

Franchise

in 32 jurisdictions worldwide

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Australia

John Sier and Philip Colman

Mason Sier Turnbull

Overview

1 What forms of business entities are relevant to the typical franchisor?

A corporate structure in the form of an incorporated company in accordance with the Corporations Act 2001 (Cth) is the most common form of business entity used by franchisors in Australia. Foreign franchisors have, in our experience, established wholly owned Australian subsidiary companies to conduct their Australian operations. Although the structure is simple to establish, at a cost of around A\$1,000, there is the requirement that there be at least one Australian-resident director. As a director has significant power in respect of a company's day-to-day operations, the appointed director must be someone who can be trusted and is able to be controlled. Other than this requirement, the structure is relatively easy to establish and can be set up within 48 hours. Other structures include trust structures, partnerships or joint ventures, which may be appropriate depending upon the specific circumstances.

2 What laws and agencies govern the formation of business entities?

In Australia, the Corporations Act 2001 (Cth) governs the formation of corporate entities. The government authority administering the Corporations Act is the Australian Securities and Investments Commission (ASIC), an independent Australian government body reporting to the Commonwealth parliament and the treasurer in respect of the regulation of financial markets, securities and corporations generally.

We have seen a trend for franchisors with larger franchised networks (most with aggregated brands and systems) to publicly list – although the global financial crisis has slowed, if not halted, this trend. The Australian Stock Exchange (ASX) has traditionally been responsible for the market supervision of publicly listed companies. However, from 1 August 2010, responsibility for market supervision transferred to ASIC.

3 Provide an overview of the requirements for forming and maintaining a business entity.

If the business entity is a company, the establishment process is generally via the registration of a company at a cost of around A\$1,000. It is possible to establish a company yourself, and the ASIC website, at www.asic.gov.au, will provide all relevant details in relation to the formation and operational maintenance of a company. It is also relevant to register the trademarks to be used by the company at this early stage. Ongoing annual reporting requirements to ASIC are required by the Corporations Act 2001. The company's financial records must be retained for a period of seven years. The franchisor also needs to apply for a tax file number (TFN) and register for goods and services tax (GST). An Australian business number (ABN) is evidence of such registration. Further information regarding setting up an Australian business can be found at the government website www.business.gov.au.

4 What restrictions apply to foreign business entities and foreign investment?

Subject to the foreign investment laws briefly discussed below, foreign business entities are not precluded from operating as a franchise system within Australia provided they comply with Australian law (and particularly laws governing franchising). A foreign business entity may establish an Australian subsidiary.

If the Australian subsidiary is an Australian private company, at least one director of the company must reside in Australia. If the company is an Australian publicly listed company, that company must have at least three directors (two of whom must reside in Australia).

Foreign investment is governed by the Foreign Investment Review Board (FIRB). Whether or not foreign investment approval is required depends upon the type of investment and whether the investment is above a monetary threshold. Most residential real estate acquisitions require prior approval of FIRB, as do certain acquisitions of commercial real estate. Acquisitions of shares in or assets of businesses valued at more than the applicable monetary threshold (which as of 1 January 2010 is A\$231 million for non-US investors) require FIRB approval. For US investors, the free trade agreement between Australia and the USA has established different criteria and threshold values depending on whether the investment is within a 'prescribed sensitive sector' of industry. In most instances, these scenarios will not apply to a prospective foreign franchisor unless it proposes to enter the Australian market via an acquisition. Further information can be obtained from the FIRB website at www.firb.gov.au.

5 Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

Taxation legislation in Australia does not distinguish between franchising and other forms of business. The franchise relationship is affected by income tax, capital gains tax, goods and services tax, stamp duties and other federal and state taxes and charges that might apply, depending upon the legal structure chosen by the franchisor.

Income tax laws are integral in selecting the appropriate structure for the franchise network. Relevant acts are the Income Tax Assessment Act 1936 (Cth) and the Income Tax Assessment Act 1997 (Cth). Furthermore, A New Tax System (Goods & Services Tax) Act 1999 (Cth) imposes goods and services tax on all suppliers of goods and services under franchise agreements.

State taxation, stamp duty, payroll tax and workers' compensation are also important considerations in the franchise business.

