

## Franchising Bill 2010

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Western Australia

LEGISLATIVE ASSEMBLY

*(Introduced by Mr Peter Abetz, MLA)*

*(As amended during consideration in detail)*

**Franchising Bill 2010**

**A Bill for**

**An Act to regulate the conduct of people who are about to enter or who are parties to franchise agreements and for related matters.**

The Parliament of Western Australia enacts as follows:

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**Part 1 — Preliminary matters**

**1. Short title**

This is the *Franchising Act 2010*.

**2. Commencement**

This Act comes into operation as follows —

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on the day after that day.

**3. Terms used**

(1) If a term is given a meaning in the Franchising Code of Conduct (WA), it has the same meaning in this Act, unless the contrary intention appears.

(2) In this Act, unless the contrary intention appears —

**Commissioner** has the meaning given to that term by the *Fair Trading Act 2010* section 6;

**Commonwealth Code** means the Franchising Code of Conduct set out in the Schedule to the *Trade Practices (Industry Codes — Franchising) Regulations 1998* (Commonwealth) as in force from time to time;

**Franchising Code of Conduct (WA)** means the provisions that apply because of section 7;

**renew**, in relation to a current WA franchise agreement, means —

- (a) to renew or extend the current agreement, whether or not for the first time and whether or not pursuant to a written agreement by the franchisor to renew or extend the current agreement, and irrespective of whether or not there is a contractual right of renewal or extension, and irrespective of any terms in the WA franchise agreement to the contrary; or

- 
- 1 (b) to enter into a new WA franchise agreement, whether or  
2 not pursuant to a written agreement by the franchisor to  
3 enter into a new agreement, and irrespective of whether  
4 or not there is a contractual right to a new agreement,  
5 and irrespective of any terms in the WA franchise  
6 agreement to the contrary, under which —
- 7 (i) the franchisee under the current agreement is the  
8 franchisee under the new agreement; and
- 9 (ii) the new agreement has effect when the current  
10 agreement expires; and
- 11 (iii) the business conducted under the current  
12 agreement continues under the new agreement;
- 13 ***WA franchise agreement*** has the meaning given by section 4.

14 **4. Term used: WA franchise agreement**

- 15 (1) A franchise agreement (as defined in the Franchising Code of  
16 Conduct (WA)) is a ***WA franchise agreement*** for the purposes  
17 of this Act if the agreement relates to the conduct of a franchise  
18 business in, or substantially in, Western Australia.
- 19 (2) For the purposes of subsection (1), a franchise agreement is a  
20 ***WA franchise agreement*** —
- 21 (a) whether it is entered into before or after this Act  
22 commences; and
- 23 (b) whether it is entered into in or outside Western Australia  
24 or the Commonwealth; and
- 25 (c) even if the law governing it is not the law of Western  
26 Australia.
- 27 (3) This Act does not apply to agreements which are excluded  
28 under sections 5(3)(a) and (b) of the Franchising Code of  
29 Conduct.

1 **5. Concurrent operation of laws of other places not affected**

2 This Act is not intended to exclude or limit the concurrent  
3 operation of any law of the Commonwealth, another State, a  
4 Territory or a place outside the Commonwealth.

5 **6. Extra-territorial application**

6 This Act, so far as possible, applies to —

- 7 (a) acts, transactions and matters done, entered into or  
8 occurring outside, or partly outside, Western Australia  
9 or Australia in relation to WA franchise agreements; and  
10 (b) acts, transactions and matters (wherever done, entered  
11 into or occurring) that would, apart from this Act, be  
12 subject to the law of the Commonwealth, another State,  
13 a Territory or a place outside the Commonwealth.

1           **Part 2 — Franchising Code of Conduct (WA)**

2   **7. Commonwealth Code applies in WA**

3           The provisions of the Commonwealth Code —

- 4           (a) apply as a law of Western Australia; and  
5           (b) as so applying, may be referred to as the Franchising  
6           Code of Conduct (WA).

7   **8. Franchising Code of Conduct (WA), interpretation of**

8           (1) The *Acts Interpretation Act 1901* (Commonwealth) applies to  
9           the Franchising Code of Conduct (WA).

10          (2) The *Interpretation Act 1984* does not apply to the Franchising  
11          Code of Conduct (WA).

12   **9. Contravening Franchising Code of Conduct (WA)**

13          (1) A person who proposes to be or is a party to a WA franchise  
14          agreement must not contravene the Franchising Code of  
15          Conduct (WA).

16          (2) A contravention of subsection (1) is not an offence.

1 **Part 3 — Duties of people involved in franchising**

2 **10. Duties are additional**

3 The duties under this Part are in addition to any duties under  
4 this or any other law and in addition to any rights or obligations  
5 under the WA franchise agreement and apply irrespective of any  
6 terms in the WA franchise agreement to the contrary.

7 **11. Duty to act in good faith etc.**

8 (1) In this section —

9 ***act in good faith*** includes to act fairly, honestly, reasonably and  
10 cooperatively.

11 (2) A person who proposes to be or is a party to a WA franchise  
12 agreement must act in good faith —

13 (a) in any dealing or negotiation in connection with —

14 (i) entering into or renewing the agreement; or

15 (ii) the agreement; or

16 (iii) resolving, or attempting to resolve, a dispute  
17 relating to the agreement;

18 and

19 (b) when acting under the agreement.

