



RESPONSE

TO REVIEW OF FRANCHISING REGULATION IN NEW ZEALAND

DISCUSSION DOCUMENT

INTRODUCTION

- 1 DLA Phillips Fox welcomes the opportunity to provide submissions on the issues raised by the discussion document issued by the Ministry of Economic Development.
- 2 These submissions reflect the fact that DLA Phillips Fox regularly provides clients with legal advice on franchising relationships in Australia and New Zealand.
- 3 Our firm typically acts for franchisors. Our New Zealand franchisor clients include major players in the food, entertainment, finance, logistics and retail sectors.
- 4 We also regularly advise overseas systems regarding entry into the New Zealand market. This work is predominantly through our Australian and United States offices.
- 5 The ability to borrow from the experiences of our offices in Australia and internationally through our exclusive alliance with DLA Piper, the biggest and most respected franchise law firm in the United States, shapes our comments on the issues raised by the discussion document.
- 6 In presenting our submissions we have not responded to all of the questions for submitters.
- 7 These submissions reflect the views of DLA Phillips Fox, they do not necessarily represent the views of any of our clients.

SUBMISSION

Q1 Are there any particular features about franchise contracts that mean that potential and existing franchisees require further protection?

CONTRACTUAL POWER IMBALANCE

- 8 We agree that there is often a contractual power imbalance in franchise relationships. It is a commercial reality that the franchisor often has much greater bargaining power than the franchisee.
- 9 However, the success of a franchise system is dependent on the strong reputation of the franchised brand and the goodwill associated with the system. It is therefore fundamental to this success, which benefits the franchisor and all the franchisees of the system, that the franchisor has sufficient control over the behaviour of its franchisees to maintain quality and consistency across the system. Further, the intellectual property rights in the brand and the system are developed and owned by the franchisor which should entitle them to a degree of control over how such rights are used by others.
- 10 An imbalance of power is not uncommon in commercial relationships and provided we are not dealing with essential services, we see nothing wrong with contracting on a 'take it or leave it' basis. The fundamental principle of freedom of contract should prevail and allow the parties to dictate, agree or accept whatever terms they wish.
- 11 Practically, franchising is not unlike other forms of doing business such as distributorships, supply arrangements and agencies which are not flagged for statutory regulation. In essence, they are all forms of doing business although each displays different characteristics.
- 12 In our view, what is important is that the franchisee has been sufficiently informed as to what his or her rights are under the franchise agreement and is therefore aware of the contractual terms to which they are committing.

TERMINATION WITHOUT CAUSE

- 13 In our experience it is uncommon for a franchise agreement to contain a right for the franchisor to terminate the agreement prior to the expiry of the term without breach of the agreement by the franchisee. These types of provisions are probably limited to the petrol and motor vehicle industries.
- 14 In Australia, franchise agreement provisions providing for termination by a franchisor without cause are not prohibited but reasonable notice and reasons must be given to the franchisee before these provisions can be relied upon to terminate a franchise agreement.
- 15 The experience of our Australian offices is that even where these 'termination without cause' provisions are available they are not often used. This reflects the commercial reality that a franchisor is dependent upon its franchisees for its income stream and only in the most extreme conditions will a franchisor resort to termination in the absence of breach of the franchise agreement by the franchisee. Not only does it affect the franchisor's income stream, it also adversely impacts upon a franchisor's credibility and standing amongst its franchisees and in the marketplace generally due to franchise closures.
- 16 On balance, we do not believe there are sufficient grounds for imposing restrictions upon what the parties are otherwise free to agree regarding the termination of their contractual relationship.

INFORMATION IMBALANCE

- 17 We also agree that, in some franchise relationships, franchisees may have insufficient access to information about the success of the franchise system and the experience of the franchisor to enable the franchisee to undertake appropriate due diligence before entering into the franchise relationship. Arguably, a prospective franchisee is in principle no worse off than a buyer of any small business, or for that matter, a distributor and/or agent acquiring rights under any of those other forms of doing business. However, you will see that on balance, we are comfortable with limited information disclosure.

