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Office of the President

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Our ref (VK-FrLC)

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

By email: corporations.joint@aph.gov.au

Dear Committee Secretary

Effectiveness of the Franchising Code

Thank you for the opportunity to provide comments on the effectiveness of the Franchising Code. Queensland Law Society (**QLS**) appreciates being consulted on this important issue. This response has been compiled with the assistance of the QLS Franchising Law Committee, whose members have substantial expertise in this area.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 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. The QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

QLS has considered the Franchising Code and its operation generally, and in the context of the particular issues and queries raised by the Joint Committee, and provides the following advice for the committee's consideration.

Effectiveness of the Franchising Code

The Franchising Code is considered effective although it does not regulate:

(1) all of the contractual terms of a franchise relationship; or

(2) all aspects of the conduct of parties in a franchise relationship.

The Australian franchise sector often laments and asserts that it is the most regulated franchise country in the world. The Society believes that the mandatory industry code regime and regulatory oversight by the Australian Competition & Consumer Commission (**ACCC**) (including existing powers to conduct compliance checks, provision for fines and penalties for contravention of civil remedy provisions) are adequate for enforcement of the Franchising Code of Conduct (the **Franchising Code**).

The Franchising Code currently strikes a fair balance. Coupled with the provisions of the *Competition and Consumer Act 2010* (**CCA**) and other laws, it is an effective way to prevent exploitative behaviours by franchisors without discouraging the business model itself. Despite assertions by the sector, generally the cost to a franchisor of compliance with the current Code is not unduly onerous as compared to other highly regulated industries.

The disclosure document in Annexure 1 of the Franchising Code is intended to provide a minimal level of information to a prospective franchisee.

However the Society notes that:

(1) Some of the items of disclosure are still open to interpretation. The ACCC publishes a template disclosure document with 'tips' to assist a franchisor to complete a document itself without legal assistance. Some items should be reviewed to ensure they are made clearer. As a consequence, information relevant to the prospective franchisee's decision making process is not given because the item is vague or limited and does not go far enough[1];

(2) As a general rule most disclosure documents are lengthy and can be upwards of 100 pages before annexures are added. As a consequence prospective franchisees may find the extent of information overwhelming and affect their ability to absorb the relevant information to make a reasonably informed decision;

(3) In many cases, there is an inconsistency in the terminology used in a franchise agreement compared to the Franchising Code. As a consequence it can be confusing to a prospective franchisee where different terminology is used. For example the terms 'renew' and 'extend' are mutually exclusive expressions defined in the Franchising Code and apply in specific circumstances. It is not unusual for a franchise agreement to use inconsistent terminology[2] which can result in confusion when the document is prepared and how a franchisee interprets the information provided.

The Information Statement in Annexure 2 was intended to be a risk statement outlining the risks of franchising as a business opportunity before the prospective franchisee committed to proceed with the opportunity. There is no clear evidence whether the introduction of the obligation to give the Information Statement to a prospective franchisee at the earliest opportunity has provided enough warning of potential risks to a prospective franchisee about the consequences to it if a franchise business fails. Franchisees should also be encouraged to engage in prudent borrowing practices to repay debt over the term of the franchise so at end of term there is not a residual debt remaining. In many cases franchisees have not reduced their debt level and then struggle to be able to afford to refurbish the premises as a condition of the renewal.

(a) the operation and effectiveness of the Franchising Code of Conduct, including the disclosure document and information statement, and the Oil Code of Conduct, in ensuring full disclosure to potential franchisees of all information necessary to make a

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[1] For example Item 9 - Item 9.1 asks a yes-no question about whether an exclusive or non-exclusive territory is involved or the franchise is limited to a specific site. Many franchisors do not grant a territory or protective zone. As a consequence unless a territory is granted some franchisors do not answer item 9.2 and instead put not applicable. Rewording item 9 would assist to ensure that competition issues involving the right of a franchisor or its associates or other franchisees to compete with the business is properly disclosed.

