

murdoch

1. OBLIGATION TO ACT IN GOOD FAITH

Each party to a franchise agreement is required to act with good faith in respect of any matter arising from or relating to the Franchise Agreement and the Code.

The obligation extends to prospective franchisees in respect of a dealing or dispute relating to the proposed franchise agreement, the negotiation of the proposed franchise agreement and the Code.

In considering whether a party to a franchise agreement has failed to act in good faith, the court will have regard to whether the party acted honestly and not arbitrarily and whether the party cooperated to achieve the purposes of the agreement.

A franchise agreement must not contain a clause that limits or excludes the obligation to act in good faith, and if it does, the clause is of no effect.

A franchise agreement may not limit or exclude the obligation to act in good faith by applying, adopting or incorporating, with or without modification, the words of another document, as in force at a particular time or as in force from time to time, in the franchise agreement.

While the franchise agreement cannot limit or exclude the obligation to act in good faith, that obligation does not prevent a party or a prospective party from acting in its legitimate commercial interests.

The fact a franchise agreement does not give a franchise an option to renew the agreement or allow the franchisee to extend the agreement does not mean the franchisor has not acted in good faith in negotiating or giving effect to the agreement.

2. DISCLOSURE DOCUMENT

A franchisor must create a disclosure document which complies with the Code.

The disclosure document is designed to give a prospective franchisee or an existing franchise information to help them make a reasonably informed decision about the franchise and give current information that is material to the running of the franchised business.

Ensure the disclosure document is in the prescribed form and contains the prescribed information. There are two types of permitted disclosure document.

Ensure the disclosure document is signed by the franchisor, or a director, officer or authorised agent of the franchisor.

Ensure the disclosure document has a table of contents based on the items in Annexure 1 of the Code, including the page number on which each item begins. If the disclosure document attaches other documents, the table of contents must list these other documents too.

Subject to some exceptions, the disclosure document must be updated within 4 months after the end of each financial year.

Even if one of the exceptions applies, if a request is made under section 16(1) of the Code, the franchisor must update the document so that it reflects the position of the franchise as at the end of the financial year before the financial year in which the request was made.

3. DOCUMENTS TO BE PROVIDED – MINIMUM 14 DAYS BEFORE SIGNING

A franchisor must give a copy of the Code, a copy of the disclosure document and the franchise agreement in the form in which it is to be signed to a prospective franchisee at least 14 days before the prospective franchisee enters into a franchise agreement or makes a non-refundable deposit to the franchisor or an associate of the franchisor.

If the parties to a franchise agreement agree to renew or extend, the franchisor must provide the Code, a copy of the disclosure document and the franchise agreement at least 14 days before the renewal or extension of the franchise agreement.

Diarise these dates and provide the Code, a copy of the disclosure document and the franchise agreement in the form in which it is to be signed to a franchisee at least 14 days before the expiry date of the franchise agreement.

4. FRANCHISEE MUST OBTAIN LEGAL AND ACCOUNTING ADVICE BEFORE SIGNING

The franchisor must not enter into a franchise agreement, renew or transfer a franchise agreement, extend the term or scope of a franchise agreement, enter into an agreement to do any of these things or receipt a non-refundable payment (whether by way of money or other valuable consideration) under a franchise agreement or agreement to enter into a franchise agreement unless the franchisee has given the franchisor a statement that the franchisee has received, read and had a reasonable opportunity to understand the disclosure document and the Code.

Before a franchise agreement is entered into (other than a renewal or extension of a previous franchise agreement), the franchisor must have received from the prospective franchisee:

1. signed statements that the prospective franchisee has been given advice about the proposed franchise agreement or franchised business, by an independent:
2. legal adviser;
3. business adviser;
4. accountant; or

a signed statement by the prospective franchisee that the prospective franchisee:

5. has been given that kind of advice about the proposed franchise agreement or franchised business; or
6. has been told that that kind of advice should be sought but has decided not to seek it.

