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Our ref: FrLC/KB&JG

Franchising Review Secretariat Unit
Small and Family Business Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: franchisingreview@treasury.gov.au

Dear Franchising Review Secretariat Unit

Review of the Franchising Code of Conduct

Thank you for the opportunity to provide a submission to the Review of the Franchising Code of Conduct.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This submission has been drafted with the assistance of the QLS Franchising Law Committee, whose members have substantial expertise in this area.

We have reviewed the consultation paper and have set out our answers to the specific questions below, including some key issues that are outlined in answer to question 1.

GENERAL QUESTIONS

1. Are there any general observations you want to make about the regulatory framework?
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1.1 Retention of the Code

The prevailing view of our members is that the Franchising Code of Conduct remains fit for purpose and should be retained.

1.2 Further reviews

We note that several reviews and inquiries have been conducted into the sector in recent years. Typically, the review period is once every 5 years and this is the case in other areas, and for other pieces of legislation. The rationale for this timeframe is to allow recommendations to be implemented and to monitor the effect once this has occurred.

For each review or inquiry in relation to franchising, various stakeholders have provided feedback on the terms of references and their experiences with the legislation and other issues. These reviews and inquiries do yield positive change. However, there is a limit to their effectiveness if they are conducted too frequently. The sector needs time to comprehend and implement the changes, which can be timely and costly. There is a risk of over-burdening people and business such that there is a reluctance to embrace reform.

From the perspective of legal advisors, the work that parties need to do understand and implement the constant reforms can be considerable and advising clients on the outcomes of each review also adds to costs.

1.3 Franchise Disclosure Register ineffectiveness

There are a number of issues surrounding the completion and use of the Franchise Disclosure Register (**Register**) which we have outlined in our answer to question 9. It is critical that these issues are addressed to ensure a franchisor is able to comply with legislative requirements that are reasonable and not overly-burdensome. Equally, issues with the online platform and usefulness of searches for franchisees seeking to gain information about an industry sector must also be resolved.

1.4 The complexity and duplication of disclosure

In addition to review of the Register, QLS would welcome steps taken to reduce the level and duplication of disclosure that is required under the Code. In the experience of our members, the process has now become too complicated and the documentation, too extensive. The extent of documentation that a franchisee has to review can be overwhelming.

The process itself is also time-consuming. It now takes 28 days to for an unconditional agreement to be in place for a new franchise (minimum 14 days for disclosure and the 14 day cooling off period). For some, this time allows a full consideration and review to be undertaken, but for many, it prevents them from taking any steps for about a month, which increases overall costs. Additionally, the Code now requires transaction-specific disclosure which is complex, increases costs and slows down transactions.

The process to establish a franchise should be as simple as possible while still providing sufficient time for parties to consume the requisite information.

There is also a concern that volume of material, together with the complexity of some of the legal requirements (discussed throughout this submission) may lead to a reluctance to seek legal advice due to costs. A failure to seek legal advice before an agreement is entered into can lead to disputes and ultimately, further costs and other adverse impacts. QLS encourages all parties to seek legal advice, but where this advice is time-consuming and complex, franchisees may be unable or unwilling to do so.

Any practical and commercial ways to simplify the process would be welcomed. As an example, we suggest the size of a disclosure document can be reduced by removing the requirement to physically attach the Code and instead providing this in an alternate form, such as an accessible link.

1.5 Flexibility

Long term agreements and terms need sufficient flexibility to accommodate change and developing conditions. We consider flexibility in more detail throughout our submission.

Related is the need to consider emerging trends which will have an impact on how the Code is applied and we refer to our answer to question 3.

1.6 Separate framework required for NVDAs/MVDAs

There are a number of differences between general franchise agreements and those that relate to new vehicle dealership agreements (**NVDAs**) and motor vehicle dealership agreements (**MVDAs**); for example, regarding the application of “good faith” and mandatory compensation clauses.

These differences are such that consideration should be given to separating out the regulation of NDVAs and MVDAs into a separate code or regime, rather than just relying on some specific clauses in Part 5.

