



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

3 December 2020

The Department of Industry,
Science, Energy and Resources
Small Business Franchising
10 Binara St
Canberra ACT 2601

via email: SmallBusinessFranchising@industry.gov.au

Dear Sir/Madam

Franchising Code of Conduct: exposure draft

We welcome the proposed changes to the Franchising Code of Conduct (the Code) that include additional franchising dispute resolution functions for this Office. We make the following suggestions for further improvements:

1. **Retrospective variation protections:** Retrospective and unilateral variation clauses are Unfair Contract Terms, yet the Code provides for parties to agree to vary existing agreements in this way. This will lead to pressure on franchisees to accept unfair unilateral variations and lead to disputes. As such, Subclause 31A(2)(a) should be removed.
2. **Improved marketing fund:** The appointment of a fund administrator is a promising start. However the fund would be more secure as a trust that protects franchisee contributions should a franchise system fail. The trust deed should provide for approved spending from the fund and be overseen by the fund administrator.
3. **Remove unfair imposed maximum sales prices:** Franchisor-imposed unfair maximum sales prices can make it difficult for franchisees to operate successfully. As such, imposed maximum sales prices need to be regulated. We suggest banning maximum sales prices where the imposed cost of inputs leave no room for franchisees to cover the costs unless there is an agreement to indemnify the franchisor for loss of profit resulting from the reduced sales price.
4. **Strengthened capital expenditure regulation:** Proposed capital expenditure in a renewal agreement is often used to push franchisees out of the agreement. As such, Subclause 30(2)(a)(i) should be amended to remove renewals, so that proposed capital expenditure is only permitted when entering into a new agreement.
5. **Better franchisee termination rights:**
 - a. Allowing franchisees to propose to terminate an agreement is beneficial. However, there should be clear guidelines on acceptable reasons for a franchisor to deny a proposed termination.
 - b. Franchisees should have equal termination rights to franchisors where breaches have occurred or significant changes to agreements are made.
 - c. The Code gives the franchisor the power to terminate an agreement without due cause. This creates a power imbalance that may lead to unfair consequences (such as churning and burning). Clause 28 should be amended so the circumstances that allow franchisors to cancel an agreement without a breach by a franchisee are limited to force majeure reasons.

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6. **Improved leasing rights:** There is a conflict of interest when a franchisor owns the premise they are leasing to the franchisee. This creates tension, potentially leading to disputes. As such, when a franchisor owns the leased premises, an independent administrator should manage the premises.
7. **Prevent franchisors passing on legal costs:** Franchisors should not be able to pass on legal fees to franchisees under any circumstances. Proposed subclause 19A(2) should therefore be removed.

The key facts sheet will be beneficial to increase disclosure and inform franchisees. We suggest that mock-up 1 is the most effective format. We also suggest adding a word-limited free-text option after the 'tips' sections for a franchisor to justify its response. This would place the onus on the franchisor to explain its actions and practices rather than on the franchisee to follow up the franchisor for explanation.

Furthermore, the key facts sheet should provide the number of disputes the franchisor has had in the past 12 months. The details of the disputes should not be required, however, the information about the amount of disputes will allow franchisors to be appropriately informed.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Mr Luke Collins on 02 6213 7540 or at luke.collins@asbfeo.gov.au.

Yours sincerely



Kate Carnell AO
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