[2] In some agreements where an option to renew is granted, the words 'extended term' or ' further term' are used instead of 'renewal term'. A consistency in terminology may assist prospective franchisees.

fully-informed decision when assessing whether to enter a franchise agreement, including information on:

(i) likely financial performance of a franchise and worse-case scenarios

Under the Franchising Code franchisors are not currently required to give all financial information necessary to enable a franchisee to make a "fully informed" decision. The purpose of a disclosure document is set out in the Franchising Code and differs between a document required to be given to a prospective franchisee and one given to a current franchisee. In respect to a prospective franchisee the purpose is to give information to enable them to make a "reasonably informed' decision about the franchise not a 'fully informed' one.

The Franchising Code does not make it mandatory for a franchisor:

(1) to give 'earnings information'; or

(2) to give 'earnings information' that constitutes a 'projection or forecast' - namely a representation about future financial performance of the business (a **financial performance representation**).

A franchisor may elect to do either, but in respect to a financial performance representation, faces a greater potential risk of liability (and reverse onus of proof) under the Australian Consumer Law if it does not take steps to ensure it had reasonable grounds at the time it made the financial performance representation.

Whilst it is less onerous to require a franchisor to disclose historical earnings information of its corporate stores, it may not always have access to franchisees turnover figures. In some systems where a flat fee may be payable there is no obligation to provide financial reports or details of revenue or costs.

A franchisor should not be compelled to make a financial performance representation when it does not want to.

The amount and nature of earnings information provided to prospective franchisees varies between franchise systems. Franchisors are reluctant to provide earnings information to a prospective franchisee seeking to establish a greenfield location. It is more common to see historical trading earnings information provided by the franchisor in the sale of a franchise business operated by the franchisor (or its associate) or provided by an existing franchisee on a sale.

Some franchise systems give very little costs information except that which is mandated by the Code in Item 14. It is impossible for a franchisor to estimate, forecast or project the amount of a franchisee's turnover, earnings or profit. In regard to operating costs, the Franchising Code requires a franchisor to disclose operating costs or a high low range. Because they are prepared for use across different locations those costs are not necessarily tailored for that site and may therefore not be of great assistance to a franchisee. For example, rent for a site could range from $20,000 per annum in a suburban strip shop to $100,000 per annum in a large shopping centre. This range of figures does not help a franchisee to make a decision when they are choosing a location.

Further, because the amount of expenses in the business (such as wages, cost of goods) all depend on the characteristics of each store including:

(a) size of the store;

(b) its location;

(c) the number of staff it employees and their basis of employment;

(d) the salary the franchisee wants to set for itself;

(e) the turnover of the business; and

(f) other issues;

a franchisor cannot give a franchisee all information necessary to make a fully informed decision. It is impossible to make a fully informed decision in business.

A requirement to provide financial information about the likely performance of a franchised business may have the opposite outcome to that intended. The information provided by a franchisor is, out of necessity, general in nature (in that it may cover the financial information of franchised businesses within the system with greatly varying characteristics) and may lead a franchisee to form the view that the performance of the franchised business will be better than actually eventuates. A franchisee may make important financial decisions, including level of funding, upon this financial information initially provided by the franchisor.

Even though financial information may be provided, a franchisee needs to seek independent accounting advice to evaluate the opportunity from a financial perspective and to prepare a business plan on the business opportunity from their specific situation. That accounting advice should evaluate and consider the characteristics of the actual franchised business the franchisee intends to operate whilst taking into account the general financial information provided by the franchisor as guidance.

QLS suggests that the Franchising Code should make it mandatory for all prospective franchisees to obtain accounting and legal advice before entering into a franchise agreement. It should not be mandatory in the case of a renewal, extension of the scope or term or other agreed variation (excluding transfer to a new franchisee entity) of an existing franchise agreement.

A franchisee should be required to obtain independent legal advice to, amongst other things, help to ensure an understanding of the end of term arrangements, payment requirements under the franchise agreement and the consequences of a failure to comply with the terms of the franchise agreement.