1.7 Amendment of specific provisions

We have suggested amendments to the Code throughout the submission. Below are some additional amendments that we submit will enhance the effective operation of the regime.

The items discussed below highlight the difficulty franchisors and franchisees face in ensuring compliance with the Code. Our members note the complexity of much of the legislation they are required to advise on. Consequently, this advice can take considerable time to prepare, which leads to increases in costs. The Code’s provisions need to be clear and practical to ensure effective compliance.

1.7.1 Inconsistency of terminology regarding end of term provisions: The Code contains terms such as “renew” and “extend” which are used inconsistently in its operative provisions (for example, in clause 23(1)(e)). These inconsistencies can lead to disputes.

The term ‘renew’ is defined in clause 4 of Code and relates to ‘renewing the agreement’. However, the term is often used in a way that assumes it relates to ‘renewing the franchise’ whether on the terms of the existing agreement or on entering into a new agreement. Elsewhere in the Code, for example in item 18.1(a), ‘renewal’ may include circumstances where an option (or legally enforceable right) has been given to the franchisee to enter into a new agreement.

A ‘holding over’ is not defined or considered a ‘renewal’, but could ‘extend the agreement’ on a short-term licence or extension of the existing term but terminable on a month-by-month or other basis.

These inconsistencies can lead franchisees to be unclear about their options. Definitions in the Code should be clear and unambiguous because they can affect the interpretation of other operative provisions.

1.7.2 Warning Statements: The warning statements in items 18.3, 18.4 and 18.5 are inconsistent and problematic. These should be amended so that information is conveyed in a clear and concise manner.

1.7.3 Timing of an audit report: A previous amendment to the Code shortened the time within which a franchisor could obtain an audit report for item 21.4. Following this change, an exemption was added into the Code to allow a franchisor to delay updating its disclosure document, but this exemption was not extended to audit reports. This means that a franchisor who applies the exemption has to incur costs for an audit report it may never need to use if it does not want to provide its financial reports.

Clauses 8(7) and 8(8) of the Code should be amended to expressly allow the franchisor to delay obtaining an audit report if it applies the exemption. In addition, item 21.4 should be amended so it recognises that if a franchisor applies the exemption in clause 8(7), then it can rely on, obtain and use an audit report if the report is obtained within 11 months after the end of the financial year. Currently, there is a 4 month period to obtain an audit report and if a franchisor misses this time, it has to give financial reports for the last 2 years.

1.7.4 Electronic signature: There is a definition in the Code of 'electronic signature' that was not removed in the last review when other electronic provisions were. It is currently not used anywhere else in the Code. We recommend that this definition could be used in an amended clause 8(4) to make it clear that a director, officer or authorised agent can sign a disclosure document, or a director's solvency statement (item 21.1(a)) or any notice required to be given to a franchisee under the Code using an 'electronic signature'. This is commensurate with many federal and state reforms modernising the way documents are executed.

1.8 Breaches of the Fair Work Act 2009 (Cth)

We are aware that some stakeholders are considering advocacy on amendments to the Code to respond to breaches of the *Fair Work Act 2009* (Cth) (**FW Act**) by franchisees, such as a statutory right to terminate. Any examination of this issue should consider whether this right should be exercised only for certain of the types of breaches; i.e. where the breach is serious and intentional.

Our preliminary view is that there should be a proportionate response to breaches, which can include the provision of a breach notice for minor breaches up to the exercising of a right to terminate under clause 29 for serious and systemic breaches. Depending on the actions of the franchisee in relation to the FW Act breaches, there may be an existing right to terminate; for example, in cases of fraud, the franchisor may be able to terminate under clause 29(1).

We note that clause 29(1) could only apply where the franchise agreement contains a clause about a right to terminate for a breach. If there is an intention to provide this right to all franchisors, then further amendment may be required; for example, by including a serious breach of the FW Act into the "serious offence" definition in the Code. Many franchise agreements already contain clauses dealing with serious offences and rely on the Code's definition.

Further, any amendment will also need to deal with clause 27(4) which prohibits a termination where the franchisee has remedied the breach. If the situation involves serious and systemic breaches, it may still be reasonable to terminate despite the breach of the FW Act being remedied.