BARRIERS TO RESOLVING DISPUTES

- 18 The cost of resolving disputes and where this cost should lie is another consideration to be taken into account. With regard to the comment that the cost of taking private legal action can be substantial, we agree with this statement but note that it is a commercial reality for any party wishing to enforce contractual rights.

- 19 Further, any form of prescribed dispute resolution carries additional cost. The need to introduce and maintain a prescribed dispute resolution mechanism such as mediation should be balanced against the actual percentage of franchisor/franchisee disputes referred to a third party advisor for resolution.
- 20 In finding this balance we can be guided by the bi-annual Griffith University's Asia Pacific Centre for Franchising Excellence Australia survey released in October 2008, which indicates only approximately 2% of franchisor/franchisee disputes are not internally resolved and proceed to mediation or end up in the court system. These survey results are consistent in this respect with other developed countries.
- 21 As a general comment, our experience is that franchisors who have undertaken a rigorous selection process for identifying potential franchisees will have far less disputes with franchisees than those franchisors that do not.
- 22 In context, it is questionable whether such a small percentage of disputes warrants costly intervention, not only into the freedom of parties' rights to contract on terms of their choice, but also burdening public funds to set up and operate an office dealing with screening and appointment of suitable mediators.
- 23 While alternative dispute resolution mechanisms are intuitively attractive, in our experience they are of little value unless the parties genuinely wish to resolve the dispute and continue their relationship. If this is the case, then the parties can of course agree on a dispute resolution procedure, such as mediation, even if it is not provided for in the franchise agreement.
- 24 In other cases it may be in the best interests of the franchise network as a whole to ensure the expedient exit of a franchisee that is blatantly breaching their franchise agreement and probably damaging the goodwill of the brand.
- 25 For these reasons we are not in favour of prescribed dispute resolution mechanisms being compulsory in franchise agreements. We would prefer that this be left to agreement between the parties. If prescribed dispute resolution mechanisms are introduced we would favour strict time limits of short duration to enable either party to act if the resolution process is not achieving a favourable outcome.

PUBLIC PERCEPTION

- 26 In our view, well run franchise systems will not benefit from regulation. The industry *as a whole* may benefit from regulation which inhibits or deters the behaviour of 'cowboys' whose behaviour may otherwise damage the public's perception of the industry.
- 27 However, there is little evidence anywhere in the world that franchise regulation inhibits or deters the behaviour of rogue or fraudulent franchisors.
- 28 The occurrence of such behaviour from time to time is not unique to franchising. It is an everyday occurrence in virtually all forms of commercial activity.
- 29 As far as such behaviour occurs in franchising or under the guise of franchising, it is the exception to the rule and for this reason it tends to make news headlines.
- 30 To introduce regulation in an attempt to address the exception may not be well founded, especially in the absence of any empirical evidence that regulation inhibits or deters such behaviour. Existing laws, including criminal law should be able to address such behaviour.

Q2 Have the problems been defined correctly? Are there other problems?

OTHER PROBLEMS - PROVEN SYSTEMS

- 31 In our view, it is important that a franchise system has been tested by the franchisor and is a proven system before it is franchised. Franchisors should not be licensing an idea but rather a proven business model. However, we query whether this should be regulated and believe this issue could be adequately addressed by disclosure requirements.

OTHER PROBLEMS - 'CHURN'

- 32 We are aware that the Australian Competition & Consumer Commission (ACCC) has been investigating churn in Australia. This is where a franchisor has a deliberate strategy to buy back failing franchises from the franchisees at a low cost to then resell them to a new franchise. However, we are not aware of this being a particular problem and any moves to stop this activity could interfere with genuine buy backs which occur for legitimate reasons.

Q3 What is the magnitude of these problems? Do they apply to the franchising sector as a whole, or are they specific to particular types of franchising or particular industries?

- 33 Our view is that the magnitude of problems in the franchise industry as a whole is low.
- 34 As noted at paragraph 20, survey results and the experience of our Australian counterparts suggest that only a small percentage of franchise disputes are not resolved internally between franchisors and franchisees.
- 35 A couple of high profile cases involving fraudulent behaviour by individuals have resulted in the franchise industry being brought into the public spotlight.
- 36 There is no evidence to suggest that inappropriate behaviour brought into the public spotlight occurs more or less in any particular industry applying franchising as a way of doing business.
- 37 The root cause is rather fraudulent behaviour by those hiding behind the guise of franchising and regulating the franchise sector is unlikely to address or curb these isolated incidences and deter those individuals who are fraudulent.

