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SUBMISSION ON THE DISCUSSION PAPER
"REVIEW OF THE FRANCHISING CODE OF CONDUCT"

Submission by:

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Contact details:

Refer to earlier submission and request for confidentiality of contact details

Date of Submission: 28 February 2013

The Respondent does not object to the public release of all of this Submission other than those Submissions contained in Annexure A of the original submission.

The respondent has provided this supplementary submission based on the issues discussed with the Reviewer and the request for further written submissions made by the Reviewer.

DISCLOSURE AND SUPPLEMENTARY DISCLOSURE

Recommendations

1. ***Amend the Code to only require a copy of the version of the franchise agreement intended to be signed (e.g. a sample or template) to be attached to the disclosure document rather than only requiring the final execution version.***

This is a real and immediate problem for the sector and should be amended immediately. It can be done simply by amending Clause 10(c), Item 22 of Annexure 1 to make this clear.

Clause 19 should be amended so it is clear what *type of agreement* must be attached to the disclosure document if the existing franchisee requests the disclosure document under clause 19(1) during the term (e.g. is it a current template only, or their actual current franchise agreement or does a franchisor have to have it in execution form even though there is no intention for a franchisee to sign it).

The problem arises because of the express wording in **Item 22 of Annexure 1 and Clause 10(c) of the Code**. See below the comments regarding re-disclosure.

2. ***Add a guidance note to clause 10 of the Code to deal expressly with disclosure required to be given that amounts to "an extension of the scope of a franchise agreement".***

Currently clause 10(c) requires you to annex the franchise agreement in the form in which it is to be executed. The guidance note should clearly indicate whether you also have to attach the existing franchise agreement as well as the deed or agreement that extends the scope of it? It would be beneficial for a franchisor not to have to do so to reduce volume.

An agreement which *"extends the scope of a franchise agreement*" is taken to be a franchise agreement under clause 4(2)(a) of the Code but not every variation will amount to an extension of the scope (including unilateral variations that do not require an agreement to be signed to document that change.

Therefore it appears that any variation to a franchise agreement that extends the scope needs a disclosure document and section 11 certificate. There is no guidance on what is an extension of the scope of a franchise agreement.

A note as to whether a holding over on a "*month by month basis*" after the end of a term is intended to be caught by the word "extension".

If it were then arguably a Disclosure Document would be required to be given monthly during a holding over period.

The whole disclosure regime and how it applies to a unilateral variation which may extend the scope of a franchise but not be embodied in an agreement needs to be considered as should what is an extension of the scope.

3. ***Amend the Code to include a new regime requiring a Franchisor to give supplementary disclosure after a disclosure document is given when information may change requiring supplementary disclosure before the franchise agreement is signed? See below***

4. ***Fix the clear drafting mistake and inconsistency between Item 4.1(b)(i) of Annexure 1 which refers to "section 127A or 127B of the Workplace Relations Act 1996" as opposed to Clause 18(2(c)(i) which refers to "Part 3 of the Independent Contractors Act 2006".***

5. ***Amend the code to make it clear whether you have to completely re-disclose where amendments are made or negotiated after original disclosure is given?***

6. ***Develop a new short form Annexure 2 disclosure document for master franchise disclosure to sub-franchisees by the head franchisor***

7. ***Add disclosure of territory developer agreements, area developer and other hybrid models within the system including additional brands in the network and how they may interrelate in terms of shared marketing, training etc***

8. ***Include a disclosure item that deals more in depth with internet sales and whether the franchisee can use its own website or market online or it is required to participate in an ecommerce arrangement***

Often the grant of rights may reserve this right to the franchisor. In addition a franchisor may offer an ecommerce platform that requires franchisees to supply orders generated through that platform.

General Comments on some of these:

I have highlighted in my submission that there has been a problem experienced in commercial practice regarding the application of the amendment to the Code (in 2008) which imposes an obligation to attach the execution version of the franchise agreement when giving a current disclosure document.

The problem becomes obvious where amendments are being negotiated and made to the franchise agreement or other documents to be signed after disclosure has initially been given.

Clause 10(c) appears to require a complete re-disclosure of the final execution version of the franchise agreement with an entire Disclosure Document (including all annexures such as the Code) although the Code does not adequately deal with re-disclosure either

generally or specifically other than under clause 18 of the Code to franchisees (as opposed to prospective franchisees).