This advice should entail a full business plan and cash flow analysis being prepared by the accountant which would be based on the actual location of the business. That way the franchisee would know the amount of turnover that would be needed for the business to operate. A franchisee must take some degree of personal responsibility for its own financial decisions and seek independent advice.

The argument against having mandatory accounting advice is that it places an unreasonable expense on the prospective franchisee before entering into the franchise agreement.

QLS submits that:

(1) the process may result in better informed financial decisions being made before entering into the franchise agreement; and

(2) the expense is warranted and deductible that in comparison would be significantly less than the loss the franchisee would suffer if the business failed.

To help to ensure the independent accounting and legal advice received by a franchisee assists a franchisee in making a reasonably formed decision, a statement of independent accounting and legal advice should form a part of the Franchising Code which outlines each of the heads of advice the adviser needs to provide to a franchisee.

(ii) the contractual rights and obligations of all parties, including termination rights and geographical exclusivity,

It is noted that in previous versions of the Franchising Code, the disclosure document template did require more detailed summaries of relevant franchise agreement provisions, but the Society suggests that in balancing franchisor and franchisee interests and needs, and given the potential size a standard the disclosure document can reach and information overload that may not be beneficial, the current provisions are sufficient to provide proper disclosure, subject to the following submissions around geographical matters.

What does not seem to be recognised under the current disclosure document template is that not every franchise involves an allocated or protective territory, and even when granted, it may be conditional.

In a number of cases the franchise may be instead limited to a nominated site and granted a prime marketing area within which the franchisee must undertake primary local area marketing. There may be restrictions on others undertaking marketing within the primary local area marketing, but limited or no restrictions on the sales and/or servicing of potential and/or existing customers.

Generally, in the absence of an express right of first refusal or protective provision there is no restriction on a franchisor:

(1) opening a competing outlet and/or otherwise competing within the relevant area; or

(2) granting another franchise to another person to open a competing outlet and/or otherwise compete within the relevant area;

and even when a right of first refusal or protective provision is provided, these rights may be conditional.

Consequently, it is submitted that item 9 of the disclosure document, by arguably giving rise to an assumption that a territory is granted with any franchise, is currently poorly drafted. In some cases franchisors who do not offer a clear territory to a franchisee complete their disclosure document on the basis (or assumption) that item 9.2 does not apply. As a consequence the wording of the item itself may prevent disclosure of appropriate information about exclusivity and competition within a geographic proximity to the site or within the territory or prime marketing area allocated to a franchisee.

QLS notes that some law firms already strongly recommend greater disclosure than the current wording provided under clause 9, to meet the overarching obligation not to mislead or deceive.

Overall, it is recommended that the current disclosure document template be amended to not act on the basis of an assumption that a territory is granted, and instead require franchisors to provide greater detail on these matters. It is also suggested that the tips and/or examples provided by the ACCC could be expanded for this area to assist ensure better understanding and disclosures by franchisors.

Finally, given the growing impact of online sales, while this specific issue is dealt with at item 12, it is recommended that the template disclosure document be amended to make a clear reference in item 9 for people to also review and consider the impact of item 12 when reviewing item 9.

(iii) the leasing arrangements and any limitations of the franchisee's ability to enforce tenants' rights, and

Queensland's *Retail Shop Leases Act 1994* (the **Retail Shop Leases Act**) gives a franchisee rights to compensation because of actions by a landlord, rights for a guarantor to be released on assignment and other rights that may not be included in other Acts around Australia. However, the QLS considers that there are areas which still need to be considered and may need to be addressed by amendments to the Franchising Code which would ensure that the matters are covered in all States of Australia.

Those matters are:

(1) Where a franchisee is excluded from negotiations relating to the increase in rent either on a market review, on the exercise of an option or on a renewal of a lease where the term and any options have expired.

Many franchisors prefer to hold the lease in their name or in the name of an associated leasing company. This gives the franchisor more control over the site. Generally, a franchise agreement will provide that if the lease is in the name of the franchisor, then the franchisor will have all dealings with the landlord. However, this can lead to a situation where the franchisor negotiates the rent for the premises without any reference at all to the franchisee and agrees with the landlord on the new rent. The franchisee is then in a position where they have little choice but to accept the new rent or be in breach of the franchise agreement. The franchisee may feel that the business cannot support the increase in rent that was demanded by the landlord and agreed by the franchisor.