1.9 Restraints of trade

Clause 23 of the Code provides that a restraint of trade clause will have no effect if the agreement is not extended, subject to a number of conditions in the clause being met.

A number of reviews have previously considered this issue, including whether a restraint of trade clause is to have no effect where the agreement *did* contain an option to extend or renew and the franchisor *chose not to* exercise this (and no compensation was paid to the franchisee) or, whether the clause should have no effect in circumstances where *there was no option* in the agreement and the agreement was not renewed or extended (in these cases, there is no compensation payable as the agreement simply came to an end).

It appears that clause 23 is not limited to the first scenario. We note the following from the Explanatory statement:

*"Clause 23 is intended to provide relief in special circumstances where a franchisee, through no fault of its own, has not had its franchise agreement extended by the franchisor."*¹

This may not align with the recommendations set out in the 2013 review report² and in any event, we query the clause's current effectiveness in providing a benefit to the franchisee in either scenario. For example, clause 23(1)(a)(i) and (ii) could be in conflict, depending on the agreement at the time of expiry, and may also not align with subclause (d). We also reiterate our comments about the definitions of "extend" and "renew" being inconsistent throughout the Code. This clause exemplifies the problems that unclear terms can create.

As all elements need to be met to satisfy the clause, it seems unlikely that a franchisee will be able to rely on it in. We recommend that the intent behind this provision be clarified and, that the clause be redrafted to ensure effectiveness.

1.10 Mandatory legal advice

Finally, we are aware of suggestions by some stakeholders that it should be an express requirement for a franchisee to obtain legal advice. QLS supports information being made available to a franchisee stipulating that it should obtain legal advice, but we do not endorse this being mandated. A statutory requirement to obtain legal advice can create unnecessary costs and other burdens for the solicitor and their client. The focus can shift to complying with the requirement, rather than providing the client with the information they need.

Instead, we call for the reforms suggested in this submission to be progressed to enable franchisees to more easily access information and legal advice.

Parties to commercial agreements are strongly encouraged to obtain legal advice before and during the transaction. This advice could be obtained on an as needed basis from qualified legal practitioners or, as part of an ongoing retainer with a law firm.

¹ *Competition and Consumer (Industry Codes--Franchising) Regulation 2014* (Sli No 168 Of 2014) Explanatory Statement, Select Legislative Instrument No. 168, 2014, Issued By The Authority Of The Minister For Small Business

² *Review of the Franchising Code of Conduct*, Mr Alan Wein, 30 April 2013

2. Is the Franchising Code fit for purpose? Should it be retained? If so, should it be remade prior to sunseting?

The Franchising Code remains fit for purpose and should be retained. It should be remade prior to sunseting, with the amendments suggested in this submission.

3. Are there any emerging trends, such as technology or cultural innovations, which would affect the operation of the Franchising Code?

The COVID-19 pandemic brought about significant changes to contracting with electronic signing platforms becoming the new normal. Execution of documents using platforms such as DocuSign are a trend and innovation that can lead to cost savings and streamlining transactions.

There are also emerging technologies, including artificial intelligence that can be used to change the way documents are prepared.

The Government should monitor how these changes will impact of the operation of franchises. Long term agreements and terms need sufficient stability to withstand any uncertainties and developing conditions. For example, a franchise agreement may not have provided for online sales by franchisees. The COVID-19 pandemic, however, necessitated a pivot to online sales for many businesses and allowed bricks-and-mortar businesses to pursue e-commerce sales. Franchise agreements need to accommodate these developments. Flexibility encourages collaboration between franchisors and franchisees allowing them to react more quickly and make decisions with more certainty.

A. THE SCOPE OF REGULATION

4. Does the general scope of coverage of the Franchising Code remain appropriate? Is the scope of coverage flexible enough having regard to the diversity of the franchising industry?

Yes. However, participants in the automotive sector are advancing compelling arguments for Government to consider prescribing a separate mandatory industry code or legislation to deal with NVDAs and the issues concerning conduct of participants that currently the Code does not address. Deeming a NVDA to be a franchise agreement to gain protection assumes that other franchisors and franchisees confront the same issues and need the same protections as this sector does. However, this is not the case and vests the future of the Code in those equipped to advocate heavily for enhanced protections within their industry.