Whilst there clearly an express statutory obligation not to mislead or deceive a franchisee or prospective franchisee under the ACL and CCA it would be obvious to say that a franchisor should have an obligation to re-disclose BEFORE execution of the franchise agreement in circumstances where that Original Disclosure Document was either misleading or deceptive at the time it was given or subsequently became misleading or deceptive. Unfortunately the commercial problems do not really arise only then but in other areas I have identified below which may not of themselves make a disclosure document misleading or deceptive.

The commercial problem arises from and relates to how the clauses in the Code interelate including clause 6B(1)(b), clause 10(c), clause 11(1) and clause 18 and particularly Items 21, 22 and 23 of Annexure 1.

There is no express language used in the Code (or in any clause of the Code) that specifies in what circumstances a franchisor is required to re-disclose to a franchisee or prospective franchisee. There is an obligation for a franchisor during the term of a franchise agreement to give continuous disclosure of certain **materially relevant facts** to a franchisee and a prospective franchisee (clause 18(1)). Those facts are simply a list of a few core clauses of the existing Annexure 1 (items 2, 4.1) and other items that may change.

Clause 21 logically only seems to work if you assume the date of the disclosure document is say 1 November 2012 (i.e. the day after the 4 months ends) and giving the document today on 28 February 2013. There is a strong argument that if you have to add the information into the disclosure document under this item 21 then you may have to change the preparation date on the cover to make it the date it was amended and then make the whole document updated to be current at that date. The clause suggests you have one date on the front that does not change e.g. 1 November and you add any changes to information of the kind under clause 18(2) if applicable.

There is no guidance or clarity about whether you have to update the whole document and re-disclose if you accidentally omit to include something in the Disclosure Document such as a copy of the Code or whether you can simply deliver a copy of the code rather than totally re-disclosing.

It would create certainty for the sector (and immediately remove this ambiguity) to ensure that the Code makes it clear what impact an error of that kind has and whether you have to reissues a disclosure document. Similarly it would also be useful to give guidance on whether re-disclosure is required if the parties subsequently negotiate amendments to the franchise agreement or other documents to be signed.

This includes consideration of whether the Code should expressly require a franchisor to re-disclose in <u>every circumstance</u> (or just limited circumstances):

(a) Should re-disclosure occur by reissuing a new disclosure document in the Form of Annexure 1 with all annexures including the Code (as if the original one was withdrawn) or alternatively allow flexibility by giving a simpler less structured supplementary disclosure (without the need for everything to be re-sent);

(b) Should it require a further 14 days disclosure period to consider the supplementary disclosure or proposed amendments – and whether that period should be able to be shortened by agreement; and

(c) Should there be a new Clause 11(1) statement obtained before entering into the agreement (or whether there should be a simpler statement required that they have had the amendments and any supplementary disclosure explained to them).

Unfortunately there is also NO guidance in the Code as to what is the consequence to a franchisor and the franchise agreement of a franchisor failing to re-disclose if amendments are negotiated.

As a result it is logical to consider whether the consequence (or relief available to a franchisee) would change depending on whether:

(i) the amendments made were at the request and for the benefit of the franchisee (rather than for the benefit specifically of the franchisor); or

(ii) the nature of the amendments is simply to correct minor typographical errors or changes in the law that do not affect substantive rights or obligations; or

(iii) the amendments do not make the existing disclosure document incorrect or misleading or deceptive and as a consequence do not need to be changed at all other than to attach the amended franchise agreement or other document to be signed; or

(iv) the amendments were made to other transactional documents (but not the franchise agreement) which are annexed to the Disclosure Document (but not to the franchise agreement) such as deeds of confidentiality, subleases or occupation agreements;

(v) the franchisee is not adversely affected by the changes and suffers no demonstrable loss or if the loss is simply an insignificant inconvenience (for example a franchisee may want to use a technical breach to get out of their franchise agreement even though they suffer no actual or significant loss); or

(vi) the amendments are required by the franchisor or an associate such as a leasing entity that wanted to amend the terms of the franchise agreement or other legal agreement the franchisee must sign after disclosure has been given but before signing; or

(vii) the amendments would make the disclosure document misleading or deceptive and therefore require full re-disclosure.

If the amendments to terms of the franchise agreement to be finally signed would result in the disclosure that had been given in the original disclosure document becoming misleading or deceptive then it would normally be incumbent upon the franchisor to correct that disclosure.

