

Our Ref: RS9556/daily

Your Ref:

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Business Conditions Branch
Department of Industry, Innovation, Science, Research and Tertiary Education
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SUBMISSION ON THE DISCUSSION PAPER "REVIEW OF THE FRANCHISING CODE OF CONDUCT"

15 FEBRUARY 2013

SUBMISSION BY RICHARD SOLOMON LL.B

This is a personal submission by Richard Solomon and is provided upon the basis that the views contained are Richard's personal views and not necessarily those of this firm. Richard claims no confidentiality upon this submission.

I have read with interest the submission made by the Franchise Council of Australia and I am aware of the content of some of the other submissions. I apologise for my delay in making this submission. I ask that it still be accepted even though it is not being sent until after 15 February 2013.

I wish to submit in respect to 5 specific matters namely:

1. PAYMENT OF GOODWILL OR COMPENSATION UPON TERMINATION

I attach (*) a copy of my 7 October 2012 paper titled "*SHOULD GOODWILL BE PAID UPON TERMINATION OF FRANCHISE AGREEMENTS*" and I further comment as follows:

- 1.1 you will note that I say there should be only very limited circumstances where compensation should be considered e.g. a franchisor not granting a new franchise to a fully complying existing franchisee but to another new franchisee in the same territory;
- 1.2 in my view if the stated intention of some politicians for this goodwill or compensation was given any legislative outcome then this will discourage an otherwise potentially good franchisor from establishing and/or continuing with a franchise system;
- 1.3 I express my views in this paper with a wealth of experience in franchising over the last 25 years or so and having acted for franchisors and franchisees. My franchising background and experience is summarised on page 17 of this paper;



2. GOOD FAITH

I have considerable concern about there being any statutory obligation in the Franchising Code of Conduct ["Code"] for the franchisor and the franchisee to act in good faith whether in the negotiation stage or during the currency of any franchise agreement. In this respect:

- 2.1 currently the common law suggests that an implied obligation to act in good faith is a contractual obligation. In my view good faith should remain a matter to be dealt with by the common law;
- 2.2 no doubt in your consideration you will be aware of various submissions on good faith and the Code made by the Law Institute of Australia, the Law Societies of Qld and SA and other prominent bodies. In summary the expression "*good faith*" is difficult if not impossible to define and if defined is likely to cause havoc with there being extensive and expensive litigation arising from the same.

3. NOVATION

In my view all mention of "*novation*" should be removed from the Code especially as the Code very adequately deals with assignment and transfer. Many people [including lawyers] have great difficulty in coming to terms with the concept of novation. If it is to remain then:

- 3.1 it should be more comprehensively defined as its present very poor definition is meaningless when trying to understand novation.
- 3.2 A franchisor should be given a right to state in the franchise agreement that transfer by novation is not to be applicable.

4. SCOPE

The insertion of the word "*scope*" in Clause 6A of the Code has led to much confusion and arguments. If it is to remain then there should be an attempt to define "*scope*" in the context of its use in the Code. The present literal interpretation means that even any minor variation to a franchise agreement means that a cumbersome and expensive disclosure document process has to be followed. By way of example if a retail store selling products from its store at a retail level by sales personnel now wishes to also have online sales then this is likely to be an extension of the scope of a franchise agreement [if not already covered by existing wording]. If there is a variation then it cannot be a unilateral variation. Surely if a franchisor and franchisee agree a variation to the scope of the existing franchise agreement then such a variation can be made by an appropriate Deed of Variation without the necessity for the disclosure document process. If the word "*scope*" is to be reviewed then Clause 11 of the Code will also require an amendment. I would suggest the removal of the word "*scope*" from the Code and an amendment to Clause 11 so that:

- 4.1 Subclause (2) now commences:

"Before a franchise agreement or a variation of a franchise agreement is entered into....."

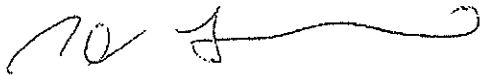
- 4.2 Subclause (3) is amended by deleting the wording "*or extension of the scope*"

5. FORM OF FRANCHISE AGREEMENT TO BE ENTERED INTO

Clause 10(c) of the Code effectively means that before the franchisor serves its disclosure document that the terms and conditions of the franchise agreement must be final. Any subsequent change is likely to mean that the disclosure document has to be served once again. This is proving to be a very time consuming and an unnecessary expense. It is my understanding that when this 2008 Code amendment was made that it was meant to be "*intended form*" and that it was a drafting error that the word "*intended*" was omitted. If there is a change of wording to "*intended form*" then any subsequent changes to the intended form will require the agreement of each of the franchisor and the franchisee and of course the Clause 11 advice statements are still applicable. I strongly urge the insertion of the word "*intended*" immediately prior to the word "*form*".

I am disappointed that the review team is apparently only visiting Qld, NSW and Vic but not SA and WA. SA is often the "*forgotten*" state. I invite a telephone conference with Alan Wein at a mutually convenient time if there are matters to be further discussed arising out of the above or any other matter he wishes to discuss with me.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Richard Solomon', with a long, sweeping horizontal flourish extending to the right.

RICHARD SOLOMON