QLS is not aware of any compelling need or call from industry stakeholders to extend Part 5 of the Code to other forms of motor vehicle dealerships such as trucks, buses and heavy equipment (agricultural) dealerships.

5. Have the amendments regarding the exclusion of cooperatives from the provisions of the Franchising Code effectively clarified that they fall outside the scope of the Code?

QLS has no comment with respect to this question.

6. What evidence is available to suggest additional protections in the Franchising Code for new car dealerships should be extended beyond new car dealerships (for example to truck, motorcycle and farm machinery dealerships)?

Many of the issues that initiated the need for the introduction of Part 5 of the Code only impact the new motor car sector, and potentially dealers in new motorcycles.

There does not appear to be obvious significant levels of disputation in the truck and heavy machinery or farm machinery dealership sectors to justify the extension of Part 5 to their dealerships. That part of the automotive sector does struggle with the concept and regulation of their businesses under the franchising regime as it (and the dealers) does not consider the businesses to be franchises.

7. Should agreements between automotive manufacturers and dealerships that relate only to service and repair work (which do not cover matters relating to vehicle sales) be considered as franchise agreements and covered by the Franchising Code protections? Why or why not?

QLS has no comment with respect to this question.

8. Has the amended definition of motor vehicle dealership effectively clarified that agency sales models remain within the scope of regulation under the Franchising Code?

Yes

B. BEFORE ENTERING INTO A FRANCHISE AGREEMENT

9. How effective are the requirements of the Franchising Code that ensure franchisors make information available to franchisees prior to entry into a franchise agreement? If possible, please comment on the effectiveness and content required for inclusion in each of the Franchise Disclosure Register, Information Statement, Key Facts Sheet and Disclosure Document.

Franchise Disclosure Register

Although our members recognise the intent behind the Register, there are several issues with its design and operation which impact its ability to achieve the purpose for which it was introduced.

One overarching issue is the amount of information required to be placed on the Register that is in addition to, and in fact a duplication of, the information already required to be given to a prospective franchisee in the disclosure document and key fact sheet. The additional costs to a franchisor in complying with the requirements to complete the Register are also unjustified if the Register fails to achieve its stated purpose due to myriad of issues.

We have outlined some of these additional issues:

- The search function is not easy to use. Our members report entering an exact name into the search function, this result not being found, but other, similar names are listed in the results instead. There is a concern and can create a disadvantage for some franchisors.
- There are also examples where a franchisor has registered in an industry class that is quite different to its competitors, so a franchisee trying to search across the same industry class is shown results that are incorrect.
- There are sometimes problems uploading information onto the Register.
- Our members report significant issues with registering their client's franchises online using myGov where the client is from overseas (e.g. New Zealand and India). It is also impossible to register a franchisor where their passport and licence do not match.
- As a result of some of the issues with the Register, there are sometimes multiple registrants for the same business.
- There appears to be inconsistent interpretations of what is to be provided:
 - This makes it difficult to compare across franchises and to work out how many franchise systems are registered.
 - One of our members noted they have taken a conservative approach to interpreting the questions and uploading the relevant documentation. This carries the burden of increased work and disclosure for their clients, in addition to putting their clients at a commercial disadvantage when others are not undertaking the same approach.
 - This results in inconsistent disclosure of costs and fees, making it difficult to compare across franchises. Further, some fees cannot be calculated up front, which makes it difficult to provide accurate information for the Register.
- Details about the date of publication, registration, and last update are not available on the Register. This information should be available to assess compliance.

- There do not appear to be appropriate checks on the documents that franchisors are uploading which is resulting in incorrect documents being uploaded to the Register (e.g. a glossy brochure instead of the key fact sheet).
- Our members are not aware of how frequently or effectively the ACCC is taking enforcement action for breaches of obligations surrounding the Register.

Recommendation

Given the increased work required to comply with obligations to update the Register, and the issues outlined above, our members call for consideration to be given to simply uploading the key fact sheet to an online portal that it is searchable, in lieu of completing a profile page with similar questions on the Register.

