



WHAT FRANCHISORS CAN DO NOW

ACTION RESPONSE TO:

Parliamentary joint committee on corporations and financial services. Fairness in Franchising March 2019¹

The following outlines the recommendations of the committee as they relate to franchises and a suggested course of action for franchisors to:

1. implement best practice procedures;
2. identify potential areas of concern; and
3. take proactive stance in relation to areas of recommendation.

The Committee Recommendations

The Franchise & Business Lawyers recommendations are noted in red

Recommendation 1.1

The Australian Government should establish an inter-agency Taskforce to examine the feasibility and implementation of a number of committee's recommendations.

No action suggested for franchisor

Whistleblower protections:

Recommendation 3.1

Recommends the whistleblower protection regime apply to franchisees and the Code.

No action suggest for franchisor however note that if the regime applies to franchising then the franchisor will be restrained from certain behaviour in relation to the whistleblower.

Intervention power and investigations:

Recommendation 4.1

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The ACCC be given power to intervene and prevent marketing and sales of franchises where a franchisor shows a track record of churning and/or burning.

Churning is the repeated sale of a single site of a failed franchise to a new franchisee.

Burning refers to continually opening new outlets, some of which are unlikely to be viable, to profit from upfront fees whilst leaving existing outlets to struggle and close. RFG (Retail Food Group) received evidence this problem was far greater within the RFG system. Recommendation that the ACCC be given power to intervene and identify and act on franchisors showing a track record of systematic churning and/or burning.

Action for Franchisor – ascertain if this occurs within the franchise system. Gather information about the sites or businesses for which this has occurred. Seek legal advice and take action with respect to those sites.

Recommendation 4.2

The ACCC, the ASIC, and the ATO conduct investigations into Retail Food Group and its directors, etc, with regard to matters including but not limited to the Australian Consumer Law, the Code, insider trading, short selling, market disclosure obligations (including related party obligations), compliance with director's duties, audit quality, valuation of assets (including good will), and tax avoidance.

Action for Franchisors – consider each of the matters for which RFG may be investigated. Consider your system, policies and procedures. Seek legal advice. Take action if appropriated.

Industry associations:

Recommendation 5.1

The Taskforce to examine how franchisees can be better represented.

Franchisors : No action required.

Recommendation 5.2

The Taskforce to examine how the Government is provided regular reports and updates.

Franchisors : No action required.

Disclosure and registration:

Contractual-disclosure.



Recommendation 6.1

Recommendation that disclosure document and franchise agreement must be made available in electronic and hard copy format.

Franchisors : No action required at this point but be aware this requirement may be introduced.

Recommendation 6.2

Information statement to be given to franchisees as separate document subject to disclosure and cooling off provisions and not an attachment to the Code.

Franchisors : the Information Statement should be given separately and when a franchisee makes an application to become a franchisee. Should be given earlier than disclosure and should be given as a separate document (many franchisors are merely providing a copy of the Code which includes the Information Statement as an annexure).

Provision and accuracy of earnings information:

Recommendation 6.3

The committee recommends that the Government amend the Code to provide:

- Vendor, franchisee or franchisor must provide prior two years business activity statements, a profit and loss (income) statement, and balance sheet (statement of financial position), and an assessment of labour costs for the particular franchise business to the prospective franchisee in the disclosure document or attached to the disclosure document; or
- If the franchise is a greenfield site, then the franchisor must provide business activity statements, profit and loss statements, and balance sheets for the two year period of a comparable franchise in the disclosure document or attached to the disclosure document.

Franchisors: No action required. However may consider the following. Take legal advice.

For the sale of a current business:

1. ensure that the above outlined financial information forms a part of the contract of sale;
2. take appropriate steps to ensure the financial information is correct e.g. cross reference with the financial information held by the franchisor and have the franchisee's accountant certify the information is correct;
3. Amend the Operations Manual to require:

(i) this information forms a part of the contract of sale;



- (ii) the contract of sale for a franchised business may not be signed without first having the franchisor or the franchisor's lawyer review the contract of sale to ensure compliance;

For a Greenfield site:

1. ensure the franchise information provided is for a comparable business;
2. provide financial information for a number of comparable businesses;
3. point out to the potential franchisee the differences which may impact the financial information e.g. the age of the business, differences in demographics etc;
4. point out to franchisee that the financial performance of the franchisee's business may be different because of external influences e.g the performance of the franchisee, competition etc

Recommendation 6.4

Recommend the Government amend the Code to provide all financial information relating to the franchise business must not be provided to the franchisee separately to the disclosure statement (it must be attached to the disclosure statement).