While some franchisor's may be prepared to allow prospective franchisee's waive their requirement to obtain independent advice, a franchisor may insist on statements from independent advisers.

5. INFORMATION STATEMENT

A franchisor must give a copy of the prescribed information statement set out in Annexure 2 of the Code to a prospective franchisee.

The information statement must be set out in size 11 font and be contained on no more than 2 pages.

As soon as practicable after a prospective franchisee formally applies or expresses interest in acquiring a franchised business, the franchisor must provide the information statement.

A franchisor does not have to provide the information to a franchisee in relation to a renewal or extension of a franchise agreement.

6. FRANCHISOR'S OBLIGATIONS

6.1. Lease documents

If the franchisor or an associate of the franchisor leases premises, the franchisor must give the franchisee:

1. a copy of the agreement for lease (if there are works that need to be completed to prepare the premises); or
2. a copy of the lease; and
3. details of any incentive or financial benefit that the franchisor or associate is entitled to receive as a result of the lease or agreement for lease.

A copy and details must be given within 1 month after the lease or agreement for lease is signed.

If the franchisee occupies, without a lease, premises leased by the franchisor or its associate must give to the franchisee evidence that it has the legal right to occupy the premises, being:

1. a copy of the lease or agreement for lease;
2. details of any of its inventive or financial benefits arising from the lease or agreement for lease.

Alternatively, the franchisor must provide:

1. a copy of the documents that give the franchisor the right to occupy the premises;
2. written detail of the conditions of occupation;
3. details of any incentive or financial benefit which it or its associate is entitled to receive as a result of the franchisee's right to occupy the premises.

These documents and the details of the incentives and benefits must also be provided within 1 month after occupation commences or the documents are signed.

6.2. Other documents

If the franchisor or an associate of it requires the following kind of documents to be signed by a franchisee party, they must be provided to the franchisee at least 14 days before the day on which the franchise agreement is signed (if available), otherwise when it becomes available:

1. A direct lease with a landlord;
2. Hire purchase agreement;
3. Intellectual property licence;
4. Security agreement, including a guarantee, mortgage, security deposit, indemnity, loan agreement, bank guarantee;
5. Confidentiality agreement;
6. An agreement not to carry on business within an area or for a time after the franchise agreement is terminated.

6.3. Financial statements – marketing or cooperative fund

If a franchise agreement requires a franchisee to pay money to a marketing or other cooperative fund, the franchisor must:

1. Within 4 months after the end of each financial year, prepare an annual financial statement detailing all of the fund's receipts and expenses for that financial year;
2. Ensure the statement includes sufficient detail so as to give meaningful information about:
 - a. Sources of income;
 - b. Items of expenditure, particularly with respect to advertising and marketing expenditure;
3. Have the statement audited by a registered company auditor within 4 months after the end of the financial year to which it relates;
4. Give to the franchisee, a copy of the:
 - a. statement within 30 days of preparing the statement; and
 - b. auditor's report within 30 days of preparing the report (if the audited report is required).

An auditor's report is not required if:

1. 75% of the franchisees in Australia who contribute to the fund, have voted to agree the franchisor does not have to comply with the paragraph in respective of the financial year; and
2. That agreement is made within 3 months after the end of the financial year.

The reasonable costs of administering and auditing the fund must be paid from the fund.

6.4. Disclosure document

In addition to giving a disclosure statement before a franchise agreement is entered into, a franchisee can request in writing another copy, but only one copy every 12 months.

While a franchisor must update the disclosure document within 4 months after the end of each financial year. If the franchisee makes a request before the end of the 4 month update period, the franchisor must provide the disclosure document within 2 months of the request being made.

For any other request, the franchisor must provide the update disclosure document within 14 days after a request is made in writing.

The disclosure document must be updated to the end of the financial year immediately preceding the date the request was made.