Q4 Which of the options do you favour? Why?

- 38 Some jurisdictions, such as the United Kingdom and New Zealand, currently operate without franchise regulation. The United Kingdom, although being a part of the European Union, has to date resisted any attempt to introduce relationship and/or disclosure laws and has consistently found that there are inadequate reasons to upset the status quo.
- 39 We believe that the status quo is adequate most of the time. General contractual law and statute such as the Fair Trading Act 1986 and Contractual Remedies Act 1979 provide remedies in most situations. However, the cost of access to the remedies available under the current regime can be prohibitive for small franchisees.
- 40 While we are comfortable with the status quo, if there is strong support for franchise-specific regulation then we would like to help ensure that any such regulation is well thought through and well drafted.
- 41 Accordingly, we comment on each sub-option in option 3 below.

APPROACH TO THE REGULATION OF FRANCHISING

- 42 We can see benefits for franchisees in some of the suggested regulatory measures, but each will come at a cost, usually to the franchisor. These costs are likely to be passed onto franchisees and ultimately consumers.
- 43 Any franchise regulation introduced may involve relationship laws, disclosure laws or a hybrid of the two.
- 44 Relationship laws intervene in the contractual relationship between franchisor and franchisee by specifying the actual terms and conditions upon which the parties to that relationship are obliged to contract.
- 45 Disclosure laws simply oblige the franchisor to disclose certain information relating to the franchisor, the franchise system and the franchise opportunity upfront. Such disclosure aims to assist a prospective franchisee to make an informed decision.
- 46 The introduction of relationship laws (commonly in addition to disclosure laws) has adversely affected the growth of franchising. Typically, this occurs in civil law jurisdictions and a fair number of states in the United States are examples.
- 47 In Iowa the State Government introduced far reaching relationship laws in 1992. This resulted in protracted constitutional legislation where, amongst others, McDonalds and Holiday Inn had certain provisions of the Iowa Franchise Act set aside on the basis of being contrary to the United States Constitution. Despite this, and even to date, franchisors have shunned Iowa as a State in which to offer franchises.
- 48 In Australia the Franchising Code (one of the most comprehensive and robust disclosure regimes in the world) has a hybrid regulatory franchise regime mixing relationship and disclosure laws.
- 49 Clauses 16, 20, 21, 22, 23 and clauses 24 through to 30A of Australia's Franchising Code clearly restrict an entrenched principle of the common law, the freedom of franchising parties to contract on lawful terms of their choice. These provisions prescribe what terms the parties can contract upon as far as the subject matter of these clauses is concerned.

OPTION 3.1 MANDATORY INFORMATION DISCLOSURE

- 50 Should franchise regulation be introduced in New Zealand, we strongly recommend that regulatory requirements be limited to disclosure reasonably required to put a franchisee in a position to make informed upfront decisions before entering into the franchise agreement.
- 51 We agree that a benefit of mandatory information disclosure would be that it would help address the problem of information imbalance between franchising parties.
- 52 We believe that franchisees could benefit from certain upfront disclosures on the part of the franchisor to assist franchisees in making informed decisions.
- 53 While this increases costs for franchisors, on balance, and provided the required disclosures are reasonable, we believe that most franchisors would accept these costs if the disclosures were seen as reasonable and clearly beneficial to franchisees.

