

15 February 2013

Franchising Code Review Secretariat
Department of Industry, Innovation, Science, Research and Tertiary Education Small
Business Division
GPO Box 9839
Canberra ACT 2601

By Email to: franchisingcodereview@innovation.gov.au

Dear Sir or Madam

Submission to Mr Alan Wein in relation to the Department of Industry, Innovation, Science, Research and Tertiary Education, Discussion Paper: Review of the Franchising Code of Conduct 2013.

As a franchise consultant and a prior franchisor of 3 national franchise brands I am well placed to observe the effectiveness of the Franchising Code of Conduct (Code). My impression is that the Code and the disclosure process work well although can always be improved as any industry code can no doubt be. The review will undoubtedly improve the effectiveness of the Code further.

I have had input into other submissions to the review and my views in relation to the terms of reference are included in those. As a long term franchise sector participant however I would like to submit to you three recommendations in relation to franchise sector regulation. Raising these at a time coinciding with your review would seem to be timely.

1. Franchisor Registration

It is my strong belief that franchisors should be required to be registered prior to granting a franchise. Existing franchisors should be required to be registered retrospectively. One of the tests when defining a franchisor would be that they are required to comply with the Code rather than being a franchisor by name only but not technically. Similarly those referring to themselves as licensors but yet are technically franchisors will also require registration.

There are several advantages of franchisor registration. By way of example, the ACCC could use the data on the franchise register to conduct truly random audits. It is my understanding that to date audits are only conducted on those franchise systems that are the subject of a complaint to the ACCC. A register would allow the ACCC to proactively arrange random audits as they would be aware of all sector participants. Communication of this to registrants will increase the effectiveness of the audits as they act as a deterrent to improper activity.

A register will allow for the accurate collection of statistics and correspondingly the size of the sector and other useful information, some of which could be used by Government for educational and economic reasons. Currently the most authoritative research is conducted by an Australian University however identifying franchisors is by industry research rather than from official records. Several representatives from Government agencies I have spoken with were surprised no franchise register exists.

There are numerous examples of registration in other industries such as building and financial services for example. To obtain a list of all registered builders in Australia is not difficult. Suspending the registration of a builder is also not difficult. Without registration they cannot conduct business without rectifying the matter causing suspension. The same process could be used for franchisors. A franchisor may not be permitted to enter into a franchise agreement whilst registration is suspended.

The majority of franchisees receive advice on the franchise agreement they are considering entering in to along with the franchisors disclosure document. I propose that the franchisor's registration number should appear on the front of the disclosure document or at least within it. A lawyer or any other advisor could use this requirement as an instant assessment point i.e. if a registration number does not appear the franchisee is advised not to proceed until the fault is rectified should the franchisor indeed be registered. An internet search mechanism to confirm current registration status could also be developed.

2. End of Term arrangements

The concept of franchising is based upon the premise that the franchisor grants the right to a franchisee to conduct the business for a period of time. Upon expiration the franchisee has no further rights and no right to any compensation. Changing this premise fundamentally changes franchising and would have tremendous ramifications for the sector.

Compensating a franchisee upon leaving the franchise system creates significant franchisor financial liability. My concern is that a requirement to compensate franchisees upon exit reduces the ability of a franchisor to sell their business. A potential purchaser would need to be advised of the upcoming term expiries and the estimated compensation payments. That

liability would likely discourage them from purchasing the business as unlike the existing owner, they cannot offset these payments against past profitability. The cost of the upcoming payments would be seen to be in addition to the purchase price of the business.

3. Disclosure Document amendment

There has been mention over the past few years of a proposal to introduce a requirement for a franchisor to provide a prospective franchisee with a “plain english document”. Whilst I do not support that in its’ entirety I do support a variation of that.

The current requirement in the Code is for a disclosure document to contain a statement (at 1.1 (e)) setting out many of the franchisees rights, obligations and recommendations that they conduct thorough due diligence. I do not believe this statement is considered and acknowledged to the level it should be by prospective franchisees. It is however some of the most important content in the document.

The statement at 1.1 (e) could be amended to add further relevant content and therefore act as a quasi “plain english document”. For example the statement should explain clearly, in plain english, the effect of the franchise term ending. This would be the best way to reinforce and clarify the effect of the term ending and would avoid the need to address it elsewhere in the disclosure document.

Acknowledgement by the franchisee of having read and understood the statement should be made separately by signing off on the statement (separately to the disclosure document receipt). The franchisor and franchisee should both retain a copy of the signed statement.

Thank you for the opportunity to submit the foregoing to your review. Please contact me should you require clarification of any of the foregoing or seek any more input to your review.

Yours faithfully

Dean Franks
Director