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By email

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Submission by the Avis Budget Group 2013 Discussion Paper: Review of the Franchising Code of Conduct

I am writing on behalf of the Avis Budget Group (ABG) which comprises Avis Australia and Budget Australia.

ABG is pleased to make a submission on the Discussion Paper: *Review of the Franchising Code of Conduct (Discussion Paper)* prepared in connection with the review into the amendments in 2007 and 2010 (**Amendments**) to the Franchising Code of Conduct (**Code**) and certain other matters (as described in the Terms of Reference) by Mr Alan Wein (**Review**).

This submission has three components:

Part 1 — comments on the methodology and approach of the Review.

Part 2 — responses to the 'discussion questions' raised in the Discussion Paper.

Part 3 — certain further matters which ABG would like to raise, from a franchisor's perspective, not covered under Parts 1 and 2.

For your information, I note the following:

- ABG is a franchisor of 58 franchises in the car rental industry. The value of the business conducted through the franchisees in 2012 was in excess of \$270 million.
- In the period since the Amendments, ABG has had only one dispute with a franchisee. This dispute was settled amicably during mediation, coincidentally with Mr Wein as mediator.
- In the ten years prior to the 2010 Amendments, ABG had no disputes with its franchisees requiring resort to mediation or litigation.

Part 1

Comments on the methodology and approach of the Review

ABG has some concerns about the methodology of the Review.

The Terms of Reference in the Discussion Paper provide (see Discussion Paper, p 6) that the report by Mr Wein is to:

'[I]nclude findings and recommendations, based on evidence presented to the reviewer and these terms of reference. In gathering evidence to support findings and recommendations for the final report, the reviewer is required to undertake appropriate consultation, including with industry and interested State and Territory stakeholders.'

This seems to contemplate an interim or draft report. It is not clear from the Discussion Paper whether any such report will be prepared, or whether stakeholders will be provided with the opportunity to comment prior to finalisation of the report. The Discussion Paper does not provide stakeholders with detail on factual matters which may be used to support findings and recommendations. Reference is made to particular matters. For example, p 24 of the Discussion Paper refers to:

'information from the Office of the Franchising Mediation Advisor (OFMA) indicates that, for the 2011 — 2012 financial year, exit issues were a common reason for enquiring with OFMA'.

However, there is no detail or evidence which supports this broad generalization.

Moreover, participants are not asked to respond to factual information about the operation of the Amendments. Instead, they are asked a series of questions, some of which raise difficult legal issues, on which they can respond with personal views and anecdotal evidence based on their own experience. For example, there is no request to provide factual information about:

- the number of disputes;
- the number of alleged breaches of franchise agreements or the Code; or
- what participants in the industry understand by the concept of 'good faith'.

In addition, several questions in the Discussion Paper assume that the principal issue is whether there should be further regulation of the industry. The idea that the industry might benefit from reduced regulation is not canvassed. And the perspective on further regulation is mainly whether franchisors should be subjected to further obligations. This approach lacks balance. The Code regulates franchisors by proscribing how they must conduct their business. The Code does not proscribe the way in which franchisees must carry on their business. Therefore, if civil pecuniary penalties were to be imposed for contravention of the Code, that would impact unevenly as between franchisor and franchisee.

In ABG's view, there is also a lack of balance in the questions which, as a consequence, could produce skewed conclusions or findings. For example, no less than 8 questions are raised in relation to good faith. That is more than a quarter of the total number of questions. The concept, and analysis around, good faith is more a legal issue than a commercial issue. Some questions appear to assume that the Amendments have been unsuccessful, or imply answers which favour franchisees. See, for example, questions 3 and 23.

Part 2

Responses to the 'discussion questions' raised in the Discussion Paper

1. Has the additional disclosure requirement regarding the potential for franchisor failure effectively addressed concerns about franchisees entering into franchise agreements without considering the risk of franchisor failure?

ABG has no information on this issue. However, it is difficult to understand how anyone could contemplate significant financial investment in a business, the success of which is dependent on the continued viability of another business, without appreciating the risk that the other business might ultimately fail.

2. Does the sector have any concerns regarding the operation of this requirement?

ABG can only express its personal views. It has no concerns regarding the operation of this requirement.