Where foreign entities are involved, issues such as withholding taxes in respect of the payment of offshore royalties become relevant. The amount of withholding tax on payment of royalties to the US, UK or France, for example, is at the rate of 5 per cent. As this is far less than the corporate tax rate in Australia at 30 per cent, which corporate profit is then paid out as a fully franked dividend, any credit available for the Australian tax paid is dependent on the

shareholding and the double tax treaties in the relevant countries. Careful planning is therefore required to ensure the best outcome for a foreign franchisor expanding to Australia. Further information can be obtained from the Australian Tax Office website at www.ato.gov.au.

- 6** Are there any relevant labour and employment considerations for typical franchisors? What is the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor? What can be done to reduce this risk?

Workplace relations laws exist at federal and state level and regulate the employment of staff by franchisors and franchisees alike throughout Australia. These laws set minimum wage levels that must be paid to all staff, minimum and maximum hours that can be worked and when they can be worked, the provision of minimum annual, sickness and long-service leave entitlements and loadings and penalties that must be paid to staff depending on their job classification and spread of hours. Franchisors and franchisees can avoid many of these obligations through the use of an enterprise agreement – a workplace agreement registered with the federal government.

Federal laws also deal with issues such as unfair and unlawful dismissal, discrimination and harassment, union right of entry and transmission of business.

Several state laws continue to operate, including laws in relation to occupational health and safety, long-service leave and workers' compensation.

Depending upon the type of franchise, franchisors must be particularly mindful of their responsibilities in relation to occupational health and safety. Franchisors may be held to have control over a workplace because they dictate the manner in which the franchise business is operated. Franchisors should seek specialist advice regarding their liability in this area.

In certain circumstances, a franchisee may be a deemed employee of the franchisor. A requirement that any franchisee incorporate as a pre-condition to entering into the franchise agreement generally eliminates this risk.

- 7** How are trademarks and know-how protected?

Trademarks, know-how and trade secrets are all protected by intellectual property laws in Australia. Intellectual property includes patents, designs and copyrights, as well as other forms of recognised proprietary knowledge. Applications to register ownership or an interest in intellectual property must be made through IP Australia (an Australian government agency responsible for administering patents, trademarks, designs and plant breeders' rights). A preliminary search of the trademark you wish to use can be conducted on the website www.ipaustralia.gov.au. This site also provides some detailed information about intellectual property in Australia and the registration process.

- 8** What are the relevant aspects of the real estate market and real estate law?

Franchisors whose franchise model requires business premises often take a direct head lease from the landlord and grant a sub-lease or licence to occupy the premises to their franchisees. In this way the franchisors are able to control the site in the event of default by the franchisee. Certain disclosure obligations must be made in favour of a subtenant or licensee under the various state-based retail leasing legislation. The disclosure statement usually details the more important aspects of the lease or sublease, including rent outgoings and other obligations. Failure to provide the required disclosure can allow the tenant or subtenant to avoid its obligations under the lease in certain circumstances. It is also necessary to provide the head landlord's disclosure statement in most state jurisdictions to ensure full disclosure

is made. In Victoria, there is an obligation to inform the Office of the Small Business Commissioner within 14 days of entering into a retail premises lease. Careful consideration of the franchisor's obligations under the various state-based retail leasing legislation is therefore critical for foreign-based franchisors.

Laws and agencies that regulate the offer and sale of franchises

- 9** What is the legal definition of a franchise?

The Franchising Code regulates rights and obligations under a franchise agreement.

The Franchising Code defines a franchise agreement as an agreement:

- that takes the form, in whole or in part, of any of the following:
 - a written agreement;
 - an oral agreement; or
 - an implied agreement;
- in which a person (the franchisor) grants to another person (the franchisee) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor;
- under which the operation of the business will be substantially or materially associated with a trademark, advertising or a commercial symbol:
 - owned, used or licensed by the franchisor or an associate of the franchisor; or
 - specified by the franchisor or an associate of the franchisor;
- under which, before starting business or continuing the business, the franchisee must pay or agree to pay to the franchisor or an associate of the franchisor an amount including, for example:
 - an initial capital investment fee;
 - a payment for goods or services; or
 - a fee based on a percentage of gross or net income whether or not called a royalty or franchise service fee; or
 - a training fee or training school fee; but excluding:
 - payment for goods and services at or below their usual wholesale price;
 - repayment by the franchisee of a loan from the franchisor;
 - payment of the usual wholesale price for goods taken on consignment; or
 - payment of market value for the purchase or lease of real property, fixtures, equipment or supplies needed to start business or to continue business under the franchise agreement.