It should be lawful just to give written supplementary disclosure (like written notice under Clause 18 of the code) rather than an obligation to give a whole new Disclosure Document to replace the original document.

There is currently no obligation for a franchisor to highlight in the new disclosure document the relevant Items where disclosure has changed from the earlier version - the obligation is simply to give a disclosure document. As a consequence this can delay transactions and impose an unnecessary cost burden on the parties rather than giving meaningful information to assist them to make the decision or enter into the agreement.

The Code should be amended to clarify this supplementary disclosure issue and it would be commercially sensible to the sector to help remove red tape to suggest the following:

(i) Amend clause 18 to require a franchisor to give supplementary disclosure under Clause 18 of the Code to *either a prospective franchisee or franchisee* if a relevant item of the disclosure document becomes incorrect, misleading or deceptive after the disclosure document is given to the franchisee or prospective transferee but at any time during the period immediately before the franchise agreement (or the agreement to extend the scope of the franchise agreement) is signed.

Currently it simply requires disclosure within 14 days after they become aware of it which can be a period AFTER they have signed the franchise agreement. That supplementary disclosure should refer to the relevant item and information that is either amended replaced or qualified by that supplementary disclosure. It may need to redefine what is meant by a disclosure document to include the original disclosure document as it is updated or varied by any supplementary disclosure which will then be considered for example to form part of Item 21 of Annexure 1.

(ii) Amend the existing Item 21 Updates section of Annexure 1 to require supplementary disclosure of any relevant significant information at all (not just limiting it to a disclosure currently required to be given for the items under clause 18) that changes between the date of the disclosure document until they are to enter into the franchise agreement that has become incorrect or misleading or deceptive. It should expressly allow that information to be given can be given separately (as supplementary written disclosure). In this way any changes can be highlighted with references to the relevant Clauses of the franchise agreement (or other agreement which have changed) and Item numbers of the disclosure document and make re-disclosure meaningful and timely.

(iii) Make it clear what the consequence is of failing to give re-disclosure and whether it is affected by all or any of those considerations referred to above or other relevant considerations.

If the Governments concern is to ensure that prospective franchisees must be allowed 14 days to consider any amendments or supplementary disclosure then this time frame can delay transactions unnecessarily and cause significant additional costs to the parties and as a consequence if a Disclosure Document has already been given.

The Code should allow a franchisee to waive any 14 day additional supplementary disclosure period (or at least reduce it to 7 days) for supplementary disclosure if the franchisee or prospective franchisee gets independent legal accounting or business advice on the changes and/ or specifically signs a waiver (or gives a statement similar to Clause 11) of the benefit of that period.

It is preferable that the clause require EITHER the sample version of the then current franchise agreement or the execution version. The wording could be changed so it reads 'the version which is intended to be entered into" should be attached to the Disclosure Document rather than JUST the execution version.

In addition the wording of the clause does not work well when you look at the requirement to give a disclosure document for an "*extension of the scope of a franchise agreement*".

In that case often you are simply amending (but not replacing) the existing franchise agreement and the document to be signed may not be a new franchise agreement but simply a deed of variation. It should therefore also make it clear whether in that case you

just attach the deed of variation or whether you have to also attach their current franchise agreement that it varies as well because attaching the then current version of the sample franchise agreement is just not relevant.

It may be the case that the standard disclosure document used may have references to the relevant clauses of the *then current franchise agreement* rather than that actual franchisees franchise agreement (which may be older) being varied and it should be made clear whether there is the obligation to specifically tailor the Disclosure Document to the franchisees document or just the standard version. If you had to do the earlier it is a significant cost.

Clause 6B should be amended to add an obligation to give *supplementary disclosure* if a disclosure document becomes misleading or deceptive after it has been given (and before they sign the franchise agreement) and allow that *supplementary disclosure* to be "given" in a separate document or in writing.

Clause 10 would need to be amended to say which version must be given and add an express provision to deal with supplementary disclosure and waiver as with clause 11.

This change should apply not just to new grants but also renewals, extensions, extensions of the scope, transfers and novations etc whenever a disclosure document must be given.

COMPENSATION AT END OF TERM

Recommendations:

End of term – no renewal period remaining.

I do not agree that some codified obligation to provide compensation is warranted at end of term for non renewal where there is no franchise option term remaining. There is clear common law authority to support this. Most franchise agreements deal with payments to acquire plant, equipment and other assets in accordance with a formula.