3. Have amendments to the Franchising Code improved the transparency of financial information for franchisees? If not, why not? If so, what benefit is this having for franchisees?

From ABG's view, yes. When compared with other investors, franchisees are in a fortunate position with the amount of information provided.

4. Does the sector have any concerns regarding the operation of these amendments?

ABG can only express its personal views. It regards the operation of these Amendments as administratively burdensome in the context of the volume of documents (and copies of documents) that need to be prepared and sent under the Code to franchisees.

5. Have the amendments regarding unilateral variation, transfer and novation been effective in addressing concerns about franchisors' ability to make changes to franchise agreements? Why or why not?

ABG believes that amendments regarding transfer have gone too far and that in addressing concerns about franchisors' ability to make changes to franchise agreements insufficient weight has been given to the importance of the identity of a proposed new franchisee to a franchisor. A request to transfer a franchise is in most cases simply a request that the franchisor enter into a new contract with a third party chosen by the franchisee. The franchisor should be free to make that decision on whatever terms it thinks fit.

In addition, it seems inappropriate to require franchisors to give franchisees the 6 months' notice prior to the end of the franchise as to whether the franchise will be renewed as it may be a pointless exercise since the franchisee may have no intention of renewing the franchise. Further, the Code does not impose a corresponding obligation on the franchisee to advise the franchisor of the franchisee's intention about the franchise renewal.

Given this, ABG requests a bi-party notification as follows:

Timing	Notice by whom to whom	What
Prior to 6 months of the termination date of the franchise	Franchisee to franchisor	Of the franchisee's intention to request a renewal of the franchise at the termination date
Within 21 days of the above notice from the franchisee (but only if the franchisee wishes to renew the franchise)	Franchisor to franchisee	Of the franchisor's decision to renew or not to renew the franchise at the termination date

6. Does the sector have any concerns regarding the operation of these amendments?

ABG can only express its personal views. See response to question 5.

7. Have the changes to the Franchising Code led to improved franchisee knowledge about franchisors and their conduct before they enter into franchise agreements? Why or why not?

The answer is clearly 'yes', unless the Code is not being complied with.

8. Is the information being provided useful to franchisees?

ABG has no information on this question. However, ABG believes that it would be useful.

9. What effect has the requirement to provide this additional information had on franchisors?

It is a significant administrative burden. The shortening of the reporting period from 60 days to 14 days is particularly onerous.

10. Does the sector have any concerns regarding the operation of the new provisions?

ABG can only express its personal views. See response to question 9.

11. What impact has the removal of the foreign franchisor exemption had on the sector?

This is not relevant to ABG's operations. ABG does not wish to respond to this question.

12. Has the removal of the exemption caused any issues?

This is not relevant to ABG's operations. ABG does not wish to respond to this question.

13. On the whole, do the 2008 and 2010 disclosure amendments ensure franchisees are provided with adequate information?

Yes.

14. Is the extra onus on franchisors justified by the benefit this disclosure is providing to franchisees?

There is a clear potential benefit to franchisees. However, whether franchisees actually benefit is not something on which ABG feels able to comment. The provisions do, however, illustrate a certain ambivalence in the approach to franchisees. On the one hand, franchisees are treated as being relatively unsophisticated, and on that basis need to be advised expressly of matters which ought to be obvious, such as the risk of franchisor failure. On the other hand, franchisees are treated as being able to undertake regular reviews of detailed financial information.

15. How effective were the targeted amendments in 2010 to the Franchising Code in addressing specific issues, instead of inserting an overarching obligation to act in good faith?

ABG believes that it is more useful for both franchisors and franchisees that the Code utilises specific requirements which can be understood without the aid of legal advice, than for generalised concepts such as good faith to be used. Unless good faith is expressly defined, perceptions of the impact of any explicit good faith requirement would be likely to differ markedly.

To impose a requirement of good faith would be inconsistent with the objectives of the Code as explained on p 22 of the Discussion Paper, namely, 'that industry codes should clearly and unambiguously set out requirements and obligations, rather than aims and ideals'.

16. How effective is section 23A of the Franchising Code, which provides that nothing in the common law limits the obligation to act in good faith?