Franchisors : consider providing this information with the disclosure document now. Take legal advice.

Recommendation 6.5

Recommends the Government amend the Code to require a franchisor to include a statement in the disclosure document providing:

'To the best of the franchisor's knowledge, the earning and other financial information provided in this disclosure document are:

(A) Accurate, correct and compliant with the Franchise Code of Conduct, and relevant Australian Accounting Standards Board standards at the time of signing;

(B) Except where discrepancies have been identified in writing at the time of signing."

Franchisors : consider including such a statement now. Take legal advice.

Franchise agreement brokers

Recommendation 6.6



The committee recommended that the Taskforce review the use of third party brokers in selling franchise businesses and the continued appropriateness of the use of "no agent" and "entire agreement" terms in franchise agreements, and if so, whether additional disclosure on the meaning and effect of such clauses should be mandated in the Code.

Franchisors :

1. Review current sale procedures;
2. The majority of franchise agreements state that the franchise agreement is the entire agreement between the parties. Consider introducing an explanation of that term now. Take legal advice.

Marketing fees and marketing funds

Recommendation 6.7

The committee recommended that the Government amend clauses 15 and 31 of the Code to provide both clauses apply where a franchisee is required to make regular payments to cover advertising and marketing activities. The language in the clauses needs to be consistent.

Franchisors : No action required

Recommendation 6.8

Recommendation that the Government amend clause 31 of the Code to provide for civil pecuniary penalties.

Franchisors : No action required except to ensure continued compliance with the disclosure obligation about the marketing fund.

Recommendation 6.9

The committee recommended the Government amend clause 15 of the Code to provide the actual financial statements for the marketing fund account be provided to franchisees within 30 days of the end of each quarter with sufficient detail as prescribed in the Code and relevant standards.

Franchisors : This will increase the regularity of reporting to franchisees about the use of the marketing fund. No action required now.

Recommendation 6.10

The committee recommended that the Government amend clause 12 of the Code to provide that a master franchisor must comply with clauses 15 and 31 where the subfranchisee is directly or



indirectly required to contribute to a marketing or cooperative fund controlled or administered by the master franchisor.

Franchisors : No action required now. Master Franchisors to consider compliance with the suggestion now. Take legal advice.

Recommendation 6.11

The committee recommended that the auditing and insurance standards board prepare and issue audit guidelines and chart of accounts for marketing and cooperative fund audits in order to:

- assist accountants and franchisors to prepare financial statements for the marketing or cooperative fund; and
- assist auditors to prepare audit reports for marketing or cooperative funds.

Franchisors : No action required now. However, review marketing and cooperative fund reports to ensure sufficient itemised information is provided to franchisees.

Recommendation 6.12

The committee recommended that the Government clarify the distribution of unused marketing funds in the event the franchisor is wound up.

Franchisors : No action required.

Franchise registration

Recommendation 6.14

The committee recommended that the Taskforce investigate options for a public franchise register where franchisors provide updated disclosure documents and template franchise agreements annually to comply with the Code. Consider civil penalties for non-compliance.

Franchisors : No action required.

Recommendation 6.15

The committee recommended that the Government amend section 51 ADD of the Competition and Consumer Act 2020 to provide civil pecuniary penalties for non-compliance with a section 51 ADD notice.

Franchisors : No action required.



Additional disclosure

Recommendation 6.16

The committee recommended that the Government amend the Code to require as part of mandatory disclosure guidance on employment matters, especially awards, minimum wages, and oversees workforce issues to be developed by the Fair Work Ombudsman.

Franchisors : Consider incorporating and providing this information to potential franchisees now. Take legal advice.

Third line forcing

Recommendation 7.1

The committee recommends that the Taskforce examine how to amend the Code to provide that franchisors are required to include in the disclosure document to franchisees for the two-year period prior to the franchisee entering the franchise:

- where maximum resale price of each item has been below the cost price of the product purchased by the franchisee including, but not limited to, the cost of the product inclusive of any fees associated with the purchase of the product, royalties, other fees and fixed and variable costs in relation to the purchase and sale of the product have been added; and
- the margin between the purchase price paid by the franchisee and the maximum price or the recommended retail price of the top five by volume of goods and services sold by the franchisee; and
- if data is not available for that particular franchise, then data for a comparable franchise needs to be provided.

