

27 April 2018

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
CANBERRA ACT 2600



SWAAB Attorneys

ABN 71 028 846 652

Level 1, 20 Hunter Street
SYDNEY NSW 2000

DX 522 SYDNEY NSW

T +61 2 9233 5544
F +61 2 9233 5400

www.swaab.com.au

Dear Sirs/Mesdames

Submission in relation to the enquiry concerning the operation and effectiveness of the Franchising Code of Conduct

I am a legal practitioner who practises, amongst other things, in the area of franchising law.

I write in response to the above Committee of Enquiry's consideration of the operation and effectiveness of the Franchising Code of Conduct (**Code**)

This submission is solely directed to paragraph (e) of the Terms of Reference being *"the adequacy and operation of termination provisions in the Franchising Code of Conduct and the Oil Code of Conduct"*.

1 Summary

1.1 It is submitted that clause 27 of the Code should be amended to better facilitate termination by a franchisor of the franchise agreement in circumstances where a franchisee:

- (a) commits a breach of the franchise agreement which is not capable of remedy; or
- (b) consistently breaches their franchise agreement but remedies such breaches in accordance with notices served under the franchise agreement.

2 Clause 27 of the Code – Termination – Breach by Franchisee - Introduction

2.1 Clauses 26 to 29 of the Code create a regulatory framework for termination of the franchise agreement. Given the language used, it is strongly arguable that a termination occurring otherwise than in accordance with these provisions will constitute a breach of the Code.

2.2 For example, clause 29(2) permits a franchisor to terminate the franchise agreement without complying with clauses 27 and 28 if termination occurs with the franchisee's agreement. By implication, a franchisor cannot terminate otherwise than in accordance with clause 27 or clause 28 without the franchisee's agreement.

Contact

Richard Ottley
Partner
rbo@swaab.com.au

Our ref
140008

By post

Liability limited by a
scheme approved under
Professional Standards
Legislation



Member of Meritas
Law Firms Worldwide





2.3 I suggest that there are other circumstances where the franchisee's behaviour justifies termination and where (with appropriate safeguards), the Code should confirm that a franchisor may terminate. Two situations spring to mind:

- (a) where a franchisee breaches a franchise agreement but the breach is not capable of remedy (but does not fall within section 29); and
- (b) where a franchisee continually breaches the franchise agreement but always remedies the breach as required by the franchisor's breach notice.

3 **Breach incapable of remedy**

3.1 Clause 27 appears directed only to breaches capable of remedy and prescribes a method by which a franchisor must give the franchisee an opportunity to remedy a breach before seeking to terminate because of it. Clause 27 does not specifically address breaches incapable of remedy.

3.2 In practice, franchise agreements often provide that the franchise agreement may be terminated on reasonable notice if a default is "*incapable of remedy*".

3.3 This type of provision is practical and aligns with contract law and common sense – however, it, does not appear to fit squarely within the wording of clause 27 of the Code.

Suggestion

3.4 It is suggested that clause 27 of the Code be amended to expressly permit termination of the franchise agreement, on service of reasonable notice of the proposed termination and the reasons for it, where the franchisee has committed a breach of the franchise agreement which is incapable of remedy.

4 **Where a franchisee commits multiple breaches but remedies each breach in accordance with a breach notice**

4.1 Circumstances may exist where a "serial offender" repeatedly commits the same or a similar breach but always remedies those breaches in accordance with any breach notice served by the franchisor.

4.2 Under clause 27(4) of the Code, if a franchisee has remedied the breach then the franchisor may not terminate the franchise agreement for **that** breach. Therefore, a franchisor can be left in a situation where the franchisee's conduct falls short of the circumstances referred to in clause 29 of the Code, is capable of remedy and is remedied on every occasion.

4.3 A literal adherence to the Code may therefore leave franchisors with a time consuming and administrative burden of constantly sending breach notices to recalcitrant franchisees. The franchisee's conduct may adversely affect the franchise system (including its reputation) and, consequently, other franchisees. But the franchisor may be powerless in these circumstances.

4.4 One possible solution might be to include in the franchise agreement a provision for a defaulting franchisee to not only remedy the default but also to give a written undertaking not to permit the same or a similar default to occur within a set period after the first occurrence.

4.5 A breach of that undertaking would then be deemed (under the franchise agreement) to be a failure to comply with the original default notice, thereby giving rise to a right of termination. This is relatively complicated structuring to attempt to deal with what is an essentially

simple issue, and its efficacy is unpredictable. Such potential solution highlights the need for legislative reform.

Suggestion

- 4.6 It is suggested clause 27 of the Code be amended by the addition of a provision along the following lines:

"A franchisor may treat a breach as incapable of remedy and serve a notice terminating the franchise agreement due to such a breach where:

- (a) the franchisor has served on the franchisee a breach notice for the same or similar conduct on at least 2 previous occasions during the currency of the franchise agreement; and*
- (b) less than 2 years have elapsed since the last of those previous breach notices was served".*

5 Conclusion

- 5.1 I hope the above is of assistance. I give permission for this submission to be published as determined by the Committee.

Yours faithfully

Richard Ottley