6.5. Disclosure of solvency, financial statements and audit reports

A franchisor must provide a:

1. statement of solvency;
2. annual financial statements showing the last 2 financial years;
3. if the franchisor is in a tax consolidated group, and a franchisee requests, the audited financial reports;

as soon as reasonably practicable and in the case of a prospective franchisee, before entry into the franchise agreement.

6.6. Disclosure of change of control and disputes

A franchisor must, inform a franchisee in writing, within a reasonable period of time (ie within 14 days) after becoming aware of:

1. change in majority ownership or control of the franchisor, its associate or the franchise system;
2. proceedings alleging breach by the franchisor or a franchisor party of the franchise agreement, trade practices law, the Corporations Act, unconscionable conduct, misconduct or dishonest;
3. judgment against the franchisor or a franchisor party for breach of the Independent Contractors Act, a law regulating workplace relations (other than unfair dismissal) or independent contractors;
4. civil proceedings against a franchisor or a franchisor party by at least 10% or 10 franchisees of the franchisors in Australia;
5. certain other court or tribunal judgements;
6. an administrator, controller or liquidator being appointed to the franchisor or its associate;
7. a change in the intellectual property or ownership or control of the intellectual property that is material to the franchise system;
8. details of any undertaking given under the Competition and Consumer Act or orders in relation to such undertaking.

The name of the parties to the proceedings, the name of the court or tribunal, the case number and the general nature of the proceedings must be disclosed. In the case of an administrator, controller or liquidator – the name and address must be provided.

6.7. End of term arrangements

When a franchise agreement is approaching the expiry date, the franchisor must notify the franchisee in writing whether the franchisor intends to:

1. extend the agreement; or
2. enter into a new agreement.

The term of the franchise agreement determines when the notice must be given by. For example, if the term is 6 months or longer, the end of term arrangements notice must be given at least 6 months before the expiry date. If however, the term is less than 6 months, the end of term arrangements notice must be given at least 1 month before the expiry date.

Where the franchisor gives notice that it intends to extend the term, the end of term arrangements notices must include a statement "subject to subclause 16(2), the franchisee may request a disclosure document under clause 16".

6.8. Record keeping and documents

A franchisor must retain a copy of each:

1. written notice from a franchisee;
2. disclosure document;
3. document relied on to support a statement or claim,

for 6 years after it was created.

7. TERMS OF THE FRANCHISE AGREEMENT

7.1. Prohibited term – general release from liability

A franchisor must not require a franchisee agree to sign a general release of the franchisor from liability towards the franchisee or a waiver of any verbal or written representations made by the franchisor.

This requirement does not prevent a franchisor from settling a claim after a franchise agreement is entered into.

If a franchise agreement contains a general release or waiver, it is of no effect, even if it is signed by the franchisee.

7.2. Jurisdiction for settling disputes

A franchise agreement may contain a provision which states the forum for bringing a proceeding or mediation is the state or territory in which the franchised business is based.

It cannot require the forum to be outside that State or Territory. If it does, the clause is of no effect.

7.3. Costs of settling disputes

A franchise agreement must not contain a clause that requires the franchisee to pay to the franchisor the franchisor's costs in relation to settlement a dispute under the agreement. If it does, the clause is of no effect.

7.4. Restraint of trade clause

A restraint of trade clause in a franchise agreement has no effect after the agreement expires if:

1. the franchisee had given written notice to the franchisor seeking to extend the agreement on substantially the same terms as those:
 - a. contained in the franchisor's current franchise agreement; and
 - b. that apply to other franchisees or would apply to a prospective franchisee;
2. the franchisee was not in breach of the agreement or any related agreement;
3. the franchisee had not infringed the intellectual property of, or a confidentiality agreement with, the franchisor during the term of the agreement;
4. the franchisor does not extend the agreement; and
5. either:
 - a. the franchisee claimed compensation for goodwill because the agreement was not extended, but the compensation given was merely nominal amount and did not prove genuine compensation for goodwill; or
 - b. the agreement did not allow the franchisee to claim compensation for the goodwill in the event that it was not extended.

