

Table 2: Changes Operative from 1 July 2021 or 1 November 2021

Issue	Summary of Amendments
<p>Extension of Cooling Off Period after a person has entered a new franchise agreement</p>	<ul style="list-style-type: none"> • The changes to the Code extend the duration of the cooling off period that applies to new franchise agreement (from 7 days to 14 days) and amends the conditions which trigger the commencement of the cooling off period (Subclause 26(1)). • Two new Subclauses (Subclause 26(1)(B) and (C)) will only apply where the franchisee is to lease the business premises from the franchisor or an associate of the franchisor, or the franchisee is to occupy the premises without a lease, and that lease is not yet in force. • New Subclause 26(1)(B) will allow the franchisee to terminate the franchise agreement 14 days after receiving the terms of the proposed lease or right. • New Subclause 26(1)(C) will allow the franchisee to terminate the franchise agreement within 14 days after entering into the lease or being granted the occupancy right if, before entering into the lease or being granted the occupancy right, if the franchisee did not receive from the franchisor or associate a document setting out terms of the proposed lease or occupancy right that are substantially identical to the actual terms of the lease or occupancy right. • New Subclauses 26(1)(B) and (C) <u>will not</u> apply to: <ul style="list-style-type: none"> - the renewal of existing franchise agreement; - the extension of the term or scope of an existing agreement; or - a transfer of an existing agreement where the new franchisee does not have to enter a new franchise agreement. • A new Clause 26A is inserted which extends cooling off rights to • incoming franchisees who are transferring an existing franchise agreement. The cooling off period expires at the earlier of: <ul style="list-style-type: none"> - 14 days from the day after becoming the franchisee for the purposes of the franchise agreement, or - once the incoming franchisee takes possession and control of the franchised business. <p>If this cooling off right is exercised in time, the agreement will revert to the old franchisee, who is reinstated as the franchisee.</p> • Clause 26A also provides for refunds to be made to the new franchisee if they exercise their cooling off rights, with any reasonable expenses deducted. Refunds must be provided within 14 days of the provision of the notice that the new franchisee is exercising their cooling off right. • Failure to refund payments made under the contract, less any reasonable expenses, within the 14-day period may result in the application of civil pecuniary penalties. The penalty is applied to deter unreasonable delays or the withholding of payments by the franchisor or old franchisee.

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Early exit termination provisions for franchisees	<ul style="list-style-type: none"> • A new Clause 26B will be added to the Code providing an explicit avenue for franchisees to request early termination of their franchise agreement. The franchisor will have 28 days to provide a written response to the franchisee. • If the franchisor’s response is to refuse to terminate, or to refuse to agree to terminate, the franchise agreement on the terms proposed, the response must include the reasons for the refusal. The response must be <u>substantive</u> in nature. • The parties are obligated to act in good faith during such negotiations. • A franchisor is not obligated to entertain multiple requests from a franchisee seeking early termination. • It is important to note that the new Clause 26B will <u>not</u> give a franchisee the right to exit a franchise agreement on demand, instead it will provide franchisees with <u>an explicit avenue</u> to commence negotiations with their franchisor.
Termination by Franchisor - Special Circumstances	<ul style="list-style-type: none"> • Most franchise agreements will contain a clause that allows a franchisor to immediately terminate a franchise agreement where special circumstances exist. The changes to the Code (Clause 29) introduce an additional 7-day notice provision where the franchisor purports to terminate an agreement in special circumstances. • During the 7-day notice period, a franchisee can contest the purported termination and dispute the grounds of the proposed termination and commence dispute resolution proceedings. If a dispute is raised, the proposed termination cannot be effected until after the end of 28 days from the giving of termination notice, to allow the parties to complete the ADR process or to allow the franchisee to commence urgent proceedings to stay or prevent the termination. • The clause also provides for an expedited process for appointing an ADR practitioner or arbitrator to resolve disputes related to the purported termination. However, recognising that allowing a franchisee to continue operating a business in some circumstances could pose substantial risks for third parties, the franchisor may be justified in taking immediate and decisive action in order to protect their brand. Accordingly, if the franchise agreement allows the franchisor to take such action if a special circumstance in Subclause 29(1) arises, the franchisor is able to stop the franchisee operating the business while dispute resolution proceedings are underway by providing written notice.
Disclosure - Significant capital expenditure	<ul style="list-style-type: none"> • The changes to the Code (Clause 30) tighten the prohibition on significant capital expenditure being required of franchisees by extending recent changes to capital expenditure for automotive franchising to the broader franchising sector. • For a franchisor to require a franchisee to undertake significant capital expenditure during the term of an agreement, the franchisor must either: <ul style="list-style-type: none"> - disclose the expenditure in the disclosure document at the time the agreement is entered into, renewed or expanded; - get approval from a majority of franchisees if the expenditure affects all or a majority of franchisees in the system; - require it in order to comply with legislative obligations; or - get the approval of the individual franchisee affected. • The new clause requires the franchisor to provide a prospective franchisee with <i>‘as much information as practicable about the expenditure’</i>.