20 (3) A contravention of subsection (2) is not an offence.



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## Part 4 — Enforcement and remedies

### 12. Civil monetary penalties

- (1) If, on an application made by the Commissioner or any other person, the Supreme Court or the District Court is satisfied on the balance of probabilities that a person has, by any act or omission, done any of the following —
- (a) contravened this Act;
  - (b) attempted to contravene this Act;
  - (c) aided, abetted, counselled or procured a person to contravene this Act;
  - (d) induced or attempted to induce a person, whether by threats, promises or otherwise, to contravene this Act;
  - (e) been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by another person of this Act;
  - (f) conspired with others to contravene this Act,
- the court may order the person to pay to the State a monetary penalty for each act or omission.
- (2) The court must not order the person to pay a monetary penalty for an act or omission if, under the *Competition and Consumer Act 2010* (Commonwealth) or the *Fair Trading Act 2010*, the person has been ordered to pay a pecuniary penalty for the act or omission.
- (3) The monetary penalty must be an amount that the court decides is appropriate having regard to all relevant matters including but not limited to these —
- (a) the nature and extent of the act or omission concerned;
  - (b) any loss or damage suffered as a result of the act or omission;
  - (c) the circumstances in which the act or omission occurred;

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- 1 (d) whether the person ordered to pay the penalty has  
2 previously been found by a court, in proceedings  
3 relating to a contravention of this Act, the *Fair Trading*  
4 *Act 2010* or the Commonwealth Code, to have done any  
5 similar act or made any similar omission.
- 6 (4) The monetary penalty ordered to be paid by a person must not  
7 exceed —
- 8 (a) if the person is a body corporate, \$100 000 for each act  
9 or omission;
- 10 (b) if the person is not a body corporate, \$10 000 for each  
11 act or omission.
- 12 (5) An order made under this section is taken to be a monetary  
13 judgment for the purposes of the *Civil Judgments Enforcement*  
14 *Act 2004* and the Commissioner, or a person authorised to do so  
15 by the Treasurer, may take proceedings under that Act on behalf  
16 of the State to enforce the order.
- 17 (6) Any money paid to the State under an order made under this  
18 section must be credited to the Consolidated Account.

19 **13. Injunctions**

- 20 (1) The Commissioner or any other person may apply to the  
21 Supreme Court for an injunction against a person who has, by  
22 any act or omission, or would have by any proposed act or  
23 omission, done any of the following —
- 24 (a) contravened this Act;
- 25 (b) attempted to contravene this Act;
- 26 (c) aided, abetted, counselled or procured a person to  
27 contravene this Act;
- 28 (d) induced or attempted to induce a person, whether by  
29 threats, promises or otherwise, to contravene this Act;
- 30 (e) been in any way, directly or indirectly, knowingly  
31 concerned in, or party to, the contravention by another  
32 person of this Act;

- 1 (f) conspired with others to contravene this Act.
- 2 (2) If the Commissioner makes an application under subsection (1),  
3 the court cannot require the applicant to give an undertaking as  
4 to damages.
- 5 (3) On an application made under subsection (1), the court —
- 6 (a) may issue an interim injunction against the person  
7 pending the determination of the application;
- 8 (b) if it is satisfied the person is or is not doing, or proposes  
9 to do or not to do, any act or omission described in that  
10 subsection, may issue an injunction against the person;
- 11 (c) if the parties to the application consent, may issue an  
12 injunction against the person without being so satisfied.
- 13 (4) The court may at any time amend or cancel an injunction or  
14 interim injunction issued under this section.

15 **14. Redress orders**

- 16 (1) In this section —
- 17 *redress order*, in relation to loss or damage suffered by a  
18 person, means any order a court considers will wholly or partly  
19 compensate the person for the loss or damage or will prevent or  
20 reduce the loss or damage, including but not limited to —
- 21 (a) an order described in the *Competition and Consumer*  
22 *Act 2010* (Commonwealth) section 87(2);
- 23 (b) any ancillary, consequential or interim order, including  
24 but not limited to orders as to the preparation and  
25 execution of documents.
- 26 (2) These persons may apply for a redress order —
- 27 (a) a person who has suffered, or is likely to suffer, loss or  
28 damage as a result of an act or omission described in  
29 section 12(1) or 13(1);
- 30 (b) the Commissioner on behalf of one or more such  
31 persons with the written consent of each of them.

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- 1 (3) An application for a redress order may be made in the course of  
2 proceedings commenced under section 12 or 13.
- 3 (4) An application for a redress order cannot be made more than  
4 6 years after the date on which the act or omission described in  
5 section 12(1) or 13(1) occurs.
- 6 (5) If, on an application made under this section, the court is  
7 satisfied a person has suffered, or is likely to suffer, loss or  
8 damage as a result of an act or omission described in  
9 section 12(1) or 13(1), the court may make a redress order  
10 against any person who did the act or omission.
- 11 (6) The court may make a redress order whether or not it grants any  
12 remedy under section 12 or 13.

13 **15. Damages for harm due to contravention of this Act**

14 A person who suffers loss or damage as a result of an act or  
15 omission of another person that contravenes this Act has a cause  
16 of action against that person for damages for the loss or damage.