Another situation may be where the franchisor has been in negotiations with a landlord for rent either on the exercise of an option or on a renewal of a lease, and the franchisor considers that the rent being demanded by the landlord cannot be sustained in the business. In that case, a franchisor may refuse to agree to the rent leaving the franchisee with no choice but to abide by the franchisor's decision. Sometimes the franchisee has not been fully informed of why that decision was made by the franchisor and the franchisee has not been given the opportunity of being present at the negotiations or making submissions that the franchisor could present to the landlord. The franchisee in this type of case loses their business, must de-fit the premises and pay to make good.

The Society submits that the Franchising Code needs to be amended to give franchisees the opportunity to make submissions to landlords and for franchisors to be compelled to keep franchisees informed regarding negotiations with landlords.

(2) Situations do arise where landlords will not entertain the current tenant remaining in premises. This could be because the landlord has decided that they are going to refurbish the building and they use the end of the lease as the opportunity to do this without needed to resort to a relocation clause. Or perhaps a relocation clause does not exist.

Another example is where a landlord has a "better offer" from a third party for a lease of the premises.

In either of these situations, it seems unreasonable that a franchisee should bear the cost of the de-fit and make good of the premises. QLS submits these costs should be borne by the landlord, and notes that this may also require changes to Retail Shop Lease legislation to give the higher protection levels to both franchisees and franchisors.

(3) The tenure of a franchisee and its ability to renew or extend its franchise is often contentious. In a sale by one franchisee to another, it is not uncommon for the buyer to only get the benefit of the balance of the term of the original agreement (in addition to any renewal options). A buyer may pay an existing franchisee far more for the business than it is actually worth (operating under an assumption that a new agreement will be entered into, or the current agreement extended) given that the current agreement may only have a short period of time left before the term expires.

A decision by a franchisor to require an existing franchisee to spend significant capital expenditure to upgrade facilities or refresh the brand should in good faith be linked to the duration of the term offered to the franchisee. The term should reflect a reasonable opportunity for the franchisee to recoup the investment they are making.

Any contract of sale between an outgoing franchisee and incoming franchisee should include appropriate restraint of trade to protect the goodwill that the buyer is paying for. It should not be assumed that the franchisor has any obligation to enforce a contractual restraint in its agreement with the former franchisee, when the buyer had an opportunity to obtain its own restraint from the seller and which would give it the right to enforce that restraint directly.

(iv) the expected running costs, including cost of goods required to be purchased through prescribed suppliers;

Item 14 requires disclosure of expected costs of operating the business including payments to third parties that are reasonably foreseeable by the franchisor. This would include costs of supply by suppliers approved or prescribed by the franchisor.

The provisions of the Franchising Code already require disclosure of whether a rebate or financial benefit is payable by the supplier and whether the franchisee is entitled to participate in it. This disclosure remains relevant and requires the name of the supplier to be listed but not the amount of the rebate or method of calculation. It is not unusual in a franchise system for a franchisor to require franchisees to acquire goods or services from suppliers specified, nominated or required by the franchisor including supply by the franchisor or its associates. Issues arise where the cost of supply is higher than the same product being sourced from another supplier.

Rebates can be important sources of revenue for a franchisor, particularly to assist in in-sourcing and approving suppliers and to reduce costs to keep royalties and other payments down. In many systems rebates may be shared, including in marketing funds or contributions to (or sponsorship of) annual franchise conferences.

When considering a notification regarding supply arrangements, the ACCC will take into account a number of factors before it would approve supplier arrangements. One of the benefits of a franchise system which should be taken into account is greater purchasing power of having uniform suppliers to a network that will enable franchisees to obtain better trading terms (including terms such as credit, payment terms, price, service and support).