Franchisor : Consider if these processes can be introduced now. Consider whether best practice would require a franchisee to provide product at a cost less than the costs of production/provision of the product. Take legal advice.

Recommendation 7.2

Recommendation that Taskforce consider if the ACCC should conduct an inquiry into all terms in franchise agreements relating to the discretion of the franchisor to decide the volume and frequency of supply orders for goods and services to be sold in the franchised business to prevent exploitative behaviour around over-ordering.

Franchisor : Consider and take legal advice about:



1. consider if the franchise agreement includes a requirement to purchase levels of inventory set by the franchisor.
2. Does the franchisor enforce the requirement? If so, is it necessary or is it unfair on the franchisee?
3. Consider the impact of prohibition against acting unconscionably.
4. Review policies and procedures and seek legal advice.

Supplier rebates

Recommendation 8.1

Recommend the Government amend the Code so that all supplier rebates, commissions and other payments in relation to supply of goods or services to franchisees be disclosed as a percentage of the full purchase price on each transaction.

Franchisor : No action required.

Recommendation 8.2

Recommends that the Taskforce consider amendments to item 10 of the franchising code of conduct to require the franchisor to detail in percentage terms what proportion of the supplier rebate will be:

- retained by the franchisor; and
- directed to franchisees - including indirectly, through:
 - direct payment to franchisees;
 - free or subsidized training; or
 - advertising and marketing; or
 - subsidized goods and services; or
 - administration expenses.

Franchisor : No action required.

Recommendation 8.3

Recommendation that the Taskforce conduct an investigation to examine conflict of interest associated with supplier rebates and third line forcing, including:



- extent to which tender processes for suppliers conducted by franchisors are influenced by rebates or other benefits provided back to franchisors;
- the nature and extent of rebates or benefits that flow from suppliers to franchisors;
- the extent to which those rebates or benefits coincide with the use of third line forcing
- the extent to which such rebates or benefits may be conflicted remuneration;
- the extent of the detriment suffered by franchisees as a result of such rebates or benefits;
- whether any of the rebates or benefits (including any associated third line forcing) are in breach of the Code or competition laws;
- whether, and if so, the extent to which rebates or benefits are passed through to and provided a benefit to franchisees;
- making recommendations for policy or regulation change to address any problems that are identified.

Franchisor : No action required.

Recommendation 8.4

The committee recommends that the Taskforce consider amendments to items 7 and 10 of the Code to provide if the master franchisor controls and/or receives rebates from suppliers, this is disclosed in the franchise disclosure document.

This only applies to master franchisors.

No action required.

Unfair contract terms

Recommendation 9.1

The committee recommends that the Taskforce examine the appropriateness of amending section 23 of schedule 2 of the ACL to provide that:

- Unfair contract terms are prohibited; and
- civil pecuniary penalties and infringement notices will apply where standard formed contracts of franchise agreement contain unfair contract terms.



For Franchisors :

1. If introduced this will require a review of all franchise agreements to remove unfair contract terms; and
2. consider the conduct review of franchise agreements now to identify potential unfair contract terms. Take legal advice.

Recommendation 9.2

The committee recommends that the Taskforce amendments to the *Competition and Consumer Act 2020* to ensure section 150 notices are available to allow the ACCC to obtain evidence about whether a standard form contract contains an unfair contract term.

For Franchisors : as above.

Recommendation 9.3

The committee recommends the Government resource the ACCC to enable it to investigate all complaints or whistleblower reports about illegal unfair contract terms.

For Franchisors : As above.

Recommendation 9.4

The committee recommends the Taskforce examine the appropriateness of amending the Code to require compliance with unfair contract terms legislation.

For Franchisors : as above.

Recommendation 9.5

Committee recommends the Taskforce examine how to amend section 23 of schedule 2 of the ACL to provide that unfair contract terms provisions apply to all franchise agreements notwithstanding any other term in the franchise agreement or other agreements.

For Franchisors : as above.

Recommendation 9.6

The committee recommends the franchising Taskforce consider options to address the existence of unfair contract terms in perpetual franchise agreements.