However, the following relationships are specifically excluded from the definition of a franchise agreement:

- employer and employee;
- partnership;
- landlord and tenant;
- mortgagor and mortgagee;
- lender and borrower; and
- the relationship between the members of a cooperative registered, incorporated or formed under Australian state and federal cooperatives legislation.

- 10** Which laws and government agencies regulate the offer and sale of franchises?

The offer and sale of franchises is regulated by the Trade Practices (Industry Codes – Franchising) Regulations 1998, named by the regulations as the Franchising Code of Conduct. It is a prescribed and mandatory industry code under the Trade Practices

Act 1974 (Cth) (TPA). The TPA is to be renamed the Competition and Consumer Act. The Australian Competition and Consumer Commission (ACCC) is the government agency that administers and enforces the TTPA and franchising, and also investigates and prosecutes non-compliance with the Franchising Code of Conduct.

11 Describe the relevant requirements of these laws and agencies.

The most significant requirement under the Franchising Code is the requirement for the franchisor to give to prospective franchisees and franchisees renewing their agreements a document called a disclosure document. The disclosure document requires the franchisor to give disclosure of a number of matters to the franchisee before receiving any non-refundable money from the franchisee or before the franchisee enters into a franchise agreement. These matters include details of the franchisor and its directors and associates, including their business experience, details of litigation involving the franchisor or its directors, the franchisor's financial information, a summary of the various payments and costs associated with buying, establishing and operating the franchise and a summary of the obligations of the franchisor and franchisee under the relevant franchise agreement. The Disclosure Document must be in the prescribed form not only as to the information to be disclosed but also as to the layout of the document. A copy of the franchise agreement (in the form in which it is to be executed) must also be included with the Disclosure Document. Franchisors must update their disclosure document at least annually within four months of the end of each financial year. For most franchisors the financial year concludes on 30 June, and therefore the update must take place by 31 October each year. Various amendments have been made to the Franchising Code since it originally commenced. The latest set of amendments has been in effect since 1 July 2010.

The Franchising Code of Conduct also regulates certain terms and conditions of the Franchise Agreement. This includes, among others, terms associated with the transfer and termination of the franchise agreement and dispute resolution procedures. The Franchising Code also sets out a prescribed procedure for the offer and sale of franchises. Further details are described below.

12 What are the exemptions and exclusions from any franchise laws and regulations?

There are two exemptions or exclusions from the operation of the Franchising Code:

- where another mandatory industry code, prescribed under section 51AE of the TPA, applies to the franchise agreement; or
- if the franchise agreement is for goods or services that are substantially the same as those supplied by the franchisee before entering into the franchise agreement and the franchisee has supplied those goods or services for at least two years immediately before entering into the franchise agreement and the sales under the franchise are likely to provide no more than 20 per cent of the franchisee's gross turnover for goods or services of that kind for the first year of the franchise.

The Franchising Code will only apply to franchise agreements that satisfy all elements of the definition of 'franchise agreement' in the Franchising Code (see question 9). If one or more of the elements are not satisfied, the Franchising Code will not apply to the agreement and the relationship created under it.

Foreign franchisors granting only one franchise or master franchise in Australia were exempt from the Franchising Code, but that exemption was removed by amendments which took effect on 1 March 2008.

13 Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

The Franchising Code does not include any operational requirements that a franchisor must meet before it may begin offering franchises for sale. From a practical viewpoint, franchisors are unlikely to be successful in growing their franchise network unless they have been in the business or industry for some time and have established a proven business system, a marketable product or service, effective marketing and growth strategies and good relationships with suppliers. The Franchising Code does however prescribe certain requirements which must be met before a franchisor can issue each individual franchise, including the requirement that the franchisor must receive certain written statements from the prospective franchisee or its legal, accounting and business advisers, or both, prior to entering into the franchise agreement.

