

Australia: Overview of Franchise Laws and Amendments

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1. Introduction

If you conduct franchise business or enter into a vehicle dealership agreement in Australia, you must comply with the Franchising Code of Conduct¹ (the "Code").

The Code is positioned as a mandatory industry regulation under the Competition and Consumer Act 2010 (Cth) and has the same effect as legislation. Although its purpose is to regulate the conduct of both franchisees and franchisors, it is primarily intended to protect the franchisee and the obligations of the franchisor have been further tightened by the amendment² which came into force on 1 July 2021. In addition, an amendment to strengthen penalties came into force in September 2021³. As Australia requires greater protection for franchisees comparing to other jurisdictions, Japanese companies considering entering the Australian market through a franchising or agency arrangement should take particular care.

This newsletter provides an overview of the franchise laws in Australia and the overview of the Code in light of recent legislative changes.

2. Application

The Code applies to activities relating to "franchise agreements". A franchise agreement is primarily an agreement in which (1) a franchisor authorizes a franchisee to conduct a business offering goods or services based on the franchisor's system or marketing plan, (2) the operation of the business is substantially related to franchisor's designated trademark etc., or (3) a franchisor requires a franchisee to pay an initial fee, royalty or other fees for the business. Not only a written agreement but even an oral or implied agreement will be deemed as a franchise agreement if it falls under any of the above categories. Therefore, it should be noted any businesses which are in a franchising relationship, even without an agreement titled "Franchise Agreement", are subject to the Code.

Motor vehicle dealership agreement may also be regulated by the Code as franchise. In addition, motor vehicle dealership agreement that predominantly deals in new passenger vehicles or new light goods vehicles may be subject to separate regulations (Part 5 of the Code) introduced in June 2020.

However, if other mandatory industry rules apply, or in the case of a so-called "fractional franchise", the Code does not apply as an exception. "Fractional franchise", which is an exemption that also exists in the U.S., is a concept that if the percentage of sales of goods or services covered by the franchise agreement to the total sales of the franchisee is below a certain level, the application of regulations is exempted.

In Australia, the application of the Code is exempted if a franchisee enters into a franchise agreement that is for goods or services that are substantially the same goods or services the franchisee has provided for at least 2 years before entering into the franchise agreement, and if sales under the franchise are likely to provide no more than 20% of the franchisee's gross turnover for goods or services of that kind for the first year of the franchise.

On the other hand, there are many unclear points in the operation of this exemption. For example, it is common for a large franchisee to establish a subsidiary for each brand and the subsidiary becomes the actual franchisee. In such a case, even if the parent company meets the requirements for fractional franchise, if the newly established subsidiary is a franchisee under the contract and does not meet the requirements for fractional franchise, the franchisor is not subject to the exemption and must comply with the Code. In addition, there are no clear guidelines as to what constitutes "substantially the same" goods or services, and there are only a limited number of cases in which the exemption can be relied upon.

¹ Competition and Consumer (Industry Codes - Franchising) Regulations 2014, Schedule 1

² Competition and Consumer (Industry Codes--Franchising) Amendment (Fairness in Franchising) Regulations 2021

³ Treasury Laws Amendment (2021 Measures No 6) Act 2021 (Cth), Schedule 2

3. Obligation to Act in Good Faith

In a franchise relationship governed by the Code, both franchisor and franchisee have an obligation to act in good faith toward each other. This obligation applies comprehensively to all actions, from the negotiation with a prospective franchisee, the performance of an agreement, the resolution of disputes, the termination of an agreement, to the performance of any remaining obligations after the termination. Although it does not force franchisors to waive commercial rights or renew a contract, it requires them to respond to franchisee's exercise of rights in good faith and to make decisions based on reasonable grounds. On the other hand, actions such as providing false information, forcing the termination of agreement without any reason, or tolerating the infringement of area exclusivity are likely to be interpreted as bad faith.

4. Disclosure Obligations

The Code provides for obligations to disclose various documents to a prospective franchisee. Firstly, a franchisor must provide a prospective franchisee with the Information Statement as soon as the prospective franchisee formally expresses its interest in acquiring the franchise rights. The Information Statement is a brochure issued by the Australian Competition and Consumer Commission (ACCC) to give general information about items to be considered before acquiring franchise rights and is available in PDF format from the ACCC website⁴.

