

Parliamentary Inquiry: The operation and effectiveness of the Franchising Code of Conduct.

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Mediation Process

There is no public information available about concluded or pending mediation, whereas enforceable undertakings that franchisors reach with regulators, and court decisions are on public record.

So, if a potential or existing franchisee wants to know about the potential pitfalls of the system no one involved can talk about any disputes.

So, this practice leaves people uninformed and at risk of the same legal issue happening within a franchise.

Fairness

Fairness needs to come from the Franchise Code, so it can flow into the Franchise Agreements and Disclosure Documents.

Balance of fairness can start with the Termination Clauses within the Franchise Agreements.

We are all reasonable normal people just trying to make a life in Australia, via the franchise channel. People just want a balance in the business relationship and know that they are going to be treated and valued as business partners when they invest their life savings, time, effort and passion into their franchise business.

So many families depend on franchising, to make a life in Australia. When I came on my business visa I was only interested in purchasing a franchise, it is very daunting entering business in a new country, new cultures and rules and time pressure to get a business going to qualify for Permanent Residence. I knew that the franchise model had been tried and tested and there was support and with passion and dedication you can have a fair go.

If you do a quick calculation of the amount of money that franchisees alone invest into a franchise, it at times out ways the investment that the franchisors have put into their own business. But the Franchisee has at most times no rights.

A question to ask is why the franchising business structure was not designed to allow franchisees to have equity into the holding company of the franchise.

A franchise group that is listed on the ASX is managed for the shareholders at the expense of the franchisees.

Termination Clauses – Franchise Code

The Franchise code regarding Termination needs to be reviewed to allow fairness to come into the agreements.

We need to balance the rights between the franchisor and franchisee on terminating under the franchise agreement.

Two laws potentially even up the imbalance of rights and power between franchisors and franchisees currently. There's the Australian Consumer Law and the Franchising code of conduct 2014.

The Consumer law gives franchisees that have been misled, deceived or treated unconscionably, or whose contract terms are unfair, the right to ask a court to sort things out. But court actions are slow and expensive and can end in business failure.

Currently the franchisee must go litigation to exercise the right to termination where the franchisor can just breach the franchisee and terminate them via the agreement. The balance of financial cost is daunting upon the franchisee and the franchisors are aware of this.

Currently the Franchise Code Division 5 Termination of Franchise Agreement cover the following: -

- 26. Termination – cooling off period
- 27. Termination – breach by franchisee
- 28. Termination – no breach by franchisee
- 29. Termination – special circumstances

As you can see under this section there is no **Termination – breach by Franchisor**.

We need some of the following conditions to be considered for inclusion.

- a. If the franchisee is in compliance with the agreement and the Franchisor breaches a material term of the Agreement and fails to correct such breach within 30 days after the delivery to the Franchisor of written notice, sent by registered mail which sets out the nature of the breach and the action reasonably required to rectify the breach, the Franchisee may terminate this Agreement forthwith upon delivery to the franchisor of a written notice of termination.
- b. If the Franchisor has frustrated the Agreement by stating that it does not wish to bound by its term and conditions.
- c. There was mis presentation made to the franchisee as an inducement to enter the Agreement.
- d. If the Franchisor becomes bankrupt or insolvent.
- e. If the company becomes de-registered by ASIC.
- f. If the franchisor is convicted of a serious offence.
- g. If the franchisor acts fraudulently in connection with the operation of the business.

Other points that need to be considered as well under the Termination Clause includes: -

- h. If the Franchisor sells/takeover of the franchise business by another consortium.
 - a. The franchisees must have an option to sell back the business to the Franchisor at a market related price.
- i. The franchisor operates the franchise in a reckless financial manner.

- a. Key crucial business decisions need to have audited approved model presented to the franchisees before implementation. Ultimately these decisions impact financially on the franchisees business.
- j. If the franchisor goes into voluntary administration, receivership or liquidation bankrupt, insolvent under administration or an externally administered body corporate.
 - a. A clause allowing the franchisee to de-brand and terminate the franchise agreement if the franchisor entity goes into administration for any reason.
 - b. Franchisees need to become a secured creditor and be afforded the opportunity to have debts repaid as well. Currently franchisees are made unsecured creditors.
 - c. Intellectual property owner to take over the rights of the franchisor in the case of insolvency.
 - d. A warranty that the franchisee will continue to have rights to use the intellectual property for the remainder of the term by obtaining the rights through the intellectual property owner.

We need a Franchisee Member Organisation

When it comes to making policy submissions, no sector representative body can fully represent both sides of franchising. Consequently, there is limited effective lobbying by the Franchise Council of Australia on franchisee issues where these conflict with franchisor preferences.

I am sure that the franchisees have been blamed for most problems in franchise.

All franchisees in Australia should have the opportunity to join a dedicated Franchisee Member Organisation to allow us to strengthen our position in the industry and collectively allow us to bargain for a sector who potentially have 79,000 members. This would be good for business as the professions would have to lift their game to help the franchisees access competent advisers, allowing professions also to be accredited via law societies accreditation programs as specialist franchise lawyers and financial advisers.

Also remembering that the franchisors are likely to seek the best professional lawyer's advice and firms to look after their business interest.

Research has shown that when legal advice is required franchisees are more likely to seek advice from suburban solicitors and accountants or even decline to seek legal or financial advice before signing. They may fear the cost.

Example: A Franchisee Member Australia Organisation is established for franchisees and Franchisee Associations members only. This body is dedicated to assisting franchisees only, assisting with lobbying for changes in the industry, giving professional advice and support. This organisation to be funded by franchisees and government.

Public Database for Franchise Agreements

We require a public database of franchisors to be established, to enable franchisees and their advisers to compare offerings.

I believe this is already practised in the USA in certain states and funded by Government where the Franchisor Disclosure documents and standard form of franchise agreement can be accessed.

Currently a franchisee would have to pay a deposit and enter a selection process with multiply franchisors to get information to make a business comparison.

Franchise Agreement and Disclosure Document

Disclosure Document to display franchisees that are bankrupt in the business.

1. To be able to do due diligence on a franchise, the disclosure document is a legal requirement under the ACCC Franchising code of conduct, where franchisors are required to provide specific information to potential franchisees to help them in the evaluation process. Currently while any bankruptcies by franchisors and their boards must be disclosed on the franchisor's Disclosure Document, bankruptcies by franchisees do not. This is important information, because while there are many reasons a franchisee may go bankrupt, multiple bankruptcies undoubtedly paint a picture of deeper issues within the franchise itself. Even if potential franchisee gets a lawyer to look at the contracts and any other information before they sign, searches for information on the internet or on ASIC's insolvency notices website, franchisee insolvency would not turn up easily. People are not being made aware of the many franchisee bankruptcies that occur each year, and this could be causing many people to regret their decision to buy into a franchise. By making this change it can be another safeguard for franchisee interests, as they invest heavily (often mortgaging their homes) to buy into a franchisor business.