Whether the formula within a franchise agreement is fair at the outset is a different issue and should be negotiated. Often it is simply the written down value of some or all of the assets that the franchisor may select rather than just buying it as a going concern. It is always problematic to enforce restraints of trade and arguably the restraint is intended to protect the legitimate commercial interests of the franchisor if the business closes, is sold or the franchise is terminated.

Termination without cause on reasonable notice – Clause 22 of the Code.

Compensation arguably is already payable for termination of an agreement without cause on notice where the period of notice is not reasonable or the reasons for termination are unreasonable or unconscionable. This right to terminate without cause on notice is an unusual circumstance more applicable for a dealership agreement where terms may be short or indefinite and a right to terminate without clause along the lines of clause 22 of the code is permitted. If a fixed minimum term was granted and the agreement ended by notice without cause then there should be some compensation payable.

It may come down to more of a question of damages and how much money in lieu of notice is required to allow a party to ensure it will not suffer a loss (or continue to suffer further loss) rather than simply a question of codifying a payment for goodwill. Often it is also a question whether the amount to be invested justifies a minimum term that should override the contractual right to be able to unilaterally terminate on notice. Many dealerships have immense investments tied up that cannot

be recouped over short term. They may also be specifically constructed for that particular dealership brand. Arguably an early termination without cause may require compensation of some form.

There may be merit in looking at minimum terms of a dealership agreement as other jurisdictions such as Indonesia has done. This may be outside the scope of this review. Whether the term should be subject to a minimum investment threshold is problematic if the bar is set to high or it does not cover all of the entities involved in the investment if the property and dealership is not held by the dealer but in related entities or their private self managed super funds. I do not believe that minimum terms for other non dealer franchises have been a problem as they invariably do not contain rights to terminate by notice without cause.

Arguably if the business has been loosing money or unprofitable or not profit positive to that point there is no goodwill on ordinary concepts. If an initial payment was made to the franchisor to acquire those rights and they were terminated without cause then it is logical that some form of refund or compensation would be prudent. If the franchisee acquired the business from another franchisee and paid for goodwill then the issue is more difficult because the franchisor may not have received the benefit of that payment for goodwill. There is always an issue whether codifying this right overlaps or interferes with relief under the unconscionable conduct provisions of the ACL.

Despite what many of the cases suggest in franchising there is goodwill in many levels, from the brand – brand goodwill, from the site – site goodwill and going concern business goodwill – which comes from how the business trades and makes profit. Often there is an overlap and franchisees believe that they should be compensated for goodwill when 2 of the 3 of these may remain with the franchisor. Once the right to conduct the franchise ends invariably there is no going concern if the business closes. However if the franchisor immediately steps in and takes over the business mid term (because of a termination) there appears to be an appropriation of some going concern business goodwill. There is also an argument that once the franchise rights end there is no longer a going concern and if a restraint of trade applies they cannot continue to operate a similar business from that location (or area around it) for an agreed period.

A restraint of trade imposed under the franchise agreement is usually only enforceable to the extent necessary to protect the legitimate commercial interests of the franchisor. This would include protection of the brand and goodwill in the brand and is often cited as grounds to support the restraint being reasonable. Under a franchise agreement a restraint would apply irrespective of whether the franchisor bought back the franchise business as a going concern. It is also an unfortunate reality that many franchisees seek to avoid the restraint applying to them at end of term and often structure themselves to deliberately avoid it and continue to trade through another entity.

I believe that non compete restraints and claims for an entitlement to claim a payment goodwill would need to be considered together as it would be clearly unfair to require a payment for good will when there is no ability to enforce a restraint.

Termination for breach –

It should be left to contractual terms and other provisions of the ACL such as unconscionable conduct to provide relief.

The problem with codifying a right to compensation is that a franchisee may simply use it to get money from their franchisor to "bail themselves out" if they cannot sell their business. It could clearly be open to abuse.

It is also highly likely that they could also unfairly seek to claim some payment for goodwill without any intention of observing the restraint of trade in the franchise agreement.

If any form of payment for goodwill is made (and I do not think that there should) it must include some right to enforce a restraint of trade to make that work in practice.