Franchisees often object to suppliers of a generic good that they can source from alternative suppliers on better terms than negotiated. A franchisor should not require a franchisee to use specified suppliers unless it can demonstrate benefits to the franchisee including better terms such as credit, payment terms, price, service, quality and/or support. The Society is aware that requirements to purchase all ingredients or products from the franchisor or its associate has received a degree of criticism recently with examples where a franchisor is providing the good at a price well in excess of a similar product with the same characteristics.

QLS submits that the current provisions of the Franchising Code regarding such issues are sufficient, for the most part. The Franchising Code requires both parties to a franchise agreement to act in good faith towards each other. If a franchisor forces a franchisee to purchase goods from a specified supplier at a loss to the franchisee, the franchisee could allege that the franchisor is acting in bad faith. The civil penalties for breaching the Franchising Code, along with the ACCC's ability to issue infringement notices, act to deter franchisors from engaging in such conduct.

One of the things the ACCC considers to determine whether to let a third line forcing notification stand is the cost of the “basket of goods”. Although third line forcing is no longer a per se breach of the CCA, franchisors must nonetheless lodge a notification should the proposed conduct have the purpose, effect or likely effect of substantially lessening competition. If the cost of the basket is about the same as the franchisee could buy the goods elsewhere, then the ACCC lets the notification stand.

The issue that franchisees have is that often individual items in the “basket” are a lot more expensive to buy from the prescribed supplier than they could be bought from other sources. One example is a cake shop that uses a lot of cream. That cream must be bought through the franchisor. The use by date is short by the time it gets to the franchisee and the cost of the cream is much greater than they would pay to a local supplier who could deliver it to them with a much longer use by date. The franchisee may also be able to source a better quality product from another supplier.

In other words, some franchisees believe that the ACCC's criteria does not go far enough and that the quantity and quality of a product should be taken into account in the "basket of goods" scenario.

QLS notes that provided that a franchise agreement was entered into, renewed or its terms varied on or after 12 November 2016, (and the remaining criteria of section 23(4) of the Australian Consumer Law is satisfied), a franchisee may challenge provisions of a franchise agreement using the unfair contracts regime within the Australian Consumer Law. The terms of a franchise agreement affording a franchisor the right to restrict a franchisee's ability to source from alternative suppliers, or to force the franchisee to buy certain products from certain suppliers, have the potential to be void if such terms are not reasonably necessary to protect a franchisor's legitimate business interests.

(b) the effectiveness of dispute resolution under the Franchising Code of Conduct and the Oil Code of Conduct;

The Society encourages alternative dispute resolution. The Society maintains a register of approved mediators with franchising experience, many of whom have also been included on the list of mediators who have been approved by the OFMA to mediate franchising disputes. The Society is also aware that some law firms prefer the parties agreeing to the appointment of a mediator rather than approaching the OFMA to obtain an appointment.

(c) the impact of the Australian consumer law unfair contract provisions on new, renewed and terminated franchise agreements entered into since 12 November 2016, including whether changes to standard franchise agreements have resulted;

The extension of the unfair contract terms (**UCT**) regime to B2B standard form small business contracts where one party is a small business has resulted in a number of important changes including:

(1) a greater willingness of franchisors (and their advisors) to negotiate the terms of a franchise agreement and act more reasonably when considering a request from a prospective franchisee to amend the terms of a franchise agreement;

(2) in many cases, franchisors proactively and voluntarily changing the terms of their franchise agreements to remove or mitigate terms that could potentially be unfair contract terms; and

(3) in many cases where franchisors have amended their franchise agreements, former wide-ranging powers have been watered down, and provisions have been redrafted to justify the purpose behind provisions which on their face may appear to be 'unfair'.

As it has only been 15 months since the extension of the regime to B2B contracts it is too early to definitively determine the effect this change has made on parties to a franchise agreement. Whilst there have been no franchise-specific cases of which the Society is aware, many practitioners (and their clients) have closely followed the ACCC's interpretation of the UCT regime, in particular, the decision in ACCC v JJ Richards & Sons Pty Ltd.[3]

(d) whether the provisions of other mandatory industry codes of conduct, such as the Oil Code, contain advantages or disadvantages relevant to franchising relationships in comparison with terms of the Franchising Code of Conduct;

QLS is concerned that the review of the Oil Code and the Franchising Code have been out of step. Additionally, there are provisions that are similar in both codes but drafted quite differently.