For Franchisors : as above.



Recommendation 9.7

Committee recommends that Government amend the Code to require that where any franchise agreement provides for what would otherwise be unilateral variation to the terms of the agreement that such amendment can only be made with the agreement of the majority of franchisees within the same franchise system or representatives elected by a majority of franchisees within the same franchise system.

For Franchisors : identify any provisions for unilateral variation within the franchise agreement and consider the impact of this proposed change. Take legal advice.

Recommendation 9.8

Committee recommends the Taskforce consider whether the Code should place restrictions (including whether such amendments can only be made with the agreement of the majority of franchisees, or representatives elected by a majority of franchisees, within the same franchise system) on franchise agreements providing for what would otherwise be unilateral variation to subsidiary requirements to franchise agreements, such as franchise manuals or policies.

For Franchisors : the impact of this would be that operations manuals could not be changed without, for example, the consent of the majority of the franchisees. No action to be taken now.

Cooling off period

Recommendation 10.1

The committee recommends that the Government amend the cooling off period in the Code to clarify the cooling off and disclosure periods are measured in calendar days.

For Franchisors : No action required.

Recommendation 10.2

The committee recommends the Government amend the cooling off period in the Code to clarify in clause 26 of the Code that a franchisee may exercise a right to exit any and all arrangements including for instance leases at any time up until 14 days after the last of the following have occurred:

- A franchise agreement has been signed;
- A payment to the franchisor has been made;



- The required disclosure document set out in the recommendations in chapter 6 have been received by the franchisee (within the required disclosure period); and
- A copy of the lease has been received by the franchisee.

For Franchisors : the cooling off provisions in the Code may be supplemented by provisions more beneficial to franchisees. Consider whether such provisions should be introduced. Take legal advice.

Recommendation 10.3

The committee recommends the Government amend the cooling off period in the Code to clarify in clause 9 of the Code that the 14 day disclosure period must begin at least 14 days before the signing of a franchise agreement.

For Franchisors : No action required.

Recommendation 10.4

The committee recommends the Government amend the cooling off period in the Code to apply to transfers, renewals and extensions (including decisions to renew or not to renew), together with longer notice periods for renewals and extensions (including decisions to renew or not to renew).

For Franchisors : consider introducing these provisions into the franchise agreement. Take legal advice.

Exit arrangements

Recommendation 11.1

Recommendation that Government amend the Code to include provisions for franchisee triggered exit from franchise agreements as set out in scenarios 2, 3 and 4 as follows:

Scenario 2: Franchisee over-gear'd or suffering personal hardship

- Franchisor makes a profit from the store and the franchisee makes a loss
- Franchisee achieves a positive EBITDA – business operations profitable but either financial structure is unsustainable (eg due to excessive debt) or franchisee has suffered personal hardship which prevents them from operating business in normal manner
- Franchisor is not at fault
- should be way for the franchisee to exit
- franchise business should be allowed to fail and franchisee can terminate without undue capital destruction



- recommends:
 - franchisee can trigger early exit
 - protections so franchisee not exploited by franchisor during buy-back
 - a cap of the lesser of 6 months or remaining term on claims for damages by franchisor.

Scenario 3: Franchisor exploitation

- Franchisee's EBITDA is negative and prospect of making a profit unlikely
- Franchisors may be making a profit
- Franchisee probably operating under a bad business model
- recommends:
 - trigger for no fault termination after 3 fiscal quarters of negative EBITDA
 - franchisor responsible for breaking of 3rd party lease
 - franchisor no able to seek damages or impose costs on franchisee
 - franchisor repat pro-rata portion of upfront fees.

Scenario 4: Business failure

- Net profit after tax is negative for both franchisee and franchisor
- reasonable prospect that both parties would agree to termination
- recommends:
 - franchisor should not be able to seek damages or other costs on the franchisor in excess of 90 days i.e. the parties share the costs of the failed business model;
 - parties agree to terminate the franchise agreement

Recommended exception for a greenfield site which will require longer to establish and suggested that allow time to see ongoing growth trend.

For Franchisors : consider if any of these suggestions can be incorporated into current business model. Review current policies and procedures. Take legal advice.