14 In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

If a sub-franchisor proposes to grant a sub-franchise to a prospective sub-franchisee, the head franchisor and the sub-franchisor must either:

- each give separate disclosure documents to the prospective sub-franchisee; or
- give a joint disclosure document.

If the sub-franchisor elects to provide its own separate disclosure, the disclosure document is to be in the form required by the Franchising Code and the sub-franchisor must also provide to the franchisee a copy of the head franchisor's disclosure document, which must give disclosure of the terms of the franchise agreement between the parties. If the sub-franchisor and head franchisor agree to give a joint disclosure document, it must also address the respective obligations of the head franchisor and sub-franchisor.

15 What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?

The disclosure document must be updated each year within four months of the end of the franchisor's financial year.

During any given year, updates to the disclosure document are not required by the Franchising Code; however, the Franchising Code requires that certain 'materially relevant facts', including changes to the majority ownership or control of the franchisor changes to the intellectual property of the franchise network and certain types of litigation, be disclosed to franchisees within a reasonable time (not more than 14 days) after the franchisor becomes aware of the event.

The disclosure document must be given to a prospective franchisee not less than 14 days before the franchisee enters into a franchise agreement or agreement to enter into a franchise agreement, or pays any non-refundable money to the franchisor or an associate of the franchisor.

16 What information must the disclosure document contain?

The disclosure document must be set out and numbered, and must contain prescribed information and answers to prescribed questions. The form of the disclosure document is set out in clear detail in annexure 1 and annexure 2 of the Franchising Code (although the annexure 2 disclosure document can only be issued where the franchised business has an expected turnover of less than A\$50,000 per annum), and includes:

- information pertaining to the franchisor and its associates or directors, including address details and details of business experience;

- litigation history;
- payments to agents for the recruitment of franchisees;
- details of existing franchisees and details of the number of franchises transferred, terminated, not renewed, bought back by the franchisor and franchises that have ceased to operate (including details of past franchisees) for the preceding three financial years;
- franchise site or territory selection procedures;
- intellectual property ownership;
- supply of goods and services to and by franchisees;
- marketing or other cooperative funds;
- payments due under the franchise agreement and otherwise to establish and operate the franchise;
- summaries of the franchisors and the franchisees' obligations;
- other material conditions of the agreement;
- circumstances in which the franchisor has unilaterally varied a franchise agreement or one may be unilaterally varied in the future;
- whether confidentiality obligations are imposed on the franchisee and, if so, details of the matters that the obligations may cover;
- arrangements to apply at the end of the franchise agreement;
- whether amendments to the franchise agreement will apply on transfer or renewal;
- financial details and earnings information of the franchisor;
- a copy of the franchise agreement in the form in which it is to be executed; and
- any other relevant information that the franchisor wishes to give.

17 Is there any obligation for continuing disclosure?

The Franchising Code requires franchisors to provide existing franchisees with a copy of their current disclosure document within 14 days of receiving a written request from a franchisee. However, the Franchising Code also restricts a franchisee from making such a request more than once in any 12-month period.

Franchisors are also obliged under the Franchising Code to give written notice to both existing and prospective franchisees within 14 days of becoming aware of certain 'materially relevant facts' if those facts are not mentioned in the franchisor's current disclosure document. Such materially relevant facts are set out in the Franchising Code and include such matters as a change in majority ownership or control of the franchisor, and various types of proceedings or judgments against the franchisor or any of its directors.

Other than in these circumstances, there is no requirement for a franchisor to provide continuing disclosure to its existing franchisees.

18 How do the relevant government agencies enforce the disclosure requirements?

The ACCC keeps a close watch to ensure that franchisors comply with their disclosure obligations. The ACCC has the power to take legal action on behalf of members of the public or on its own behalf against any party not complying with the Franchising Code and the disclosure obligations. Recent case law indicates the ACCC is becoming more vigilant in ensuring that the compliance obligations of franchisors are being met. Recent legislative amendments have been passed by the Australian parliament which will, with a likely commencement date of 1 January 2011, provide the ACCC with the investigatory powers to randomly audit franchisors to determine their compliance with the Franchising Code.