Some of our members have noted, however, that the information in the key fact sheet might need to be updated or tailored, particularly when it comes to costs or disclosures relevant to a transaction by transaction basis, and so a simple uploading of the document may not work in every case.

There does need to be a serious consideration that the Register is not fit for purpose and that alternatives should be pursued.

If the Register is to remain, our members would be pleased to be consulted further on options to improve its function and accessibility for both franchisees and franchisors, including in relation to the publication of guidance materials to assist in answering questions to ensure there is consistency in approach.

10. How have changes to **unfair contract terms** laws impacted franchise agreements? Is the approach in the Franchising Code to regulating certain types of contract terms still appropriate?

The unfair contract terms (UCT) regime has applied to franchise agreements since its introduction. It is also important to note that it applies subject to specific laws or certain contractual exclusions. In this regard we note the franchising regime has multiple layers of additional protections for small businesses, many of which are not available to other small businesses when contracting with larger businesses such as:

- a. mandatory disclosure of information;
- b. mandatory cooling off;
- c. mandatory end of term notices to outline the franchisor's consent at end of term;
- d. continuous disclosure of materially relevant facts;
- e. prohibitions on certain clauses and the inclusion of mandatory clauses;
- f. processes for breach, termination, transfer and dispute resolution;
- g. the obligation to give an information statements (prescribed by Government)
- h. the obligation to register on the Franchise Disclosure Register to create and update a profile;
- i. the obligation to give a disclosure document including lots of information and attach documents including mandatory warning statements, financial details (solvency declarations, financial reports or audit reports);

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- j. an express obligation of good faith (that cannot be modified or excluded) in negotiations pre-contract, during the term and on exit;
- k. a requirement for a NVDA to contain terms that are fair and reasonable) etc;
- l. prohibitions for NVDA's and compulsory acquisition and compulsory compensation (e.g. goodwill, special tools and stock).

Our members are supportive of the intention of the UCT regime, however, given the above, those who advise in respect of franchising would generally prefer to deal with UCT in a franchise agreement by express prohibition in the Code or, a process specified in the Code which must be followed to be considered to be fair, rather than a general reference in the Australian Consumer Law that does not take into account some of the unique issues a franchise arrangement may face. In particular, a term that seems unfair may, in a franchise situation, be necessary to protect a franchise network overall. Accordingly, there is an opportunity in the Code to provide greater certainty and clarity to franchisors and franchisees on what is an unfair term in these arrangements. In this respect, prohibitions or processes could relate to operations manuals, restraint of trade clauses, and changes in product services (e.g. online services) and significant system wide structural changes to the franchise.

11. Do you have any other comments on how the Franchise Code regulates the relationship between franchisors and franchisees at the point of **entry** into a franchise agreement?

Cooling-off period

In some instances, the fact that the 14 day cooling-off period is mandatory and cannot be waived can be problematic as it results in the delay of the commencement of a franchise. This causes frustration between franchisees and franchisors. This needs to be reviewed. QLS calls for a consideration that for contracts for sales and in relation to sophisticated/multi-site clients be excluded from the cooling-off period requirement or, at least, there is an ability to waive the cooling-off period.

A further issue is that the cooling-off period is different for transfers depending on whether they are an assignment or new agreement. As a cooling-off period applies to both types of transfers, QLS submits there is no logical basis for a difference in when the cooling-off period ends.

If a prospective transferee must sign a new franchise agreement, the cooling-off period should be similar to the one prescribed by clause 26A(3). Clause 26(1) should be amended so that the cooling-off period for a new transfer **ends** at the earlier to occur of:

- (a) 14 days from signing; or
- (b) the day the new franchisee takes possession and control of the franchised business.

Transaction costs

Changes to the Code have made the disclosure document so transaction-specific that it becomes difficult to manage the disclosure process without changing multiple items in a

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disclosure document, including clauses 13.3 and 13.4, item 14.10 in respect of significant capital expenditure, item 18 and item 20. This leads to greater transaction costs.