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Marketing funds	<ul style="list-style-type: none"> Changes have been made to the Code to ensure consistency in terminology when referring to the operation of marketing funds and related obligations. Master franchisors (in addition to franchisors) (Clauses 12 and 15) may collect and manage marketing and other cooperative funds. The fund administrator may be the franchisor or a master franchisor. They are to be subject to the same requirements in their management of these funds as other franchisors, to the extent that they are responsible for a marketing or other cooperative fund. To improve accountability over the use of the marketing or cooperative funds, the fund administrator is required to prepare an audited annual financial statement for the last financial year, ensuring it contains sufficient detail to be meaningful to the franchisees, within four months of the end of the financial year to which it relates. A fund administrator will be excused from preparing an audit, where 75% of Australian franchisees who contribute to the fund agree by vote that an audit is not required. The changes to the Code clarify that the marketing fund must be kept in a <u>separate</u> account from the general operating account, whether it is kept in a bank or other deposit-taking financial institution. Where a franchisor or master franchisor operates units of the franchise business themselves, they are obligated to contribute to the marketing fund on behalf of each unit they operate on the same terms as they require of franchisees. The changes to the Code (Clause 31) also introduce civil penalty provisions to reflect the seriousness of the impact that a breakdown of trust (between franchisor and its franchisees) in relation to the use of marketing funds, ensure greater franchisor accountability and to further deter the inappropriate use of funds.
Passing on of a franchisor's legal costs	<ul style="list-style-type: none"> Changes to the Code (new Clause 19A) have been made to limit the exposure of franchisees not only to the legal costs of preparing the franchise agreement, but also to future legal costs which may arise and which, at the time of entrance into the franchise agreement, are unquantifiable. Franchisors will usually require a prospective franchisee to cover its costs for preparing, negotiating and executing the suite of franchise agreement. This practice can continue so long as the amount is quantified and stipulated in the agreement (and disclosure document)(Clause 19A(2)). In terms of passing on any costs associated with drafting and the execution of <u>other documents</u> related to the agreement, for example a notice of breach or a notice of a termination, this practice will be prohibited (Clause 19A(1)).
Retrospective unilateral variation of a term of a franchise agreement	<ul style="list-style-type: none"> The changes to the Code (new Clause 31A) will prevent the franchisor from varying an agreement with retrospective effect unless the affected franchisee consents, in writing, to the making of the variation.
Leasing of premises from franchisor or a related entity	<ul style="list-style-type: none"> Disclosure related to lease arrangements and any interests that the franchisor has in a lease has been improved to alleviate the risk of conflicts of interest arising relating to the business premises and to assist franchisees understand the implications of any head lessor and sub-letting arrangements. When a franchisee occupies a premises without a lease, the franchisees will need to be given more information about any incentives or benefits a franchisor derives from the lease and the franchisee's occupation of the premises. Existing obligations to disclose lease information continues to apply.