OPTION 3.2 MANDATORY PROFESSIONAL ADVICE

- 54 We also believe that franchisees should be strongly encouraged to get professional advice before being committed to the franchise relationship. This is consistent with the proposal made recently in Australia by DLA Phillips Fox to the Federal Government's Parliamentary Committee to make obtaining professional advice prior to entering into the franchise agreement mandatory.
- 55 Any mandatory or voluntary information disclosures by a franchisor will be of little assistance to a franchisee who does not obtain good advice, whether legal, accounting or other professional advice, in respect of the information provided.
- 56 As mentioned above at paragraph 12, it is important that the franchisee has been sufficiently informed as to what his or her rights are under the franchise agreement and is aware of any onerous terms particularly if they do not have a strong bargaining position.
- 57 Our Australian experience and the Griffith University Franchising Australia Survey suggest most if not all franchise disputes arose where the franchisee failed to obtain professional advice prior to entering into the franchise agreement, despite being advised by the franchisor to do so.
- 58 In the experience of our Australian offices, rather than obtaining such advice, the majority of prospective franchisees sign a certificate to the effect that they acknowledge having been encouraged by the franchisor to obtain such advice but have decided not to seek this advice.
- 59 This is despite the undisputed argument that the cost of having a dispute resolved, be it through mediation or the court system, is invariably substantially higher than the cost of obtaining professional advice from an informed advisor.
- 60 However, despite the merit in prospective franchisees receiving upfront information by way of mandatory disclosure, very few prospective franchisees actually read the disclosure document, or understand what they read.
- 61 Furthermore, while it can be argued that mandatory advice will increase the prospective franchisee's costs, invariably, whether it's a low or high cost of entry to the franchise, the prospective franchisee is often putting (within its ability) substantial money at risk. Compared to the benefits of getting objective third party advice overall eventual costs, should a dispute arise, will be limited.
- 62 As we discuss in further detail from paragraph 88 below, any mandatory information disclosure document would need to:
 - 61.1 Contain information relevant to the potential franchisee's decision to become a franchisee of the system.
 - 61.2 Be appropriately succinct and easy for the franchisor to prepare.
- 63 Many New Zealand systems we have come across advise the franchisee to obtain independent legal advice before entering into the franchise agreement and require a solicitor's certificate to be provided confirming that this has occurred, or a waiver of this advice from the franchisee.
- 64 We recommend requiring a prospective franchisee to obtain, at least, an advice certificate from a solicitor.

OPTION 3.3 COOLING-OFF PERIOD

- 65 We see little value in having a cooling-off period as we are not aware of franchisors 'hard selling' their franchisees. On the contrary, in our experience, franchisors encourage their prospective franchisees to get legal and business advice.
- 66 When the franchisor has undertaken an appropriate selection process to identify competent franchisees then it is unlikely the cooling-off right would be used. Likewise, if the franchisee has undertaken appropriate due diligence of the system and of the franchisor, a cooling-off period is not necessary. We think access to advice and information is more important than cooling-off periods.
- 67 Having said this, we do not see much harm or additional cost to the franchisor in having a cooling-off period.
- 68 If a cooling-off period is introduced it should be limited to a maximum of seven days from the date of the execution of the franchise agreement. By this time we expect the franchisor will have incurred a fair amount of cost and we believe it is only fair and reasonable to allow a franchisor to recover its reasonable cost.
- 69 To avoid potential dispute on what may be reasonable or otherwise, it is suggested that the amount the franchisor is entitled to retain from moneys already received or recoverable from the franchisee, must either be fixed or capable of being calculated with reference to the terms of the agreement only. For example, the agreement should contain a formula for calculation without the need to refer to extraneous evidence.

OPTION 3.4 ENHANCED DISPUTE RESOLUTION

- 70 Best franchise practice internationally suggests that a franchisor should have internal dispute resolution procedures in place.
- 71 A mandatory dispute resolution procedure may be helpful if each party values the relationship and wants the dispute to be resolved. However, one disadvantage of a mandatory dispute resolution procedure would be if one party is not interested in continuing the relationship and wants to exit the franchise agreement they could still be required to go through the mandatory process.
- 72 Furthermore, mandatory dispute resolution would introduce relationship laws into franchising relationships. Again the need for this requirement should be balanced against the encroachment it has on the freedom parties have under common law to contract on lawful terms of their choice.

