government is not able to introduce any legislation that is retrospective in its application;
- (2) it will not be possible for franchisors to elect to opt in to the new Code for their 2014 updates, as the amending legislation will not be completed until October or November 2014;
- (3) the new Code will apply to franchise agreements entered into, renewed or extended after 1 January 2015.

2 Implementation Issues

The Department accepts that transition provisions will be required. The Department is also considering options concerning the simplification of the key definitions of "franchisor" and "franchisee", and to providing greater clarity concerning renewal and extension. The new Code will not apply to all franchise agreements for the Constitutional reasons set out above.

3 Clarification

The Department is considering issues around clarification, and the need to simplify definitions. The intention is to work through the detail, but the fundamental objective is the Code must deliver greater certainty in terms of what is required, when and by whom.

4 Marketing funds

The proposed changes to the marketing fund provisions need to be considered in the context of the fact that the old Code and the new Code will need to coexist. It is important that the two Codes are consistent in relation to the rules governing marketing funds, as franchise systems will have agreements governed by both Codes. It is possible the cost of different requirements due to different Codes creates problems that could outweigh the benefits of the relatively inconsequential changes. This view seemed to be acknowledged, and the general proposition that there should be as much uniformity in both Codes as possible seemed to be accepted.

5 Restraints of trade

The Government intends to proceed with this amendment to the Code, which will apply not just at end of term but on exercise of an option if the franchisor declines to permit the franchisee to continue. However some drafting changes are likely to distinguish between renewal and end of term to avoid the risk of franchisees abusing the process on renewal. The provisions are likely to be tightened to require franchisees to be prepared to sign the new franchise agreement (on substantiality the same terms), not just to have “sought renewal” as per the Exposure Draft.

6 Good faith

The Department indicated the drafting was intended simply to adopt the common law duty, and acknowledged that the current drafting had not effectively achieved that outcome. Changes will be made to the wording to reflect that the parties to a franchise agreement act in accordance with the unwritten or common law duty of good faith. However a second paragraph will be added to provide guidance as to factors to be considered in the context of good faith in a similar manner to the indicia that are included in s51AD of the Competition and Consumer Act in relation to unconscionable conduct. The good faith duty will not be an implied contractual duty, but a statutory duty with a penalty applying.

7 Penalties

Concerns in relation to the penalty regime were noted. The intent is that penalties “apply to everything”, but the ACCC issue enforcement guidelines that will provide comfort that enforcement action in relation to penalties will in fact only occur in relation to serious breaches. Less serious breaches will continue to be addressed by the ACCC using its new powers to issue Infringement Notices.

8 Dispute resolution

Our suggestions to retain the current provisions that assist in the resolution of disputes were welcomed, and accepted.

ENDS



The Franchise Council of Australia is the peak industry body for the \$131 Billion Australian franchise sector representing franchisors, franchisees and suppliers/advisors. www.franchise.org.au