New vehicle dealership agreements

12. What impact have the 2021 changes relating to compensation and return on investment had on franchisors and franchisees entering into new vehicle dealership agreements? Where possible, please provide detail on the costs and benefits the new car dealership sector has experienced because of these changes.

QLS has no comment with respect to this question.

C. ENDURING OBLIGATIONS IN FRANCHISE RELATIONSHIPS

13. How well does the Franchising Code support franchisors and franchisees during the term of the franchise agreement? In particular, does the Franchising Code provide adequate minimum standards relating to structural and/or operational change management?

The Code does not contain express minimum standards for franchisees, however, a franchisee can request early exit from their agreement. Additionally, we note the application of the UCT regime to franchise agreements.

We refer to our comments above in relation to UCT laws and suggest consideration be given to the preferred form of regulation in this space: reliance on UCT provisions or express minimum standards.

In the course of this consideration, it should be noted that some restrictions in the Code and in the UCT regime make it difficult for a franchisor to include a general clause allowing the franchisor to adapt its model to be competitive. During the course of the agreement, there are always changes that could be made including due to technology, emerging markets and products and competitors.

With insufficient flexibility to make changes to terms, the Code can be restrictive and prevent a franchisor rolling out change (even where there is a general contractual clause allowing them to). The Code should recognise the special relationship and allow for change (together with a process to allow it to occur).

In the view of our members, it is, broadly speaking, unnecessary to change the Code to add provisions to compensate franchisees for change, to give a process for franchisees to resist change, or to give franchisees capacity to exit a franchise system without penalty if there are significant changes to the operating model or management of a franchisor. However, there may be benefit in introducing reasonable notice periods, opt out provisions and the ability to seek advice on a change, prior to it taking effect.

14. How effective are the 2021 reforms which restricted the franchisors' capacity to require a franchisee to undertake significant capital expenditure?

Our members consider these changes have made the completion of item 14 more difficult and confusing for franchisors, particularly when it comes to including information about capital expenditure in the disclosure document that is required by clause 30A. Even if some of the information required is outlined elsewhere in the item³, item 14.10, specifically, should be amended to include a clear list to ensure a franchisor is able to comply.

Our members suggest that the amendments outlined in **Appendix 1** be adopted to addresses these issues.

New vehicle dealership agreements

15. What impact have the 2021 amendments to the obligation to act in good faith in relation to new car dealerships had? Where possible, please provide detail on the costs and benefits the new car dealership sector has experienced because of these changes.

QLS does not have any comments in respect of the effect of these amendments.

D. Ending a franchise agreement

16. How effective are 2021 reforms to the Franchising Code which created a process for franchisees to formally request early exit from their franchise agreements?

Our members report that the process created by the 2021 reforms has not been extensively used. One of our members reported the new process did not assist the parties in reaching a resolution.

If the parties act reasonably, they are sometimes able to negotiate an exit from the agreement using other means.

End of term process, generally

As stated above in 1.7.1, our members consider the drafting of the end of term provisions in the Code is confusing and inconsistent. This leads to uncertainty and difficulties with providing disclosure. Given the number of disputes that occur at this time, we repeat our submission that the drafting of the definitions and operative provisions needs to be re-worked, with consultation with industry stakeholders.

³ See items 14.4 (a) to (e), 14.6 (a) to (e) or 14.7 (a) to (e)

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New vehicle dealership agreements

17. Where possible, please comment on the impact, or expected impact, of reforms to the Franchising Code which seek to ensure franchisees are paid compensation if the franchisor terminates a new vehicle dealership agreement early. Where possible, please provide detail on the costs and benefits (or expected costs and benefits) to the new car dealership sector resulting from these changes.

QLS does not have any comments to make on this issue.

E. ENFORCEMENT AND DISPUTE RESOLUTION

ACCC and enforcement

18. Is the current role of the ACCC in relation to enforcement of the Franchising Code appropriate?

We suggest the ACCC is insufficiently resourced to enable comprehensive enforcement of the Code. Our members report that some industries and alleged breaches do not appear to be pursued by the ACCC. We call for the body to be given better resources specifically to address issues in relation to franchises.