- 73 If there is a strong support for a mandatory dispute resolution procedure for franchise relationships we consider a short time frame and a well defined process for resolving disputes should be employed.
- 74 The need for a well defined process, short time frame and experienced mediators in any mandatory dispute resolution process introduced is highlighted by the experiences in Australia.
- 74.1 A problem frequently experienced in compulsory mediation under the Australian Franchising Code is the fact that if one of the parties is reluctant to attend mediation that party proverbially uses all the tricks in the book not to agree on a date for mediation to take place once the mediator has been appointed by the Office of the Mediation Advisor.
- 74.2 Unfortunately, in practice the longer the period between calling a dispute and a mediation actually taking place, the more difficult it becomes to achieve a mutually satisfactory outcome.
- 74.3 One way of forcing even a reluctant party to attend mediation is to have a short timeframe within which to attend mediation.
- 74.4 Current recommendations under consideration by the Parliamentary Committee include a civil penalty if a party fails to attend a mediation within a specified period of time and allowing the mediator to issue a report which will be admissible in subsequent proceedings (for example before the ACCC). This failure to attend may amount to a finding of '*bad faith*' on the part of one of the parties. This is a factor that can be taken into account by the ACCC or a court in determining whether or not a party has acted unconscionably given the provisions of the Trade Practices Act 1974 (Cth).
- 74.5 These developments should be taken into consideration when developing any mandatory dispute resolution procedure.
- 75 If, and to the extent, a dispute resolution mechanism such as mandatory mediation is introduced, a requirement will need to be put in place where mediators (who need not necessarily be lawyers) have mediation and franchising experience.
- 76 If compulsory mediation is considered, there should be a system to vet and register mediators to ensure that they have suitable mediation and franchising experience.

77 We note, in Australia, the Office of the Mediation Advisor maintains a registration system for mediators appointed to its national panel who act as mediators under the Australian mandatory mediation provisions contained in the Franchising Code.

OPTION 3.5 RULES FOR FRANCHISING CONTRACTS

78 Our view is that rules for franchising contracts are not necessary. The parties should be free to agree the terms of the relationship. Our rationale for this view is that franchises are not for 'essential' services and that 'one size fits all' regulation may not work well in the franchise industry due to the vast number of different types of systems being franchised.

79 Our view is that it would be sufficient if, as part of mandatory information disclosures, information about key contractual terms is set out in plain English (see paragraph 89 below).

OPTION 3.6 GOOD FAITH

80 We do not favour mandatory obligations of good faith. While it is a laudable goal to have parties act in good faith towards each other, in our view, it introduces an unacceptable element of uncertainty into the contractual relationship.

81 There would be no certainty as to what was meant by good faith and it would ultimately require judicial interpretation. In New Zealand very few franchise disputes make it to court and therefore it could take a considerable period of time before judicial precedent was available.

82 Uncertainty adds cost and risk for a party wanting to exercise its contractual rights. We believe that the concept of good faith is best left to the parties to agree upon as a term of their contract if they value it more than the uncertainty that it creates. Alternatively, it is open to a court to imply a duty of good faith in a particular case if the appropriate circumstances present themselves.

Q5 Have all of the options (and sub-options) been identified? Are there other options (and/or sub-options) that should be considered?

83 As mentioned above at paragraph 48 Australia currently has a hybrid system which can be seen as a sub-option or permutation on the two mainstream regulatory regimes followed in most countries across the globe which have adopted a statutory regulatory regime.

84 Again, we strongly recommend that any regulation of franchising in New Zealand be limited to upfront disclosure requirements, rather than dictating the terms of the contractual relationship of a franchisor and prospective franchisee.

Q6 If Information disclosure is to be introduced, which classes of information should be required to be disclosed?

85 Being close neighbours and trading partners, New Zealand is well positioned to borrow from the Australian Franchise Code and the Australian franchise experience.

86 It is the experience of our Australian offices that compliance with the Franchising Code in Australia has become so onerous and detailed that few if any franchisors have the ability to prepare a compliant disclosure document, not to speak of relationship law issues that need to be taken into consideration in preparing a franchise agreement.

87 Experience has taught us that many franchisors now have difficulty understanding and explaining their own disclosure documents to prospective franchisees. Many prospective franchisees do not read the disclosure document because it is such a complex and detailed document, and those reading it often find it difficult to comprehend without an experienced accountant or business advisor explaining it to a prospective franchisee. Arguably such disclosure misses the objective of providing a prospective franchisee with reasonably required upfront information to enable it to make an informed decision.