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Restraints of trade	<ul style="list-style-type: none"> • Clause 23 of the Code sets out circumstances in which a restraint of trade clause does not have an effect, and further narrows the circumstances under which a restraint of trade clause will be enforceable (in circumstances where the franchise agreement is not extended by the franchisor). • Clause 23(1)(b) has been updated to ensure that only a serious* breach of the franchise agreement by a franchisee immediately before the expiry is relevant to the enforceability of a restraint of trade provision. This change protects ex-franchisees against being restrained in their business activities after the expiry of the agreement purely because they had breached their franchise agreement in an insubstantial manner. <p>* The Code does not define the term 'serious'. The franchising sector is diverse, and what amounts to a serious breach may differ between franchise systems and will often depend on the circumstances.</p>
New vehicle dealership agreements	<ul style="list-style-type: none"> • The definition of “motor vehicle dealership” has been replaced, expanding the definition to expressly incorporate agency models of vehicles sales. • The definition extends to agents who sell new vehicles on behalf of a manufacturer, where the consumer may be directly purchasing the vehicle from the manufacturer. • Changes to the Code introduce an additional factor that courts must consider in determining whether a party to a new vehicle dealership agreement has acted in good faith, in addition to the terms being fair and reasonable. • The new Subclause 46A(1) provides that new vehicle dealership agreements are to include terms setting out the compensation of the dealer in the event that the manufacturer withdraws or rationalises its Australian market presence, or changes its distribution models in Australia. • The manufacturer must specify how the franchisor will buy back or provide compensation in relation to new vehicle inventory, party and special tools in the event of early termination or non-renewal of the agreement where a new agreement is not executed. The manufacturer is precluded from including a contractual provision which attempts to deny the dealer compensation if the agreement is terminated early for reasons other than breach by the dealer. If such a term is included, a civil penalty applies. • Clause 46B expands upon the other capital expenditure requirements applicable to new vehicle dealership agreements by providing that the dealer must have a reasonable opportunity to recoup any capital investment required by the franchisor upon entering into or under the agreement.

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<p>Pre-entry disclosure</p>	<ul style="list-style-type: none"> • For disclosure to be effective, useful information must be disclosed in a format which is neither unduly burdensome to prepare nor read. The changes aim to improve the quality and scope of disclosure requirements, while making it more accessible and bringing the most pertinent business information to the attention of prospective franchisees. • In addition to providing prospective franchisees with a Disclosure Document, franchisors will be required to prepare and issue a Key Facts Sheet (KFS) and if premises are leased to the franchisor or an associate of the franchisor, and they propose to sublease the premises to the prospective franchisee, a copy of the lease (or summary of the commercial terms if the lease is unavailable) and, where relevant, any written information required by State or Territory law in relation to that lease. • Failure by franchisors to provide these documents at least 14 days before the parties enter the agreement or make a non-refundable payment will be a civil penalty provision. • The KFS is intended to draw particular attention to the most crucial information contained in the disclosure document. The specific layout and contents of the key facts sheet is to be published on the Australian Competition and Consumer Commission's (ACCC) website. The KFS will only include information on matters that franchisors must already include in the disclosure document or otherwise under the Code. Franchisors will need to update the KFS annually when they update their Disclosure Document to ensure consistency. • The changes expand disclosure requirements in cases where the franchisor consents to the transfer of an existing franchise agreement to another person. The object of this amendment is to ensure that those who choose to take over an existing franchise can benefit from the same pre-entry disclosure as prospective franchisees who sign new agreements. • Franchisor will not be able to give their consent to the transfer of an existing franchise agreement until at least 14 days after giving the prospective new franchisee the required documents, to ensure that a prospective franchisee is not rushed into accepting obligations. A civil pecuniary penalty applies to a failure to meet these requirements in order to ensure that a new franchisee has proper time to read and consider the terms of an agreement without being pressured to accept immediately. • Franchisees can request documents in printed and/or electronic form. The franchisor must comply with such a request. If, however, the documents have already been provided in one form, providing them in a different form does not restart the 14-day disclosure period. • When earning information is provided separately to the Disclosure Document, the Code will deem that disclosure has not occurred when the Disclosure Document was provided. Hence, the 14-day disclosure period will be restarted.

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Pre-entry disclosure	<ul style="list-style-type: none"> • Franchisors will also be required to give a copy of the Information Statement relating to franchising that is published on the Commission’s website to a prospective franchisee prior to giving the franchisee the KFS, Disclosure Document and occupancy information concerning the business premises (if premises are leased to the franchisor or an associate of the franchisor). • Further targeted improvements have been made to pre-entry disclosure requirements, which includes: <ul style="list-style-type: none"> - A new requirement for a franchisor to disclose any interest they have in a particular lease arrangement for the franchised business; - Whether the franchise agreement provides for the resolution of disputes through arbitration and the parties’ rights to end the agreement early; - A requirement to include the length of the initial term of the franchise agreement. - A requirement to detail whether or not a franchisee has any rights to goodwill generated by the franchise; - A requirement to disclose whether the franchise agreement contains a restraint clause or a clause that restricts the activities of the franchisee following the conclusion of the franchise agreement; - A requirement that if the franchisor provides any earning information, this information must be provided in the disclosure document or as an attachment to the disclosure document; - A requirement that if the franchisor provides any earning information, this information is accurate, except where the disclosure document contains pieces of information that the franchisor knows is not accurate.