REQUIREMENT TO OBTAIN PROFESSIONAL ADVICE AS OPPOSED TO A BETTER RISK STATEMENT

Recommendations:

I submit that it is not beneficial to compel franchisees or master franchisees to seek professional advice before entering into a franchise agreement because:

(a) The people who really need it either do not perceive it is worth paying for that advice or they cannot afford it or the investment they are making is a risk they are prepare to make without that advice anyway – often these are people who invest in so called low entry cost franchises. There are many low cost service franchises that may fall within this area. Often they do not get advice simply because the cost of the advice is high compared to the investment itself;

(b) There are sophisticated investors who hold multiple franchises that are quite able to evaluate the terms without getting that advice (particularly if they are renewing or getting a second or subsequent franchise in the same group);

(c) Many of the key risk messages about no renewal at end of term etc could easily be included in a risk statement prepared by the ACCC;

(d) Lawyers will become reluctant to sign certificates without serious qualifications to ensure they are not essentially being asked to underwrite the investment risk– I suspect the insurers will issue guidance notes or qualifications to practitioners about their coverage if they are compelled to sign which may discourage lawyers to advise franchisees;

(e) Unfortunately there is no real national specialist accreditation for legal or accounting advisors in "franchising" and as a consequence consistency in advice will always be an issue where access to experienced advisors is difficult;

(f) Simply getting the advice does not mean every risk is explained to them or understood by them.

It is better for the government to develop a comprehensive risk statement. It should not be left to each franchisor to develop their own risk statement simply ensure it is included in the disclosure pack. Otherwise it gives rise to an unfair risk of litigation where the franchisor is not be able to identify every foreseeable risk.

FOREIGN FRANCHISOR EXEMPTION

I think it would be beneficial to bring back an exemption for foreign franchisors but not necessarily on the same terms as the original exemption. It may be prudent to see whether the exemption should apply only to certain parts of the Code rather than all and at least fix the language so that it is clearer as to whether it is a blanket exemption to all foreign franchisors.

It is also difficult to understand the intent of the original exemption because the language was not clear. It applied where there was an overseas franchisor and only a grant of one master franchise or franchise – normally an Australian master franchisee would acquire the rights with the intention of

granting sub-franchises so even if there is one master franchise it clearly contemplates that sub-franchises are to be granted.

If the exemption was to apply to the foreign head franchisor totally then there would be no obligation for it to comply with the Code in respect to either the grant of the master franchise to the Australian Master Franchisee or in respect to the transaction involving the sub franchise. There are clearly provisions relating to joint disclosure for master franchisors. If the old exemption is brought back it should be made clear whether it is intended to apply in this scenario or just where 1 master is granted with no sub-franchises considered.

I believe that many Australian master franchisees would consider it beneficial to have the benefit of the protection of the Code to them particularly in respect to dispute resolution under the Code.

It may be beneficial to consider the exemption from some parts of the Code to a foreign franchisor as it relates to sub- franchise particularly where the overseas franchisor is not a party to the sub-franchise agreement. In that event Part 2 of the Code and some clauses in part 3 should not apply (such as clause 18) may not apply. It is arguable that Part 4 of the Code should still apply but it may be that an overseas franchisor is not a "party to the agreement" therefore in respect to a sub-franchise it may not apply to them.

There are franchises granted where the franchisee signs up directly with the overseas franchisor and whilst a master provides services to the franchisee it may not necessarily be a party to the agreement. Ultimately a meaningful joint disclosure or short form Overseas franchisor disclosure document would be beneficial. As their financial years are different, requiring financials and audit reports is problematic.

NOVATION

Sales of franchise systems by franchisors is difficult when it is not done by a share sale and when they involve a novation of all of the franchise agreements. There are issues concerning whether a franchisee must give its consent (actual or implied) and whether a franchisee must consent to the terms of and be a party to the novation deed or simply told of the change of ownership under clause 18(2) of the Code. In a simple world it would be beneficial if an outgoing franchisor could simply sign a novation deed with the buyer without having to get every franchisee to sign. In that way a copy could be given to every franchisee and be binding on them once they have received notification of the novation. This might be ideal however it s not necessarily how assignment or novation works at law.

I am aware that in some instances novation of franchise agreements have occurred by conduct even where a franchisee has not signed a deed of novation or been given disclosure however it still remains that the Code clauses only deal with novation or transfer by franchisees and nothing in respect to the obligations to apply on a novation or assignment of a franchise agreement by the franchisor including a merger by the franchisor with a competing network.

It is therefore difficult to suggest a quick fix.