19 What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?

Aside from negotiating and reaching an agreement with the franchisor if the violation has caused loss to the affected franchisee, a franchisee may:

- report alleged breaches to the ACCC in the hope that the ACCC will take up the matter with the franchisor; or
- litigate (usually seeking a declaration that the franchisor has failed to comply with the Franchising Code and damages for any losses sustained as a result).

If the violation of the disclosure requirements is discovered within seven days of the franchisee entering into the franchise agreement or paying money to the franchisor (whichever is earlier), the franchisee can exercise its statutory cooling-off right to terminate the franchise agreement. Otherwise, the franchisee has no right to terminate the franchise agreement.

However, as the Franchising Code is made under the TPA, the remedies available for breaches of the TPA are available for breaches of the Franchising Code. These remedies include, among others, an order that the franchise agreement is void from inception, an order to refund money and orders to sign another agreement.

20 In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

In the case of sub-franchising, it is the responsibility of the sub-franchisor to provide the separate disclosure document or the joint disclosure document to franchisees (see question 14). Liability for failure to provide the disclosure documents will be imposed on the sub-franchisor. Individual officers, directors and employees of the franchisor (and their lawyers) may also be held liable if:

- they were knowingly concerned in the disclosure violation; or
- they aided the violation.

Apportionment of liability is determined by the court.

21 In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

The offer and sale of franchises is generally affected by the principles of common law and, in particular, contract law. It is also regulated by the TPA and other state-based fair trading legislation which contains provisions regarding misleading or deceptive conduct. In some states, there are laws that affect the sale of small businesses, including franchised businesses. In the Australian State of Victoria, for example, the Estate Agents Act 1980 (Vic) requires a vendor's disclosure statement to be provided to a prospective purchaser of a small business if the purchase price is less than A\$350,000 (this statement is commonly known as a 'section 52 statement'), failing which a purchaser may void the purchase contract at any time before completion.

Franchised businesses are also often affected by the local council regulations in the area in which the business is located, particularly planning regulations.

Other industry codes or laws may also apply, depending upon which industry the franchise business is concerned with. For example, where the franchise is a real estate franchise, motor vehicle dealership or building franchise, further industry regulations will apply on a state-by-state basis.

22 Are there any general obligations for pre-sale disclosure that would cover franchise transactions?

Other than the franchisor's obligation to provide a prospective franchisee with its current disclosure document, a copy of the Franchising Code and a copy of the franchise agreement in the form that the prospective franchisee will be required to sign, there are no general obligations for pre-sale disclosure that would apply to franchise transactions.

Depending on the location and purchase price of the business being sold, a purchaser of a franchised business may receive the vendor's section 52 statement described above, which contains some financial information about the business.

There may also be industry-specific regulations regarding pre-sale disclosure which will apply to franchise transactions if the franchised business being sold operates within a particular industry.

23 What other actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under the franchise sales disclosure laws?

If the franchisor engages in fraudulent or deceptive practices, the franchisee may seek remedies under the TPA (in particular under the prohibition on misleading and deceptive conduct) and in common law on the grounds of misrepresentation.

If a breach of the TPA is involved, franchisees may also seek the intervention of the ACCC.

In common law, a right to terminate the franchise agreement may exist where the party has entered into the franchise agreement induced by a false representation. As a practical matter, the affected party must act quickly, otherwise it may be argued that the affected party has affirmed the franchise agreement and the right to terminate will be lost.

Legal restrictions on the terms of franchise contracts and the relationship between parties involved in a franchise relationship

24 Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

The only franchise-specific law that regulates the ongoing relationship between the franchisor and the franchisee after the franchise contract comes into effect is the Franchising Code, which:

- requires the provision of a disclosure document upon renewal of a franchise agreement;
- prohibits franchisors from preventing franchisees from forming an association or associating with other franchisees;
- requires the franchisor to prepare and distribute an annual financial statement detailing all of the marketing fund's receipts and expenses for the financial year within four months of the end of the financial year and have that statement audited (unless 75 per cent of franchisees resolve otherwise within five months of the end of the financial year), and give a copy of the statement and the auditor's report to each franchisee within 30 days after preparing each;
- requires the franchisor to disclose changes in majority control or ownership and certain litigation and judgments within 14 days;
- requires the franchisor to give a franchisee a current disclosure document within 14 days of a request for same;
- prohibits the franchisor from unreasonably withholding consent to a transfer, sale or assignment of the franchised business;
- regulates what steps must be taken before a franchise agreement is terminated; and
- requires parties to participate in mediation if requested by either party.