88 Whilst there are many worthwhile disclosure requirements particularised in Annexure 1 of the Australian Franchising Code, prospective franchisees currently suffer from an information overload.

- 89 In our view the following information disclosures would assist franchisees to assess the success of the franchise system and the experience of the franchisor to enable the franchisee to undertake appropriate due diligence before entering into the franchise relationship:
- 89.1 Number of current franchisees.
 - 89.2 Number of franchisees who have left the system and a general comment as to why they left (for example, franchise agreement expired, franchise agreement terminated for franchisee's breach).
 - 89.3 Information on the history of the system.
 - 89.4 The experience of senior management of the franchisor in running franchise systems.
 - 89.5 Information on all fees payable by the franchisee to the franchisor under the franchisee agreement.
 - 89.6 Information on all fees payable by the franchisee to third parties under the franchise agreement.
 - 89.7 Information on fees and other benefits, such as rebates, which franchisor receives from third parties as a result of the franchisee complying with its obligations under the franchise agreement.
 - 89.8 Information on the express rights of termination by both parties under the franchisee agreement.
 - 89.9 Information on the ability of the franchisee to sell the franchised business and to assign or novate the franchise agreement.
 - 89.10 The suitability, and prior success (if any), of the site from which they propose to carry on the franchise business.
 - 89.11 The success of other franchisees of the system, particularly those who have catchments or a territory close to the franchisee's proposed site.
- 90 In addition, sufficient financial information about the franchisor would need to be provided so that the franchisee is comfortable that the franchisor is solvent. We query whether, if the franchisor is a private company, it is appropriate for full financial statements to be provided to all potential franchisees.
- 91 We suggest the disclosure document should be given to a prospective franchisee in conjunction with a franchise agreement and contain, where applicable, a reference to the relevant clauses in the franchise agreement which set out this information.
- 92 It is important that any mandatory disclosure document is succinct and easy for the franchisor to prepare.
- 93 We also believe, while typical, an obligation upon a foreign franchisor who grants a master franchise or a single franchise to also provide a compliant disclosure document to franchisees (as exists in Australia) offers little, if any, benefit particularly in the master franchise relationship for there is no contractual relationship between the franchisor and sub-franchisees.
- Q8 What are the benefits of each of the options?**
- 94 As per comments above.
- Q9 What are the costs and risks of each of the options (including any further options)?**
- 95 The cost of obtaining appropriate legal and accounting advice would be an additional cost that franchisees would incur when purchasing a franchise.
- 96 We expect any additional costs which the franchisor would incur as a result of complying with any information disclosure regulation would be passed onto the franchisee by increased initial franchisee fees.
- 97 It is also common for the franchisee to agree to pay the franchisor's legal costs for entering into the franchise agreement.
- 98 The total costs which could be incurred by the franchisee as discussed above could be substantial. If a franchisee is competing against similar stores which are not franchised this could be a substantial disadvantage.
- Q9 Can you give any estimates of the compliance costs associated with the options?**
- 99 We are unable to give an estimate.
- 100 The experience of our DLA Phillips Fox offices in Australia is that legal compliance costs, including the preparations of a compliant disclosure document and franchise agreement varies significant (depending upon the complexity of the system) but that they are unacceptably high as a result of complicated and unnecessary disclosure requirements.

Q10 With any of the regulatory options discussed are there potential conflicts with any existing law, such as securities law or company law?

SECURITIES LAW AND COMPANY LAW

101 While there may be a small amount of overlap between securities law and a mandatory disclosure regime for franchisors who are public issuers, we do not see any conflict problems in relation to securities law or company law.

PRIVACY ACT 1993

102 If information about an identifiable individual is required to be disclosed by any mandatory disclosure regime (for example the employment history of the senior management of the franchisor or contact details for present and past franchisees) the information would need to be collected and disclosed in a manner permitted by the Privacy Act.

CONFIDENTIALITY

103 It is common for franchise agreements to provide that the terms of the document are confidential and can only be disclosed in limited circumstances. Any mandatory disclosure regime may require confidential information to be disclosed.

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ABOUT DLA PHILLIPS FOX

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RNC01/DPFI347/1108

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