Secondly, a franchisor must provide the franchisee with a Disclosure Document at least 14 days prior to entering into the franchise agreement or receiving a non-refundable payment. The Disclosure Document must cover the information set out in Annexure 1 of the Code and there are detailed rules on the format. It must include wide range of information including the details of the franchisor (e.g., business performance, financial information, pending litigation, past violations, etc.), the details of the franchise (including existing franchised businesses, history of past franchise terminations, etc.), intellectual property rights, supplier-related information (including information on rebate), and details of fees.

Effective from 1 November 2021, there will be changes to what is required to be included in the Disclosure Document. For example, additional details will be required regarding rebates that a franchisee receives from suppliers, property leases, ADR dispute resolution, and capital expenditures. In this regard, agreements entered into on or after 1 July 2021 may not force a franchisee to make significant capital expenditure that is not included in the disclosure document, except as required by law.

A franchisor must also disclose in advance the following materials.

- Franchise agreement
- Key Facts Sheet ⁵
- Code
- Documents related to property lease
- Other agreements to be entered into in connection with the franchise

The Disclosure Document and the materials described above must be disclosed not only at the time of entering into a new franchise agreement, but also at the time of any renewal of the franchise agreement and material changes to the agreement. After disclosure, it is required to receive various statements from the franchisee.

The Disclosure Document and Key Facts Sheet are required to be updated annually and within four months of the end of the franchisor's fiscal year.

5. Franchise Agreement

There are various restrictions on the contents of the franchise agreement under the Code, including the right to terminate the agreement, franchisee's right to transfer the agreement, marketing and

⁴ https://www.accc.gov.au/system/files/Information%20statement%20for%20prospective%20franchisees_0.pdf

⁵ Written document that summarizes important information about the franchise business. It can be prepared using the SmartForm provided by the ACCC.

<https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=franchisor-key-fact>

advertising fees, burden of attorney's fees, dispute resolution method, effectiveness of non-competition obligation, cooling-off period.

The amendments, which came into effect on 1 July 2021, have brought the following changes to the regulations, and any future franchise agreements (including renewals and material amendments to agreements) is required to reflect these changes.

- A franchisee may propose to terminate the agreement at any time during the term of the agreement, and a franchisor receiving such proposal must provide a substantive response in writing within 28 days.
- As before, a franchisor has the right to terminate the agreement in special circumstances such as franchisee's insolvency or misconduct. However, in such a case, a franchisor is required to give seven days' notice and extend that period by 28 days if the franchisee objects.
- Cooling off period is extended to 14 days from the date of the franchise agreement. Furthermore, cooling off period does not commence until documents relating to the property lease is provided.
- Conciliation is added as a method of dispute resolution. In addition, parties must follow the ADR procedure in Australia in the event of a dispute, and an agreement must include a statement of the prescribed ADR procedure.
- As a general rule, a franchisee cannot be required to pay legal fees for the preparation of a franchise agreement unless certain conditions are met.
- It is expressly prohibited for a franchisor to unilaterally modify the agreement.

6. Penalty

The maximum fine for each offence is currently 300 penalty units (approximately \$67,000). The amendment to the Act, which came into force in September 2021, allows the maximum fine to be set at the same level as the maximum fine under the Competition and Consumer Act (\$10 million, three times the profit from the offence or 10 per cent of annual consolidated turnover). However, if this is not the case, the maximum penalty can be up to 600 penalty units (approximately \$130,000).

7. Conclusion

Since the franchise laws contain detailed regulations, it is recommended to seek professional advice from the negotiation stage with prospect franchisees or distributors. In addition to a series of amendments made to the franchise in recent years, a future amendment is expected to implement Franchise Disclosure Register⁶. Therefore, companies in the position of franchisor should pay attention to future developments.

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Author

⁶ An amendment bill is being considered that would establish a new franchise registration system and require franchisors to register the contents of the Disclosure Document (excluding personal or sensitive information) and make it available to the public. The government is accepting public comments on this bill until 29 October, 2021. <https://treasury.gov.au/consultation/c2021-210402>



[Miki Kato](#)

One Asia Australia and New Zealand Office

Miki is admitted to practice law in Australia. At One Asia Lawyers, Miki assists clients with various corporate legal matters in Australia, New Zealand, Singapore and Malaysia such as contract drafting/review, legal research, legal due diligence and contract negotiations.

If you have any queries regarding this article, please contact at miki.kato@oneasia.legal.