25 Do other laws affect the franchise relationship?

The franchise relationship is also affected by laws in relation to corporations, intellectual property and other matters that relate to franchising contracts, business relationships and trade practices in general, such as:

- Corporations Act 2001 (Cth);
- Trade Practices Act 1974 (Cth) (and regulations under this Act);
- Fair Trading Act 1999 (Vic) and applicable counterparts in each state;
- Income Tax Assessment Act 1936 (Cth);
- Income Tax Assessment Act 1997 (Cth);
- A New Tax System (Goods and Services Tax) Act 1999 (Cth);
- Occupation Health and Safety Act 1991 (Cth);
- Fair Work Act 2009 (Cth);
- Property Law Act 1958 (Vic) and applicable counterparts in each state;
- Retail Tenancies Act 1997 (Vic) and applicable counterparts in each state;
- Retail Leases Act 2003 (Vic) and applicable counterparts in each state;
- Estate Agents Act 1980 (Vic) and applicable counterparts in each state; and
- Sale of Goods Act 1987 (Vic) and applicable counterparts in each state.

Other acts that generally govern commercial and business matters, such as liquor licensing, may also apply, depending upon the particular franchise system.

26 Do other government or trade association policies affect the franchise relationship?

The Franchising Council of Australia (FCA) has recently endorsed the FCA Member Standards, which is a mandatory code of conduct for its members. This may affect the franchise relationship and the way that members are permitted to behave in a franchise relationship while being members of the FCA.

Membership of the FCA is voluntary and the FCA has no statutory authority or power. There is no precondition to becoming a member of the FCA. It is relatively easy to become a member upon paying the membership fee.

More information about the FCA can be found at its website www.franchise.org.au.

27 In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

A franchisor may terminate a franchise relationship in the following circumstances:

- the franchisee breaches the franchise agreement and does not remedy that breach after being given reasonable notice by the franchisor:
 - that it proposes to terminate the franchise agreement because of the breach;
 - telling the franchisee what the franchisor requires to be done to remedy the breach; and
 - allowing the franchisee a reasonable time to remedy the breach (which is not required to be more than 30 days);
- or immediately if:
- the franchisee no longer holds a licence that it must hold to carry on the franchise business;
- the franchisee becomes bankrupt or insolvent under administration or an externally administered corporate body;
- the franchisee voluntarily abandons the franchised business or the franchise relationship;

- the franchisee is convicted of a serious offence;
- the franchisee operates the franchise business in a way that endangers public health or safety;
- the franchisee is fraudulent in connection with the operation of the franchised business; or
- the franchisee agrees to the termination of the franchise agreement.

Other matters may constitute a breach of the franchise agreement, which may allow the franchisor to terminate the franchise agreement.

28 In what circumstances may a franchisee terminate a franchise relationship?

A franchisee may terminate the franchise relationship:

- within seven days of signing the franchise agreement or making a payment under the franchise agreement (the cooling-off period);
- with the consent of the franchisor;
- in accordance with any other rights under the particular franchise agreement;
- in common law if:
 - the franchisor has repudiated the franchise agreement by indicating that it no longer wishes to be bound by its terms;
 - the franchisor breaches an essential term of the franchise agreement; or
 - the franchisee was induced to enter into the franchise agreement by a false representation or statement and has not, since becoming aware of the falsity of the representation or statement, elected to affirm the franchise agreement.

29 May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

There is no obligation to renew unless a contractual right is granted in the franchise agreement. A franchisor may refuse to renew the franchise agreement with a franchisee, provided circumstances exist that, under the terms of the expiring franchise agreement, entitle the franchisor to refuse to renew the franchise agreement.

