

2.3 Checklist—disclosure

Am I a franchisor?

You are a franchisor if you:

- grant a franchise or
- otherwise participate in a franchise as a franchisor or
- are a subfranchisor in relation to a subfranchisee or
- are a master franchisee in a master franchise system or
- are a master franchisee in relation to a franchisee.

Do I have a franchise agreement?

A franchise agreement is an agreement (written, verbal or implied) between a franchisor and a franchisee that has all the following characteristics:

- one party (the franchisor) grants another party (the franchisee) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, suggested or controlled by the franchisor or their associate
- the franchise business is substantially or materially associated with a trademark, advertising or commercial symbol owned, used, licensed or specified by the franchisor
- the franchisee is required to pay, or agree to pay, a fee to the franchisor before starting or continuing the business.

When must I create a disclosure document?

You must create and maintain a disclosure document to issue to prospective franchisees and when proposing to renew or extend the scope or term of a franchise agreement.

You must also create a disclosure document relating to the franchise agreement no later than four months after the end of the financial year (that is, between 1 July and 31 October each year).

How do I create a disclosure document?

When the franchise expects to have an annual turnover of more than \$50 000 at any time during the franchise agreement, your disclosure document must be in accordance with the long-form disclosure document set out in annexure 1 of the code. When the franchise expects to have an annual turnover of less than \$50 000, your disclosure document may be in accordance with either the short-form disclosure document (see annexure 2) or the long-form disclosure document (see annexure 1).

A disclosure document may also contain other information, in a section headed 'Other relevant disclosure information'.

When must I give a disclosure document and to whom must I give it?

You must give a copy of your current disclosure document (and a copy of the franchise agreement in the form in which it is to be executed) to:

- a person who proposes to become a franchisee
- a franchisee proposing to renew or extend the scope or term of a franchise agreement.

Where a person proposes to become a franchisee, you must give them a copy of the code, the franchise agreement in the form in which it is to be executed and the relevant disclosure document at least 14 days before they either:

- enter into a franchise agreement or an agreement to enter into a franchise agreement
- pay any non-refundable money or other valuable consideration to you or your associate in connection with such an agreement.

Where a franchisee proposes to renew or extend a franchise agreement, you must give them a copy of the code, the franchise agreement in the form in which it is to be executed and the relevant disclosure document at least 14 days before renewal, extension, or extension of the scope of the agreement.

You must provide a franchisee with a current disclosure document within 14 days of their written request. A franchisee can request a disclosure document only once in any 12-month period.

If a master franchisee proposes to grant a subfranchise to a prospective subfranchisee, the franchisor and the master franchisee must provide the prospective subfranchisee with either:

- a disclosure document from the franchisor for the master franchise *and* a disclosure document from the master franchisee for the subfranchise
- a joint disclosure document that details the respective obligations of the franchisor and the master franchisee in the operation of the franchise.

When must I give information in addition to a disclosure document?

Where you have given a short-form disclosure document (see annexure 2) and the franchisee asks you to provide them with certain information as outlined below (referred to in annexure 1), you must provide that information to the franchisee. This may include:

- information about the relevant business experience of each officer of the franchisor
- the name of the agent, where you must make payments to an agent in connection with the introduction or recruitment of a franchisee
- information about existing franchises such as:
 - the number, locations and contact details, and when each started operating the franchised business, or
 - if there are more than 50 franchises, the location and contact details of each franchisee in the state, region or metropolitan area in which the franchise is to be operated
- information about past franchises such as:
 - the number of franchised businesses that were transferred, terminated, bought back or not renewed in the last three financial years
 - the name, location and contact details of each of the former franchisees who ran these businesses, if the information is available

- details of your requirements for the supply of goods or services to the franchisee (e.g. whether the franchisee will be offered the right to be supplied with the whole range of products you supply)
- details of your requirements for the supply of goods or services by the franchisee (e.g. whether the franchisee must supply the whole range of goods and services of the franchise)
- your policy as franchisor, or that of your associate, regarding the site to be occupied by the franchise and the territory in which the franchise will operate
- whether the proposed territory or site of the franchise was the territory or site of a previous franchise granted by the franchisor and, if so, details of the previous franchise, including the circumstances in which the previous franchisee ceased to operate
- the conditions of financing arrangements offered or required by you
- references to the conditions of the franchise agreement that deal with certain matters such as the term, variation, renewal or extension and termination of the franchise agreement
- any obligations for the franchisee to enter into other agreements (e.g. leases, subleases, hire purchase agreements or security agreements)
- earnings information about the franchise, based on reasonable grounds
- updates on ‘materially relevant facts’.

If there is other information relevant to the franchise that is not covered by the headings in the disclosure document templates, you should include it in the disclosure document under the heading ‘Other relevant disclosure information’.

What are the ‘materially relevant facts’ I must disclose?

If they are not already mentioned in the disclosure document, you must disclose issues listed in the code as materially relevant facts within a reasonable time (not more than 14 days) of becoming aware of them. Materially relevant facts include:

- a change in the franchisor’s majority ownership
- details of criminal and civil legal proceedings involving the franchisor
- an award in arbitration against the franchisor
- the existence and content of undertakings or orders under s. 87B of the Act given by or made against the franchisor
- insolvency matters.

More detailed information about the requirements to disclose materially relevant facts is on page 23.

You should seek advice from your legal or business advisers regarding action relating to the circumstances listed above. You should have procedures in place to ensure disclosure not only at the time of entering an agreement but also on an ongoing basis so that your franchisees are kept up to date on such matters.

What other responsibilities do I have before entering into a franchise agreement?

Before you enter into, extend or renew, or receive any non-refundable payment relating to a franchise agreement or an agreement to do any of these things, you will need to obtain a written statement from the prospective franchisee indicating that they have received, read and had a reasonable opportunity to understand the disclosure document and the code.

You must not enter into a franchise agreement before you have received a statement, signed by the prospective franchisee, confirming that they:

- (a) have been given advice about the proposed franchise agreement by:
 - an independent legal adviser or
 - an independent business adviser or
 - an independent accountant, or
- (b) have been given that kind of advice about the proposed franchise agreement or franchised business, or
- (c) have been told that they should obtain advice of that kind but have decided not to seek it.