For example the Franchising Code contains an express obligation to act in good faith where the Oil Code does not. Unlike the Oil Code, many provisions of the Franchising Code are civil remedy provisions for which a fine or penalty for contravention attaches.

As a consequence it is difficult to say one code is better than another. There is however, some inconsistency between the two codes that is inexplicable. For example, the Oil code requires an annual update of a disclosure document within 3 months after the end of a financial year, whereas the Franchising Code requires an update of a disclosure document within 4 months after the end of the franchisor's financial year.

A comprehensive comparison of the two codes would be worthy to bring the Oil Code into alignment with the Franchising Code.

(e) the adequacy and operation of termination provisions in the Franchising Code of Conduct and the Oil Code of Conduct;

The application of the ipso facto reforms to both codes needs to be determined. The Society has previously made a submission to Treasury about reasons why it may be necessary to exclude both codes from the regime.

A number of organizations, including 7 Eleven, have called for the Franchising Code to convey a statutory right to terminate a franchise agreement for special circumstances where a franchisee breaches a civil remedy provision of the *Fair Work Act 2009* (and exposes the franchisor to potential liability).

An amendment could be made to capture existing agreements (rather than just those agreements entered into after the Franchising Code was changed) by changing the definition of 'serious offence' in the Franchising Code to cover such a conviction.

The Oil Code currently allows for a fuel reseller to terminate a fuel re-selling agreement where a retailer breaches a provision on three occasions irrespective of whether the retailer remedies that breach. There is no such equivalent in the Franchising Code. The Franchising Code provides greater protection for a franchisee from termination in circumstances where they breach a franchise agreement and remedy that breach. The Franchising Code makes it clear that provided the breach is remedied the agreement cannot be terminated at a future time because of that breach. In some cases, franchisees systemically breach the terms of their agreement and unfairly exploit that protection. A similar provision in the Franchising Code would

[3] *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224.

be useful where there is systemic repetitive breaches. However, unlike the Oil Code, it is suggested that those systemic repetitive breaches should be over a specified period of time. For example, a franchisee may be late with payments twice in the first year and then pay all payments on time until the fourth year. That should not be caught by the three breaches rule. It is suggested that the period for the three breaches should be limited to one year so that if the franchisee breaches the franchise agreement three times in one year, which would give the franchisor the right to terminate.

(f) the imposition of restraints of trade on former franchisees following the termination of a franchise agreement;

The drafting of clause 23 of the Franchising Code is poor and could be revisited. It applies only if a franchisee requests an extension of their existing agreement.

The Society is not aware of any case where its application has been applied or tested by the Courts.

The provision does not apply to termination of a franchise agreement (other than expiry where a request for extension has been made). Distinctions could be made between franchisee vs franchisor terminations.

(g) the enforcement of breaches of the Franchising Code of Conduct and the Oil Code of Conduct and other applicable laws, such as the *Competition and Consumer Act 2010*, and franchisors; and

The ACCC has successfully pursued contraventions of the Franchising Code through issuing infringement notices and seeking court ordered penalties for contraventions of the Franchising Code since those powers were increased in 2015.

The ACCC have demonstrated a reasonably balanced use of their enforcement powers. The ACCC needs greater resources to ensure continued enforcement of the Franchising Code.

(h) any related matter.

One of the recommendations by Mr Alan Wein which remains outstanding is a review of the Franchising Code as it affects motor vehicle dealership agreements.

QLS is aware that there are industry specific issues affecting motor vehicle dealership agreements and that motor dealers are seeking amendments to the Franchising Code to provide them with greater protections. There have been a number of recent decisions of the Court relating to termination and non-renewal of motor vehicle dealership agreements.