Recommendation 11.2

Committee recommends the Taskforce consider how to amend the Code to include provision for a franchisee to have a right to terminate the franchise agreement in special circumstances (similar to clause 29), for example, if a liquidator is appointed to the franchisor (or where the franchisor is a natural person, becomes bankrupt).

For Franchisors : Consider if it is appropriate to introduce such provisions into the franchise agreement now. Take legal advice.

Recommendation 11.4



The committee recommends that for termination in special circumstances under the Code the franchisor must provide seven days notice, and if the franchisee lodges a notice of dispute with a mediator, arbitrator or court during the seven days, the termination process must be suspended until the dispute is resolved. Action by a franchisor in furtherance of a non-compliant notice (with insufficient notice) should attract a civil penalty of a similar amount to other penalties associated with such further action or termination.

For Franchisors : this recommendation relates to the franchisor's right to terminate without notice in some circumstances. Consider if it is appropriate to introduce these changes now. Take legal advice.

Recommendation 11.5

The committee recommends that Government amend the termination in special circumstances provisions in the Code such that:

- Termination in relation to fraud can only occur if the franchisee is convicted of fraud in connection with the operation of the franchise; and
- Termination in relation to public health and safety can only occur if the franchisee is served with a "permanent closure direction" for the franchise by a relevant Government body, or failure to remedy WHS orders or notices.

For Franchisors : No action required. Consider if the franchisor wishes to introduce these requirements. Take legal advice.

Goodwill

Recommendation 12.1

The committee recommends the Taskforce examine whether the Code should be amended to include a requirement for franchise agreements and transfer contracts to set out the end-of-term arrangements for franchisee goodwill, including:

- What financial consideration the franchisee is entitled to (if any) when a franchise agreement expires and the agreement is not renewed, including:
- If the franchise is closed down; or
- If the franchise becomes a corporate store; or
- If the franchise is sold by the franchisor to another party;



- What financial consideration the franchisee is entitled to (if any) when a lease between a franchisor and the landlord upon which the franchise is dependent is not renewed; and
- How the franchisee goodwill is calculated and determined separately from the site and brand goodwill.

For Franchisors : No action required. Consider if the franchisor wishes to introduce these requirements. Take legal advice.

Recommendation 12.2

The committee recommends that the Taskforce examine how to implement and collect and analyse data on franchise transfers to determine how common it is for franchisee goodwill to be included in transfer contracts and whether or not corresponding franchise agreements attribute goodwill to franchisees. The Taskforce should then re-examine whether the policy and regulatory settings are appropriate, particularly if it is common for transfer contracts to include goodwill, but franchise agreements.

For Franchisors : No action required.

Restraint of trade

Recommendation 13.1

Committee recommends that Government through the ACCC review clause 23 of the Code to determine if it is fit for purpose and whether any changes are required.

For Franchisors : this clause relates to the inability of franchisors to enforce restraint of trade at end of term in certain circumstances. No action required.

Recommendation 13.2

Committee recommends that Government amend the Code to incorporate into the disclosure document an explanation that clauses (or part thereof) of a franchise agreement that are not in compliance with clause 23 of the Code are of no effect and not enforceable by the franchisor.

For Franchisors : No action required. Consider if the franchisor wishes to introduce these requirements. Take legal advice.

Recommendation 13.3.

The committee recommended the Government amend the Code to:



- Clarify what constitutes a, "Breach," for the purposes of paragraph 23 (1) (b) with particular regard to the concept of a, "Related agreement," within the clause;
- Insert, "At the time of expiry," at the beginning of paragraph 23 (1) (b).

For Franchisors : this clause relates to the inability of franchisors to enforce restraint of trade at end of term in certain circumstances. No action required.

Collective action

Recommendation 14.1.

The committee recommends the Government implement the ACCC's proposal for a class exemption to make it lawful for all franchisees to collectively bargain with their franchisor regardless of their size or other characteristics. The committee recommends that the following additions be made to the reform:

- The proposal be extended to also cover collective action regarding franchise business models, dispute resolution, and sharing of information;
- The fees for the notification and authorization process should be reduced so that they are not an impediment to franchisees and other small business;
- Any contract term that seeks to supersede or restrict the effect of the class exemption for collective bargaining be declared illegal under unfair contract terms laws.

For Franchisors : No action required.

Recommendation 14.2.

The committee recommended that the ACCC conduct investigation into whether franchisors have taken action to impede franchisees who have attempted to pursue issues collectively and to take action based on the finding of this investigation, as appropriate.