19. How useful and effective are the educational resources provided by regulators (such as from the ACCC)? Do they ensure prospective entrants to the franchising sector are sufficiently aware of their rights and responsibilities? Is the level of industry engagement appropriate?

Our members consider there are some good resources provided by the ACCC, however, some have not been updated following recent amendments.

Further, there is a need for additional information relevant to the automotive sector to be made available.

20. What has been the impact of 2022 reforms which increased certain penalties available under the Franchising Code? Particular comment is sought on penalties which were increased to the greater of \$10 million, three times the benefit obtained, or 10 per cent of annual turnover?

There has yet to be an instance where the higher penalties have been imposed. The publicity surrounding these amendments did cause some to review their materials to ensure compliance.

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Dispute resolution

21. Is the role and activity of the ASBFEO in relation to supporting dispute resolution under the Franchising Code appropriate?

The dispute resolution process generally works well. Our members report using ASBFEO without difficulties, but note also that they use private mediators in many of their matters, instead of going through the Ombudsman process.

Some of our member's clients have experienced difficulties accessing information about the dispute resolution process. While we consider there is adequate information available, further consideration could be given to its accessibility.

22. Do the dispute resolution provisions in the Code provide an effective framework for the resolution of disputes? In particular, are you aware of whether 2021 reforms relating to multi-party dispute resolution and voluntary arbitration have been utilised by participants in the franchising sector? If not, why not?

Our members consider the dispute resolution process generally works well.

They have not been involved in many multi-party disputes following the 2021 amendments. In one matter, a franchisor did not wish to participate in a multi-party dispute resolution process even though the issues were identical for all the franchisees, and they had lodged a collective bargaining form to allow negotiation of a new agreement, collectively.

Our members have no issues with the arbitration provisions remaining, even though they are not often utilised.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Chloé Kopilović
President

APPENDIX 1: ITEM 14 – SUGGESTED CHANGES

Clause 30A and Item 14.10

Amend item 14.10 of Annexure 1 so that the information set out in clause 30A(2)(a) to (d) is clearly included in Item 14.10.

Note, item 14.9 already states the information relating to a payment need only be set out once, however, item 14.9 does not refer to capital expenditure under item 14.10. In addition, item 14 does not sit well with clause 30A of the Code and what details need to be given.

Presumably, some information may be already set out with details specified under items 14.4(a) to (e), 14.6(a) to (e) or 14.7(a) to (e). but they do not appear in Item 14.10.

Recommend changes to:

Amend item 14.8 to add “or 14.10,” after “14.7”.

Amend item 14.9 to delete the word “and” between “14.3 and 14.6” and replace with “,” add after the words “14.6” the words “or item 14.10” so it is clear you only have to refer to an expenditure that is a capital expense once.

Recommend amending item 14.10 and adding a new item 14.11 (and example from clause 30A) for consistency so they read:

14.10 Capital expenditure – Clause 30A

This item applies if the franchisor requires the franchisee to incur a capital expenditure which may otherwise be considered to be a capital expense of the kind specified in Clause 30A of the Code.

Details for each capital expenditure must include:

- (a) The description of the capital expenditure;
- (b) The amount of the capital expenditure or high low range to calculate the capital expenditure;
- (c) When the capital expenditure has to be incurred;
- (d) Whether the capital expenditure is refundable and if so, under what conditions, and as much additional information as is practicable including the following:
- (e) The rationale for the capital expenditure;
- (f) The amount, timing and nature of the capital expenditure;
- (g) The anticipated outcomes and benefits of the capital expenditure; and
- (h) The expected risks associated with the capital expenditure.

Before entering into, renewing or extending the term or scope of a franchise agreement the franchisor and franchisee must discuss at least paragraphs (e) to (h) of each capital expenditure the franchisor requires the franchisee to incur and

how the franchisee considers it is likely to recoup the capital expenditure, having regard to the geographical area of operations of the prospective franchisee.

14.11 For item 14.10, if the amount of the capital expenditure cannot easily be worked out – the upper and lower limits of the amount.

[Clause 30A Example: The information could include the type of any upgrades to facilities or premises, any planned changes to the corporate identity of the franchisor's brand and indicative costs for any building materials.]