8. TRANSFER OF FRANCHISE AGREEMENT

8.1. Request for franchisor's consent to transfer

A franchisee may request, in writing, a franchisor to consent to the transfer of a franchise agreement provided the request is accompanied by all information that the franchisor would reasonable require and expect to be given to make an informed decision.

If the franchisor required further information to make an informed decision, the franchisor may, in writing, request the franchisee (or the transferee or any other person including the franchisee's lawyer or accountant) to provide the specified information.

8.2. Franchisor consent

A franchisor must respond to a request to consent to the transfer of a franchise agreement, in writing.

The response must indicate whether consent is given or not and any conditions which the consent is conditional upon.

A franchisor must not unreasonably withhold consent to the transfer of a franchise agreement.

A franchisor may reasonably withhold consent if, among other things:

1. the proposed transferee is unlikely to be able to meet the financial obligations that the proposed transferee would have under the franchise agreement;
2. the proposed transferee does not meet a reasonable requirement of the franchise agreement for the transfer;
3. the proposed transferee does not meet the selection criteria of the franchisor;
4. the proposed transferee does not agree, in writing, to comply with the obligations of the franchisee under the franchise agreement;
5. the franchisee has not paid or made reasonable provision to pay an amount owing to the franchisor;
6. the franchisee has not remedied a breach of the franchise agreement;
7. the franchisor has not received from the proposed transferee a written statement that the transferee has received, read and had a reasonable opportunity to understand the disclosure document and the Code.

8.3. Deemed consent

If the franchisor does not advise the transferee, in writing, that the franchisor does not consent to the transfer of the franchise agreement within 42 days after the later of:

1. the date the request is made; and
2. if the franchisor requests further information, the date the information is provided to the franchisor,

then the franchisor is taken to have given consent and that consent cannot be revoked.

8.4. Revoking consent

Provided the franchisor is not deemed to have given consent, the franchisor may revoke consent within 14 days after giving consent by advising the franchisee in writing the consent is revoked and the reasons why consent has been revoked.

9. TERMINATION OF FRANCHISE AGREEMENT

9.1. Cooling off period – 7 days

A franchisee may terminate a franchise agreement or an agreement to enter a franchise agreement within 7 days after the earlier of:

1. entering into the agreement; and
2. making a payment under the agreement.

The 7 day cooling off period does not apply to a transfer, renewal or extension of an existing franchise agreement.

If a franchisee terminates during the cooling off period, the franchisor must, within 14 days repay all payments made by the franchisee to the franchisor under the agreement. However, the franchisor may deduct its reasonable expenses if the expenses or their method of calculation have been set out in the agreement.

9.2. Termination – breach by franchisee

If a franchisee breaches a franchise agreement and the franchisor proposes to terminate the franchise agreement, the franchisor must:

1. give to the franchisee reasonable notice, in writing, that the franchisor proposes to terminate the franchise agreement because of the breach;
2. tell the franchisee what the franchisor request to be done to remedy the breach; and
3. allow the franchisee a reasonable time to remedy the breach.

In relation to “reasonable time”, the franchisor does not have to allow more than 30 days.

If the breach is remedied in accordance with the breach notice within the stipulated timeframe, the franchisor cannot terminate the franchise agreement because of that breach.

9.3. Termination – no breach by franchisee

If the franchisor has a right under a franchise agreement to terminate it before the expiry date and without the franchisee's consent, even though the franchisee is not in breach of it, the franchisor must first give reasonable written notice of the proposed termination and the reasons for it to the franchisee.