For Franchisors : No action required.

Dispute resolution

Recommendation 15.1.

The committee recommended that the Taskforce consider the appropriateness of:



- Merging the office of the franchising mediation advisor with the Australian small business and family enterprise ombudsman, and that franchising be included in the name of any combined body;
- Funding any combined small business and franchising ombudsman through an industry levy based on numbers of complaints;
- All franchisees under the franchising code of conduct falling within the jurisdiction of the combined body if established;
- Enhancing the powers of any combined body so that it may refer and direct parties to binding arbitration under the franchising code of conduct;
- The appointment of a combined small business and franchising ombudsman as an independent assessor with the ability to review handling of disputes and the capacity to refer systematic or series matters to regulators.

For Franchisors : No action required.

Recommendation 15.2

The committee recommended that the dispute resolution scheme under the Code remain mandatory and be enhanced to include:

- The option of binding arbitration with the capacity to award remedies, compensation, interest and costs, if mediation is unsuccessful (does not exclude court action);
- Require that mediation and then arbitration commence within a specified time period once a mediator or arbitrator has been appointed;
- Restrictions on taking legal action until alternative dispute resolution is complete (along similar lines to those used by the Australia Financial Complaints Authority);
- Immunity from liability for the dispute resolution body;
- To include a requirement that if a franchisor takes a matter straight to court, the franchisor must demonstrate to the court's satisfaction that the matter cannot be resolved through mediation, and if not the courts should order the party to mediation;
- The capacity for a mediator or arbitrator to undertake multi-franchisee resolutions when disputes relating to similar issues arise (as determined by the mediator or arbitrator).

For Franchisors : No action required.



Comparison of industry codes

Recommendation 16.1

Recommendation that pecuniary penalties are implemented including:

- Civil pecuniary penalties (and, thereby, infringement notices) be made available for all breaches of the Code;
- The Quantum of penalties available for breach of the Code be significantly increased to ensure that penalties are a meaningful deterrent, such to at least reflect the penalties currently available under the ACL;
- Ensuring that the penalties for a breach of the Code are prescribed in legislation, so that the limit on penalties under industry codes in subsection 51 AE (2) does not apply to franchising.

For Franchisors : review documents and processes to help to ensure no infringements.

Recommendation 16.2

The committee recommends that the Government amend the code to include the following provisions:

- Except where already incorporated into a joining fee, a prohibition on passing onto the prospective franchisee the legal costs of preparing, negotiating and executing documents, including a civil penalty for any franchisor found to be deliberately attempting to increase franchise fees to circumvent a regulation to prevent the pass on of legal costs;
- A ban on unilateral variations to terms and conditions;
- A ban on retrospective variations to terms and conditions;
- A ban on franchisors charging wastage and shrinkage payments;
- A duty on franchisors to provide franchisees with training on the requirements of the Code.

For Franchisors : review current processes and ascertain if action is required. Take legal advice.

Pre-entry education and access to advice

Recommendation 18.1.



Recommendation that the Government amend the Code to require the franchisor to provide a prospective franchisee with the ACCC franchisee manual at the time the franchisor first provides the disclosure document to the prospective franchisee.

For Franchisors : No action required but consider introducing this as part of the procedure now.

Recommendation 18.2.

Committee recommends the ACCC develop a franchise smart type website with a similar design to the ASIC Money Smart website to address issues franchisees may encounter.

For Franchisors : No action required.

Recommendation 18.3.

Recommendation that Government amend the Code as part of mandatory disclosure to provide a reasonable estimate of the personal workload to be undertaken by the franchisee (or their nominee or manager) in running and operating the franchise business.

For Franchisors : No action required but consider introducing this measure now.

Retail lease arrangements.

Recommendation 20.1.