Some of the problems I have encountered in acting for franchisors in a sale include:

(a) There is arguably a cooling off period applying to a novation agreement because of the wording of clause 13 – that may be simply a drafting mistake. The definition of novation clearly contemplates how most franchisors may want it to occur but sometimes novation deeds may include other provisions which may not make the new agreement on the "same terms";

(b) Franchisors do not have the same problem if they simply sell the shares in the franchisor entity and related entities as there is no need for consent or a novation as the entity continues – a notice to franchisees under clause 18 is all that is normally required. This sort of sale does occur however there are risks and taxation consequences of buying companies as opposed to business assets;

(c) Franchisees may be asked to sign a novation deed and must be given a new disclosure document by the proposed purchaser however there is no obligation for a franchisee to sign it and they may simply refuse to sign it or a statement under clause 11;

(d) There is no express obligation in the code for a franchisee to not unreasonably withhold its consent to a transfer or novation or interfere with a proposed sale of the network;

(e) Most franchise agreements do not have comprehensive or consistent provisions about how you handle a sale of the entire system or what happens to a franchisee who refuses to sign a novation deed and does not cooperate at all;

(f) I have seen clauses where the consent in advance to a sale, they include powers of attorney that are granted to the franchisor to sign the novation deed and other documents if the franchisee refuses to;

(g) There are issues with marketing funds being taken over during a year and who has the obligation to prepare an Annual financial statement / audit and when.

There is unfortunately no time to draft or suggest a comprehensive answer to this however the department may wish to discuss this further to identify if a code change should be made to make these things clearer.

ASIC BUSINESS NAME REGISTRATIONS

Previously under state regimes there were no specific statutory provisions to deal with franchising however commercial practices allowed for notices of transfer and cessation to be signed and held in escrow by the franchisor for subsequent lodgement at end of term. The new legislation made all changes to be made on line after creation of an ASIC connect account and no forms under the old state based regimes were to be accepted after the register went on line.

Franchisors used to control the transfer and cancellation of names using this paper process without the need for any specific legislation. Now with the ASIC connect account the franchisee controls this and correspondence about the name it is entitled to register in connection with the franchise. There is a lack of consistency about how to deal with this across the sector with inconsistent approaches being used. Some of the provisions of the legislation make it harder for franchisors to get the name back at end of term without cooperation from the franchisee which may not be forthcoming.

There is serious merit in the Department looking at working with the sector to get a system that contemplates the commercial realities of how a franchisee can register the name and use it during the term which allows franchisors to deal with the name if the franchise agreement ends. It should allow a franchisor to register with ASIC that they operate a franchise system which includes the relevant business name to be franchised e.g. Awesome Pizza (region) and they should be able to be granted some form of master key and ability to access or have a central ASIC connect account where they can approve and cancel or transfer business names if required without having to get the cooperation of franchisees.

Some problems include franchisees who:

(a) Can change passwords and email addresses for the connect account without informing the franchisor;

(b) Allow deregistration of their corporate entities where the name is suspended during the period of company deregistration without the franchisor being made aware;

(c) If a franchisee cancels the name against the wishes of the franchisor the name remains reserved by ASIC for a prescribed period and is not able to be used for a specified period which may prevent reuse of that name by the franchisor or another new franchisee. That period cannot be shortened.

It would be useful for the Commonwealth to now identify and deal with the requirements of the sector to make registering business names and cancelling them or transferring them through ASIC far simpler for franchisors and their franchisees. Many franchisors still have the old cancellation or transfer forms but cannot use them. Many old franchise agreements do not even contemplate the new system and accordingly may still relate to old state based legislation and ways to remove a name.

Good faith

You asked me to suggest the wording I would use in connection with Clause 23A to prevent a franchise agreement from seeking to exclude or limit an implied common law obligation. My suggestions is:

"Nothing in this code or a franchise agreement limits or excludes any obligation imposed by the common law, applicable in a State or Territory, on the parties to a franchise agreement to act in good faith. A provision in a franchise agreement is unenforceable in so far as it limits or excludes that obligation."

I do not think that that the clause should also include the word "modify" as well as a modification if it is positive may actually be beneficial.

You asked me what wording would I suggest to add an obligation to act in good faith in mediation:

I suggest the following:

Part 4 – Add good faith to dispute resolution

There are 2 alternative approaches to this apparent to me:

1. Amend clause 29(8)

Clause 29(8) add the words "*in good faith and*" between the words "*dispute*" and "*in*" on the end of the second line of the subclause.