9.4. Termination – special circumstances

A franchisor may terminate a franchise agreement, if the franchise agreement gives the franchisor the right to terminate the agreement should the franchisee:

1. No longer holds a licence that the franchisee must hold to carry on the franchised business;
2. Becomes bankrupt, insolvent under administration or a Chapter 5 body corporate;
3. In the false of a franchisee that is a company – the company becomes deregistered by ASIC;
4. Voluntarily abandons the franchised business or the franchise relationship;
5. Be convicted of a serious offence;
6. Operate the franchised business in a way that endangers public health or safety; or
7. Acts fraudulently in connection with the operation of the franchised business.

9.5. Termination – mutual agreement

Provided the franchise agreement expressly permits it, the franchisor may terminate the franchise agreement, if at the time of termination, the franchisor and the franchisee mutually agree to the agreement's termination.

10. CAPITAL EXPENDITURE

A franchisor must not require a franchisee to undertake significant capital expenditure in relation to a franchised business during the term of the franchise agreement.

Significant capital expenditure does not include the following:

1. expenditure disclosed to the franchisee in the disclosure document that is given to the franchisee before:
 - a. entering into or renewing the agreement; or
 - b. extending the term or scope of the agreement;

2. if expenditure is to be incurred by all or a majority of franchisees, expenditure approved by a majority of those franchisees;
3. expenditure incurred by the franchisee to comply with legislative obligations;
4. expenditure agreed by the franchisee;
5. expenditure that the franchisor considers is necessary as capital investment in a franchised business, justified by a written statement given to each affected franchisee of the following:
 - a. the rationale for making the investment;
 - b. the amount of capital expenditure required;
 - c. the anticipated outcomes and benefits; and
 - d. the expected risks associated with making the investment.

11. MARKETING AND ADVERTISING FEES

A franchisor must maintain a separate bank account for marketing fees and advertising fees contributed by franchisees.

If a franchisor operates one or more units of a franchised business, the franchisor must pay marketing fees and advertising fees on behalf of each unit on the same basis as other franchisees.

Despite the terms of a franchise agreement, marketing fees or advertising fees may only be used to:

1. Meet expenses that:
 - a. Have been disclosed to franchisees in the disclosure document;
 - b. Are legitimate marketing or advertising expenses; or
 - c. Have been agreed to by a majority of franchisees;
2. Pay the reasonable costs of administering and auditing a marketing fund.

12. DISCLOSURE OF FORMER FRANCHISEE DETAILS

A former franchisee may give a franchisor a written request that the former franchisee's details not be disclosed to a prospective franchisee.

If a former franchisee makes this type of request, the franchisor must not disclose the former franchisee's details to a prospective franchisee.

A franchisor must not engage in conduct with the intention of influencing a former franchisee to make, or not make, such a request.

13. ASSOCIATION OF FRANCHISEES

A franchisee must not engage in conduct that would restrict or impair a franchisee or a prospective franchisee's:

1. freedom to form an association; or
2. ability to associate with other franchisees or prospective franchisees for a lawful purpose.

14. DISPUTE RESOLUTION

14.1. Internal dispute resolution

A franchise agreement must provide for a complaint handling procedure that complies with the Code.

14.2. Resolving disputes

A party to a franchise agreement who has a dispute with another party to a franchise agreement may take action:

1. under the agreement's complaint handling procedure; or
2. in accordance with the procedure set out in the Code.

14.3. When a party is taken to be trying to resolve a dispute

A party will be taken to be trying to resolve a dispute if the party approaches the resolution of the dispute in a reconciliatory manner, including doing any of the following:

1. Attending and participating in meetings at reasonable times;
2. Not taking action during the dispute, including by providing inferior goods, services, or support, which has the effect of damaging the reputation of the franchise system;
3. Not refusing to take action during the dispute, including not providing goods, services or support, if the refusal to act would have the effect of damaging the reputation of the franchise system; or
4. If a mediation process is being used to try to resolve the dispute:
 - a. Making the party's intention clear, at the beginning of the process, as to what the party is trying to achieve through the process; and
 - b. Observing any obligations relating to confidentiality that apply during or after the process.