Recommend the Taskforce examine the appropriateness of amending clause 13 of the Code to:

- Remove the word, "Or", after sub paragraph 13 (3) (a) (ii) and replace it with the word, "And;"

This will mean the franchisor must provide the franchisee with the lease and incentive documents together with the documents the franchisee will enter e.g. licence or sub-lease

- Require a copy of the head less or disclosure statement and final lease agreement be provided to the franchisee or prospective franchisee no less than 14 days prior to the franchisee entering into the franchise agreement;

- Remove any references to, "A copy of the agreement to lease," within clause 13;

- Require that the franchisor must upon request by a franchisee or prospective franchisee, provide the head less or disclosure statement that is currently in effect within seven days of the request;

- Remove any inconsistencies in sub clause 13 (4) with respect to the above;



- Provide that, notwithstanding any terms of a franchise agreement or related documents including the lease agreement or other agreements or documents providing the franchisee with the right to occupy a premises, a franchisee may terminate without penalty the franchise agreement and any agreement to the sub-lease of a premises by providing written notice to the franchisor within six months of the franchisee occupying the premises if:
 - The franchisor does not comply with the obligation to provide the head lease or disclosure statement;
 - A head lease or disclosure statement when given to a franchisor is:
 - Materially incomplete; or,
 - Omits information, including key financial information; or,
 - Contains false or misleading information;
 - And the franchisee is in a substantially worse position than the franchisee would be if the head lease or disclosure document were not subject to the above.

For Franchisors : No action required. However, suggest franchisors consider introducing some or all of these requirements now. Take legal advice.

Recommendation 20.2.

Recommend the Taskforce examine the appropriateness of including the following as item 9.3 in Annexure 1 to the Code:

- Whether the site to be occupied for the purposes of the franchised business is to be occupied by the franchisee:
 - As owner of the site; or,
 - As lessee under a lease or agreement to lease granted by the franchisor, an associate of the franchisor or a third party; or,
 - As sub lessee under a sub lease granted by the franchisor, an associate of the franchisor or a third party; or,
 - As licensee under a license granted by the franchisor, an associate of the franchisor or a third party; or,



- Pursuing to any other occupancy right, and if so, the details of the conditions of such occupancy rights; and,
- Whether the term of the relevant lease of license aligns with the term or period of the franchise agreement.

For Franchisors : No action required. However, recommend incorporating this requirement into current practice. Take legal advice.

Recommendation 20.3.

Recommend that the Taskforce examine the appropriateness of amending the Code to provide that when the franchisor holds the head lease and the franchisee is the licensee then money paid by the franchisee to the franchisor for the purpose of paying rent to a landlord must be held in trust and only used to pay the franchisee's rental expenses, with the franchisors being liable. Further, in the event of the franchisor winding up, the money held in trust must be used to pay the rent owed to the landlord.

For Franchisors : No action required. However, consider means by which the franchisee may be better protected.

Capital Expenditure

Recommendation 21.1

The committee recommended that the Taskforce examine how clause 30 of the Code should be amended:

- To include a clear definition of "significant capital expenditure"; and
- So that there are appropriate constraints on the ability of franchisors to impose capital expenditure requirements on franchisees to ensure that franchisees:
 - Are able to make an appropriate return on investment within the remaining franchise agreement, lease or license terms; or
 - Only have to pay for a pro-rata portion of the capital expenditure that would allow an appropriate return on investment within the franchise, lease or license terms, with the franchisor to fund the rest of the capital expenditure; or
 - Are paid appropriate compensation by the franchisor if the franchisor subsequently terminates the franchise agreement.



For Franchisors : This clause relates to disclosure about capital expenditure which may be required by the franchisee throughout the term. No action required. However, consider how franchisor may deal with this more fairly. Take legal advice.

Recommendation 21.2

The committee recommended that the Taskforce consider updating item 18 of annexure 1 of the Code to reflect any changes made to clause 30 of the Code.

For Franchisors : As above.

Recommendation 21.3

The committee recommended that the Government amend schedule 2 of the Code to explain the effect of an amended clause 30 and any interaction with the law of unconscionability and unfair contract terms.

For Franchisors : No action required.

Franchisees as a potential source of capital for franchisors

Recommendation 22.1

The committee recommended that the Taskforce examine the extent to which franchise systems and their agreements involve sufficient co-investment and risk sharing in an enterprise such that they should be regulated in a similar nature to financial products under the *Corporations Act 2001*.

Franchisors : This recommendation is based upon the extent to which franchisors rely on franchisees as a source of income and is similar to a managed investment scheme. It may be a form of capital funding for franchisors. No action required but be aware of the recommendations and review current funding arrangements and reliance upon initial franchise fees. Seek accounting advice.

You should seek legal advice specific to your circumstances. The information contained herein is of a general nature only and not specific to individual franchisors or franchisees.