It should read "….*approaches the resolution of the dispute in good faith and in a reconciliatory manner…*" So the obligation then is to act in good faith and a reconciliatory manner.

The only problem with this approach could be an argument raised that good faith somehow does not include " acting in a reconciliatory manner" or that it is somehow defined to include those things lists which apply to acting in a "reconciliatory manner" when it may not be intended to have that.

Alternatively my preference would be to do the following:

2. Amend clause 29(6) to say that:

"*The parties must attend the mediation and act in good faith to try to resolve the dispute*."

You then need to make a decision whether it is to apply to all existing agreements or just ones entered into after a date when framing the wording in application parts in clause 5 of the code (like 1A and 1B) did with the last amendments.

Risk Statement

It may be beneficial to develop a Risk Statement

This is something I usually add to Item 19 of the Disclosure Document (and may vary depending on whether it is a service or site based system):

> Due to the nature of the franchised business, earnings are highly dependent on a franchisees own effort and ability and on the location of the site from which the franchised business operates.
>
> The Franchisor does not furnish or authorise its directors, employees, officers or agents to give any oral or written information that may constitute a projection or forecast including potential sales, costs, income or profits of a franchised business.
>
> Actual results vary from site to site and the franchisor cannot estimate the results of any particular franchised territory or site.
>
> Earnings and/or profits if any of your franchised business are your responsibility. Directors, employees, officers and agents of the Franchisor, associates of the Franchisor and franchisees are not authorised to make any claims, statements or representations as to the prospects or chances of success that franchisees can expect.
>
> If at the time you receive this disclosure document we have already granted one or more franchises then you may wish to speak to existing franchisees (if any) to make your own investigations. The Franchisor is not responsible for any, claims, statements or representations made by its franchisees and no authority is conferred upon them to make claims, statements or representations on behalf of the Franchisor.
>
> The Franchisor does not guarantee your success. You are in business for yourself but not by yourself. You may need to spend more to promote or operate your franchised business than other franchisees. We suggest that you seek independent accounting and business advice before you proceed. You should prepare a business plan and at least consider what will happen to you if your business is not profitable or your business is required to be closed.
>
> If you are being granted a franchise for a site that has been operated by the Franchisor, the Franchisor may supply actual turnover figures for that site. No projection or forecast is or is intended to be made by the Franchisor if it gives you those actual turnover figures.
>
> If you are being granted a franchise for a site that has been operated by a franchisee, (i.e. as a result of a sale of a franchised business by a franchisee), that franchisee may supply actual turnover figures for that site/franchised business. The Franchisor is not a party to this transaction and is not responsible for any claims, statements or representations made by the franchisee or an engaged agent/business broker and no authority is conferred upon them to make claims, statements or representations on behalf of the Franchisor.
>
> In the event of a resale, there is no guarantee that an incoming franchisee will achieve the same or similar or comparable results as contained in any targets given by an outgoing franchisee, nor is it intended that an incoming franchisee should rely on them as a projection. In a resale of a franchised business, it is very likely that sales may initially decrease. The incoming franchisee

is required to make his/her own inquiries and investigations and is to satisfy himself/herself as to potential sales, income and gross/net profits (if any) that may be achievable.

The Franchisor disclaims any liability to you or any other person who may seek to rely upon the earnings information. Whilst all care is taken, errors can occur and the information supplied by franchisees would not have been audited or verified by us. You need to conduct your own investigations about the opportunity and get appropriate independent advice before you proceed.

There are many factors that affect or may affect the success or otherwise of a franchised business. Some of these factors are within our or your control. Others are within the control of third parties such as governments, councils, landlords and financiers.

Some (but not all) of these factors may include:

(a) **Government.** The actions of governments and financial institutions. This can lead to increases in interest rates and the imposition of additional fees, taxes, charges and greater compliance requirements and administrative burden. This can include acts of foreign governments where products are sourced from overseas markets.

(b) **Tax.** The imposition of taxation and other legislative requirements at various levels of government that place additional administrative burdens upon small business operators. This includes for example the superannuation guarantee levy, GST, fringe benefits tax and other government duties.

(c) **Trade.** Local and international trade factors which can affect the pricing or timing or availability of the supply of coffee (including trade embargos) or other ingredients or products used or sold through the franchised business.