Some of the changes that motor dealers desire include:

(1) a minimum initial term and a minimum renewal term;

(2) an automatic right to a renewal (at the election of the dealer) in the future unless there is 'just cause';

(3) other protections to prevent 'unjust conduct' similar to the protections afforded to new car dealers in NSW; and

(4) other provisions applicable to the motor dealer sector such as introducing an obligation to buy back stock, tooling and other manufacturer supplied inventory at end of term.

Motor vehicle dealership agreements are unique and differ across brands quite significantly. They are the only agreement that is afforded immediate protection of the Franchising Code and not having to meet the 4 elements test of a 'franchise agreement' in the Franchising Code. They are quite different to a normal franchise agreement. Normally, it will not contain a restraint of trade (during or post term) because the dealer may hold multiple dealerships across a number of brands.

QLS understands that tenure is an important issue to motor dealers who may be required to invest more in facilities and stock than other franchised businesses. A minimum initial term (and renewal term) or tenure for a dealership may be justifiable depending on the level of investment to convert or refurbish or upgrade facilities and acquire a significant amount of stock. Termination for convenience (where there is a contractual right to do so consistent with clause 28 of the Franchising Code) is often the cause of disputation particularly for long standing dealers who are given notice that their agreement will end or will not be renewed or extended at end of term. Whilst a minimum period of 6 months is often provided what is 'reasonable notice' is unclear and can vary depending on the length of time that the existing dealer has operated.

There are other franchised businesses where franchisees also invest large amounts in the acquisition of their businesses or the fit out of premises. Whilst the above has dealt specifically with motor dealers, other franchisees also need protection of tenure where large amounts are invested. They would also be able to justify a minimum initial term and renewal term again depending on the level of investment.

QLS does not support the concept of a franchisor being requiring to perpetually renew a franchise at the request of a franchisee unless there is 'just cause' not to renew.

The Society encourages full and unequivocal disclosure of end of term arrangements. Item 18 is poorly drafted and could be improved and closely reviewed in conjunction with clause 18 of the Franchising Code. End of term arrangements should include adequate disclosure about:

(1) whether there is an option to renew the franchise and if there is:

  (a) the contractual terms on which a renewal of the franchise will incur (e.g. same terms or different terms of the then current agreement);

  (b) to what extent the franchisor can vary the essential commercial terms (such as financial terms) on renewal; and

  (c) the conditions:

    (A) applicable before the franchisee has the right to exercise the option or right to renew;

    (B) that apply and must be satisfied (e.g. refurbishment) once the option is exercised but before renewal occurs;

(2) a right to extend the existing agreement;

(3) a right to hold over a franchise; and

(4) the circumstances in which a franchisor will be prepared to enter into a new agreement where there is no right or option to renew or right to extend.

Other franchise offerings will have a length of term determined by other factors such as the term of tenure of a lease (including renewal), the likely time it will take to recoup the cost of fit out, industry standards and other factors.

Any reforms of this kind should be insulated from other franchises and solely applicable to motor vehicle dealership agreements.

Consequence of not giving minimum 6 month end of term notice

Clause 18 of the Franchising Code currently requires at least 6 months' notice of the decision of the franchisor whether it will extend the agreement or enter into a new agreement with the franchisee. It is questionable whether it applies to 'renewal' given the change to this item in 2014. The Franchising Code does not make it clear what is the consequence to the agreement itself of a failure to give the notice. In Queensland, s 46AA of the *Retail Shop Leases Act* obliges the lessor to give a notice at least 6 months before the end of term. It gives the lessee an extension of the term if it requires it to ensure it gets the 6 months' notice. Whilst the Franchising Code currently would penalize the franchisor for failing to give the notice within the time prescribed, it may be more appropriate to allow an extension as well as an automatic relief for the franchisee who wants the additional extension without having to go to the expense and time to approach the court for such an order.

Thank you again for the opportunity to provide comments. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Vanessa Krulin by phone on (07) 3842 5872 or by email to V.Krulin@qls.com.au.

Yours faithfully

Ken Taylor
President