30 May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

The Franchising Code provides that the franchisor may not unreasonably withhold consent to a transfer. It further provides that it would be reasonable for the franchisor to withhold consent to a transfer in certain circumstances, including where:

- the proposed transferee is unlikely to be able to meet the financial obligations that the proposed transferee would have under the franchise agreement;
- the proposed transferee does not meet a reasonable requirement of the franchise agreement for the transfer of a franchise;
- the proposed transferee has not met the selection criteria of the franchisor;
- agreement to the transfer will have a significantly adverse affect on the franchise system;
- the proposed transferee does not agree in writing to comply with the obligations of the franchisee under the franchise agreement;
- the franchisee has not paid or made reasonable provision to pay an amount owing to the franchisor; or
- the franchisee has breached the franchise agreement and has not remedied that breach.

Further obligations may be imposed upon the transfer under the franchise agreement. A common obligation is the requirement that a transfer fee be paid. Transfers of ownership interest or change of control in a franchisee entity are often deemed to be an assignment or transfer by the franchisee and may thus trigger the transfer provisions.

31 Are there laws or regulations affecting the nature, amount or payment of fees?

There are no laws or regulations affecting the nature, amount or payment of fees.

32 Are there restrictions on the amount of interest that can be charged on overdue payments?

Unless the interest clause constitutes a 'penalty clause' (that is, something that goes beyond what would be a genuine pre-estimate of the loss a franchisor would suffer by reason of a non-payment of money), then there are no restrictions on the amount of interest that can be charged on overdue payments. A rate of 3 per cent to 4 per cent above the overdraft rate charged to the franchisor by its bankers would be unlikely to constitute a penalty.

33 Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

There are no such restrictions on a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency, other than compliance with the relevant withholding tax obligations referred to in question 5.

34 Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants in franchise agreements are enforceable provided they are drafted in sufficiently clear language.

35 Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

The law regarding good faith in Australia is developing. In the recent review of the Franchising Code of Conduct, a recommendation was made that the parties to a franchise agreement act in good faith. This has not as yet been adopted by the government, although the amendments to the Franchising Code which took effect from 1 July 2010 confirm that nothing in the Franchising Code limits any obligation imposed by common law. The High Court of Australia is yet to rule on this issue. There have been many cases where the state and federal courts have held that there is a necessary incident to the franchisor–franchisee relationship that, when exercising their rights and powers under the franchise agreement, they act in good faith.

The Court of Appeal of the Victorian Supreme Court stated:

The interests of certainty in contractual activity should be interfered with only when the relationship between the parties is unbalanced and one party is at a substantial disadvantage, or is particularly vulnerable in the prevailing context. Where commercial leviathans are contractually engaged, it is difficult to see that a duty of good faith will arise, leaving aside duties that might arise in a fiduciary relationship. If one party to a contract is more shrewd, more cunning and out-manoeuvres the other contracting party who did not suffer a disadvantage and who was not vulnerable, it is difficult to see why the latter should have greater protection than that provided by the law of contract.

This indicates a reticence, at least in Victoria, for courts to imply good faith obligations into contracts unless there is some imbalance.

Update and trends

As discussed in more detail above, amendments were made to the Franchising Code which apply to franchise agreements entered into on and from 1 July 2010.

Further, in the Australian State of South Australia, a private member's bill has been introduced into the state parliament that proposes (if passed) to enact state-based legislation that would require franchisors and franchisees to act fairly, honestly and reasonably with one another, effectively imposing an obligation of

'good faith and fair dealing'. The legislative bill also proposes to appoint a commissioner for franchising to arbitrate disputes. It is further proposed that monetary penalties for breaching the legislation (if enacted) will be imposed (up to A\$100,000), together with a 'name and shame' franchising register to record the names of those franchisors that breach the legislation. The Australian franchise community awaits debate on this proposed legislation within the South Australian State parliament.

- 36** Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

There is currently no law in Australia that treats franchisees as consumers, except in relation to products and services that are acquired by franchisees if the value of those goods or services does not exceed a prescribed amount or the goods or services acquired are of a kind ordinarily acquired for personal, domestic or household use of consumption (unless the goods are acquired for the purpose of resupply or are used up in the process of transforming them into other goods). There were recent proposals in consumer law to extend the definition of a consumer to franchisees, but the government recently announced that this extended definition will not be implemented.