(d) **Landlords.** The intentions and actions of landlords and developers and landlords. Landlords may consider renovating existing shopping centres or opening new shopping centres or extending in close proximity to the site you may chose. This can affect trading conditions and competition. Often exclusivity is not granted within the centre and other tenants can and do compete in the available product or service lines. There is no assurance at end of term that the landlord will renew the lease or enter into negotiations to offer a new lease. As a consequence there is always a risk that the site may be lost and you may have to relocate the franchise or cease trading.

(e) **Design.** Poor design or subsequent changes to the design of shopping centres which may have a negative impact on a shopping centre or strip shopping centre. For example, the direction or the re direction of customer flow away from the premises or a reduction of car parking spaces.

(f) **Relocation.** Landlords often change the tenancy mix and require relocation of tenants. This can impose significant financial costs for relocation and the requirement to fit out the new premises. Often compensation from landlords is not available and must be funded by you.

(g) **Changing consumer demand.** Consumer demand is constantly changing and so to must the product and service offering mix to remain relevant and viable. The image of a franchised business must evolve with it over time to meet these challenges. There are costs associated with changeover and new product and service lines can affect profitability. You must be willing to adapt and adapt quickly.

(h) **Policies.** The implementation of policies (including rules and regulations) by shopping centre management that may lead to poor performance of shopping centres.

(i) **Occupancy or vacancy.** Shopping centres or strip shopping centres not being fully tenanted at the time of opening or other tenants not opening or being ready to open at the time of store opening.

(j) **Other tenants.** The departure or relocation of key drawcard tenants either before or after store opening. If other tenants leave the centre or their businesses do not succeed or fail, this may have an adverse affect on customer traffic flow to and from within the centre.

(k) **Competitors.** The existence, nature, proximity and operations of competitors to your business both at the time of opening and during the franchise will change over time and significantly can affect your profitability. Competition can also come from other shopping centres that open in close proximity.

(l) **Rent and outgoings.** There may be escalations of rent and outgoings or fluctuations in the cost of construction or maintenance of the site due to the particular fit out or design requirements of the landlord and the willingness or otherwise of the landlord to agree to changes. Landlords may also impose additional costs due to their works required to be undertaken at your expense and the costs of their advisors signing off on the works undertaken.

(m) **Finance.** The level of gearing (finance) that you require to open and operate your store. If you have insufficient equity that requires you to rely heavily on borrowings or you do not have sufficient cash resources to use for working capital in your business then this may have an effect on your franchised business and your profitability.

(n) **Fit out.** The manner in which you chose to acquire, lease or rent the fit out for your premises.

(o) **Staff.** The manner in which you recruit and manage your staff and your business and your ability to work in and encourage a team environment, including as a franchisee in our network.

(p) **Accounting.** Your level of understanding of accounting and administration to operate your business and improve profitability.

(q) **Your management abilities.** Your ability to manage and control costs and adapt to changes in the market for prices and demand for the products and service.

(r) **Hours of operation.** If you fail to understand or cope with the demands and pressures that are placed upon operators of businesses within this industry. For example working hours may include extended opening hours and are dictated by shopping centre opening and closing times.

(s) **Usage and Exclusivity.** There are various restriction imposed upon tenants in centres under individual occupancy agreements which can affect your business including exclusivity and product and service usage.

(t) **Competition.** There is a general reluctance, by landlords, to provide exclusivity in relation to tenancy mix use so that other competitors who offer the same or similar products to you can be in the same centre.

(u) **Your suitability.** You may subsequently discover that you may not be suited to this type of industry or to opening the franchised business.

(v) **Personal Life and commitment.** The demands of your personal life and your desired work life balance will significantly affect your profitability if you do not want to be present in the business. There are strict requirements for personal supervision that must be considered. You must understand the level of personal commitment you must give to this opportunity throughout the whole term and renewal. Many issues arise in our lives that can distract your attention away from the business.

(w) **Internet and ecommerce.** Changes in technology may require additional investment to adapt to changes in consumer behaviour. Use or restrictions on the use of the internet in marketing and commerce can impact on a business. The Franchisor may operate an ecommerce platform to supply directly to consumers from online sales and may have the right to control the use of the marketing and use of the brand on the internet. This control may affect the manner in which your business may be marketed particularly outside of your territory or prime marketing area (if applicable).