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Dear Sir/Madam,

## **SUBMISSIONS FOR REVIEW OF THE FRANCHISING CODE OF CONDUCT**

Thank for you this opportunity to provide submissions for the Franchising Code of Conduct (“**Code**”).  
Our Submissions are as follows:

### **1. Key Facts Sheet**

- 1.1. The Key Facts Sheet recently introduced creates confusion. It tries to create summaries of what can be complicated topics, for example:
  - 1.1.1. Summary of costs – a true “minimum” and “maximum” range of all possible expenses creates numbers which are not helpful but compliant. A genuine estimation may result the Franchisor being helpful, but potentially not compliant if an exceptionally inexpensive or expensive Franchise is launched.
  - 1.1.2. There are many yes and no questions which are not suitable for “yes” and “no” answers, as the Franchisor is likely to attach conditions to the topic in the Franchise Agreement, such as:
    - a) the franchisor purchasing of unsold stock, assets and equipment at the end of the lease;
    - b) restraint of trade provisions; and
    - c) selling goods online.
  - 1.1.3. There are yes and no questions which may vary from Franchise to Franchise, as not all deals are the same such as:
    - a) the length of the term of the lease; and
    - b) the franchisor having an interest in the lease.

**Recommendation:** The Key Facts Sheet is removed as a requirement, or, completely overhauled.

### **2. Disclosure Register**

- 2.1. In our experience Franchisees do not understand, have not heard of, and do not use the Disclosure Register.
- 2.2. This is an unnecessary burden on the Franchisors and has little benefit.



**Recommendation:** The Disclosure Register is closed, and Franchisor obligations for it are removed from the Code.

### 3. Confusion Around “Future Legal Expenses” 19A

*(1) A franchisor must not enter into a franchise agreement that has the effect of:*

*(a) requiring the franchisee to pay all or part of the franchisor’s costs of legal services relating to preparing, negotiating or executing the agreement or documents relating to the agreement; or*

*(b) allowing the franchisor or an associate of the franchisor to require the franchisee to pay all or part of those costs.*

*(2) Subclause (1) does not prevent the franchisor from entering into a franchise agreement that requires the franchisee to make a payment, before the franchisee starts the franchised business, of a fixed amount of dollars that:*

*(a) is specified in the agreement; and*

*(b) is stated in the agreement as being for the franchisor’s costs of legal services relating to preparing, negotiating or executing the agreement; and*

*(c) is stated in the agreement not to include any amount for the franchisor’s costs of legal services that will or may be provided, after the agreement is entered into, in relation to preparing, negotiating or executing other documents.*

It is unclear whether Franchisors are prevented from charging legal fees for future events like renewal of a franchise agreement, assignment events or breaches.

**Recommendation:** It should be clear that charging fixed costs for future events like renewal of a franchise agreement, assignment events or breaches is allowed.

### 4. Disclosure Period & Cooling-off period at 14 days

4.1. The cooling off period was recently raised from 7 days to 14 days.

4.2. Having both the Disclosure Period and Cooling-Off Period at 14 days creates confusion for potential Franchisees. It is particularly difficult to explain the difference to unsophisticated clients when English is not their first language.

4.3. We note that many Sale of Business’s result in a new Franchise Agreement (instead of an assignment), as this “cleaner” document is the frequently preferred by both Franchisees and Franchisors, and banks. In this circumstances Franchisors will not allow settlement until the cooling off period has passed. Therefore, there is a minimum of 28 days to wait for settlement from the date a franchising documents are sent.

**Recommendation:** The Cooling-Off Period should be changed from 14 days. However, the length of the Cooling-Off period should not increase as it will frequently delay Sales of Business for Franchisees.

### 5. Restraint of Trade

5.1. The Code should take a stronger stance with the ability of Franchisor’s to apply restraint of trade provisions into their Franchise Agreements.

5.2. Franchisors should have the ability to prevent ex-Franchisees from: contacting the Franchise’s customers; recruiting the Franchise’s staff; or, otherwise using their intellectual property, on commercially reasonable terms.

- 5.3. Franchisors should **not** have the ability to restrict ex-Franchisees from working in their industry for longer than a period of time the Franchisor needs to stabilise the Franchise, e.g. three months.
- 5.4. This change should not be retrospective as commercial terms will likely need to be adjusted to account for this change.

**Recommendation:** The Code should specifically give maximum periods that Franchisors can require restraint of trade in the form of a table, for example:

|   | The full term did not expire | The full term expired and the Franchisee elected not to renew* | All terms and renewals expired, and the Franchisor refused renewal* |
|---|------------------------------|--|---|
| Directly contacting customers or clients of the Franchise               | 2 years                      | 1 year   | None allowed  |
| Directly contacting staff of the Franchise to offer employment          | 1 year                       | 6 months   | None allowed  |
| Working for a competitor or a similar industry                          | 3 months                     | 3 weeks  | None allowed  |
| Working in a position that cannot reasonably be said to be a competitor | None allowed                 | None allowed   | None allowed  |

\* = Assuming that immediately before the expiry, the franchisee was not in serious breach of the agreement or any related agreement; and the franchisee had not infringed the intellectual property of, or a confidentiality agreement with, the franchisor during the term of the agreement.

This change should not be retrospective. This table could be replicated with maximum areas, however, this will likely be unnecessary if our recommended changes are implemented.

Yours sincerely,

**Minerva Law**



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