- 37** Must disclosure documents and franchise agreements be in the language of your country?

Disclosure documents and franchise agreements must be written in English.

- 38** What restrictions are there on provisions in franchise contracts?

The Franchising Code:

- prohibits provisions in franchise agreements requiring a franchisee to sign a general release of the franchisor from liability towards the franchisee and a general waiver of representations; and
- requires that the complaint handling and dispute resolution procedure specified therein be included in the franchise agreement.

There are other restrictions on provisions in franchise contracts that apply at law and by virtue of statute. For example, the TPA prohibits provisions that provide for certain anti-competitive conduct, such as price collusion, third line forcing, resale price maintenance and other forms of exclusive dealing.

A detailed explanation of these terms is beyond the scope of this chapter. Further information regarding the restrictions on the provisions in franchise contracts can be found on the ACCC website at www.accc.gov.au.

- 39** Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

Competition law in Australia is contained in the TPA. Franchising-relevant parts of the TPA are:

- the requirement to comply with the Franchising Code;
- the prohibition of misleading and deceptive conduct;
- the prohibition of unconscionable conduct;
- the prohibition of price collusion between competitors and other forms of cartel conduct between competitors;
- the prohibition of resale price maintenance; and
- the prohibition of third line forcing or other forms of exclusive dealing.

In relation to the fourth, fifth and sixth items above, exemption from the prohibition may be sought from the ACCC through the process known as authorisation and/or notification.

Further information regarding the competition law that applies in Australia can be found on the ACCC website at www.accc.gov.au.

- 40** Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

There are state and federal courts in Australia. Federal court jurisdiction is limited to matters where a breach of federal laws is alleged (for example, the Franchising Code and the TPA). State courts can generally hear most matters, with the exception of certain claims under the TPA and under the Corporations Act. In most states, there are three levels of courts, with the lower two levels having monetary limits on their jurisdiction. The highest court in each state is called the supreme court. Each state supreme court and federal court has appellate jurisdiction (namely, a court of appeal).

The highest appellate court in Australia is the High Court of Australia. This court hears constitutional matters and (subject to leave to appeal being given) appeals from the state and federal appellate benches.

The most common form of dispute resolution process in franchising is mediation, which is prescribed in the Franchising Code. Under the Franchising Code, the office of mediation adviser is established to oversee the appointment of mediators to mediate disputes and keep statistical records of the results of mediations.

- 41** Describe the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction.

Dispute arbitration is very uncommon in Australia, primarily because:

- the insertion of arbitration clauses in franchise agreements (save for some international franchise agreements) is very rare;
- as juries do not decide the outcome of franchise litigation (as is the case in many jurisdictions), the fear of a franchisee-sympathetic jury does not exist;
- there are hardly any known arbitrators in Australia who can hold themselves out to have expertise in franchising (although there are many with sound commercial arbitration experience); and
- disputes between franchisors and franchisees requiring binding adjudication are not common, primarily because of the success of alternative forms of dispute resolution, such as mediation.

In reality, there is no significant advantage for foreign franchisors in including arbitration clauses that require arbitration to be conducted in Australia in their franchise agreements. This is because:

- the arbitration process is not necessarily faster than court processes;
- the arbitration process is not necessarily more cost-effective than court processes;
- there is a higher risk of a decision not being strictly in accord-

- ance with law; and
- there are more limited rights of appeal against an arbitrator's award.

Foreign franchisors may wish to include in their franchise agreements arbitration clauses that require arbitration to be conducted in their resident jurisdiction. Provided these clauses are properly drafted and proper disclosure is given to a franchisee, such clauses will be upheld by Australian courts, resulting in a permanent stay of any court proceeding commenced in breach of the arbitration clause.

- 42** In what respects, if at all, are foreign franchisors treated differently from domestic franchisors?

The amendments made to the Franchise Code of Conduct, effective 1 March 2008, now align the obligations of foreign franchisors to those of domestic franchisors to comply fully with the provisions of the Franchising Code: that is, foreign franchisors are not treated differently from domestic franchisors.



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