14.4. Right to bring proceedings

The dispute resolution section of the Code does not affect the right of a party to a franchise agreement to bring legal proceedings, whether under the agreement or otherwise.

15. INTERNAL COMPLAINT HANDLING PROCEDURE

15.1. Notification of dispute

The complainant must tell the respondent in writing:

1. the nature of the dispute;
2. what outcome the complainant wants; and
3. what action the complainant thinks will resolve the dispute.

The parties should then try to agree about how to resolve the dispute.

If the parties cannot agree how to resolve the dispute within 3 weeks, either party may refer the matter to a mediator for mediation under:

4. the franchise agreement; or
5. the Code.

If the parties cannot agree on who should be the mediatory, either party may ask the mediation adviser, who is appointed by the Minister, to appoint a mediator.

15.2. Mediation

A mediator appointed for a dispute may decide the time and place for mediation in Australia.

The parties must attend the mediation.

A party is taken to attend a mediation if the party attends or is represented by a person who has the authority to enter an agreement to settle the dispute on behalf of the party.

The parties must try to resolve the dispute.

The mediator must advise the mediation adviser within 28 days that the mediation has started.

16. CODE COMPLAINT HANDLING PROCEDURE

16.1. Notification of dispute

The complainant must tell the respondent in writing:

1. the nature of the dispute;
2. what outcome the complainant wants; and
3. what action the complainant thinks will resolve the dispute.

The parties should then try to agree about how to resolve the dispute.

If the parties cannot agree how to resolve the dispute within 3 weeks, either party may refer the matter to a mediator for mediation under:

4. the franchise agreement; or
5. the Code.

If the parties cannot agree on who should be the mediatory, either party may ask the mediation adviser, who is appointed by the Minister, to appoint a mediator.

16.2. Mediation

A mediator appointed for a dispute may decide the time and place for mediation in Australia.

The parties must attend the mediation.

A party is taken to attend a mediation if the party attends or is represented by a person who has the authority to enter an agreement to settle the dispute on behalf of the party.

The parties must try to resolve the dispute.

The mediator must advise the mediation adviser within 28 days that the mediation has started.

16.3. Termination of mediation

If a dispute has not been resolved within 30 days after mediation commences, the mediator may terminate the mediation at any time unless the mediator is satisfied that a resolution of the dispute is imminent.

If either party asks the mediator to terminate the mediation, the mediator must do so and must issue a certificate stating:

1. the names of the parties;
2. the nature of the dispute;
3. that the mediation has finished; and
4. that the dispute has not been resolved.

The mediator must give the certificate to the mediation adviser and each of the parties to the dispute.

16.4. Costs of mediation

If the mediation is triggered under the Code (as opposed to the internal complaint handling procedure), the parties are equally liable for the costs of mediation, which include the cost of:

1. the mediator;
2. room hire;
3. any additional input (including expert reports) agreed by both parties to be necessary to conduct the mediation.

Naturally, each party must pay their own costs of attending the mediation.

17. MEDIATION ADVISER AND APPOINTMENTS

17.1. Mediation adviser

The Minister has the power to appoint the mediation adviser.

The Mediation Adviser is a senior officer of the Department of Employment, Skills, Small and Family Business.

The office of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) provides administrative support to the Adviser. If a case before ASBFEO requires a compulsory appointment of a mediator, ASBFEO will refer the party to the Franchising Mediation Advisor.

17.2. Appointment period – 14 days

Within 14 days of a referral under the Code, the mediation adviser must appoint a mediator for the dispute.

Contact us

Phone: 1300 068 736

Fax: 07 4632 6600

Email: info@murdochs.com.au

ABN 55 907 562 402

murdochs.com.au

m Think Better!
lawyers

Disclaimer: Every effort is made to ensure the accuracy of the information provided in our publications. However, information should not be used or relied upon as a substitute for legal advice.

Individual liability limited by a scheme approved under professional standards legislation.