ABG's understanding is that section 23A does not say that 'nothing in the common law limits the obligation to act in good faith'. ABG's understanding is that the statement on p 19 of the Discussion Paper ('nothing in the code limits any obligation to act in good faith under the common law') accurately summarises the terms of section 23A.

Section 23A is important in ensuring that the express requirements of the Code are not treated as excluding the common law concept of good faith. It is therefore effective to preserve claims by either party to a franchise agreement that the other has not acted in good faith.

Further, and in any event, ABG notes the similarities in the circumstances of franchisees and the circumstances of retail tenants in large shopping centres controlled by large corporations. There is no express requirement of good faith statutorily imposed on shopping centre landlords in relation to their obligations and negotiations with retail tenants.

17. What specific issues would be remedied by inserting an obligation to act in good faith into the Franchising Code which would not otherwise be addressed under the unwritten law or by the ACL?

ABG's understanding is that changes to the unconscionable conduct prohibitions which occurred under the Trade Practices Act 1974 (Cth) prior to the enactment of the Australian Consumer Law (as well as to the Australian Consumer Law) have served to promote and require good faith in the negotiation and performance of contracts. ABG can see no reason why franchisors and franchisees should be singled out for the imposition of a specific statutory good faith obligation.

On p 30 of the Discussion Paper there is a quotation, which appears to come from the Government's *Policy Guidelines on Prescribing Industry Codes under Part IVB of the Competition and Consumer Act 2010 (Cth)*, p 9, that industry codes are:

'... co-regulatory measures, designed to achieve minimum standards of conduct in any industry where there is an identifiable problem to address. Industry codes can be used as an alternative to primary legislation in instances where a market failure has been identified.'

That supports ABG's view, that a good faith obligation ought not to be included in the Code.

18. If an explicit obligation of good faith is introduced, should 'good faith' be defined? If so, how should it be defined?

In ABG's view, no explicit obligation of good faith should be introduced. ABG's understanding is that the Government was not in favour in 2010 of the introduction of an explicit obligation because:

- it would be necessary to define the concept;
- an abstract definition of such a concept is regarded by lawyers as either impossible or ill-advised; and
- there would, inevitably, be considerable overlap with the unconscionable conduct provisions which are now located in the Australian Consumer Law.

19. If an explicit obligation to act in good faith is introduced, what should its scope be? That is, should it extend to: the negotiation of a franchise agreement, and/or the execution of a franchise agreement, and/or the ending of a franchise agreement, and/or dispute resolution in franchising?

In ABG's view, no explicit obligation of good faith should be introduced. Of course, the provisions of the Code already give effect to matters such as disclosure and conduct in

dispute resolution which are clearly designed to promote and require good faith by the parties to franchise agreements.

20. If a specific obligation to act in good faith was introduced into the Franchising Code, what would be an appropriate consequence for breaching such an obligation?

In ABG's view, no explicit obligation of good faith should be introduced. But insertion of the obligation in the Code would carry the consequences which attach to any failure to comply with the Code.

21. If a specific obligation to act in good faith was introduced into the Franchising Code, how would such an obligation interact with the provisions of the ACL?

In ABG's view, no explicit obligation of good faith should be introduced. Interaction with the Australia Consumer Law seems to be a legal question. But compliance with the Code does not provide any defence to a claim that the Australian Consumer Law has been contravened, for example, by misleading or deceptive conduct. Multiple layers of statutory regulation, on which legal advice has to be sought, is not in the interests of either franchisors or franchisees.

22. If the Franchising Code was amended to contain an explicit obligation to act in good faith, would there need to be other consequential amendments to the Franchising Code?

This seems to me to be a legal question. However, as noted above, in ABG's view, no explicit obligation of good faith should be introduced.

23. Have the amendments regarding end of term arrangements and renewal notices been effective in addressing concerns about inappropriate conduct at the end of the term of franchise agreements? Why or why not?

The end of term arrangements are designed to protect franchisees. They have done nothing to prevent inappropriate conduct by franchisees at the end of the term of franchise agreements.

24. Has conduct and behaviour during mediation changed since the introduction of the 2010 amendments to the Franchising Code, including requiring parties to approach mediation in a reconciliatory manner? If so, in what ways?

ABG has limited experience with mediation. However, its experience is that the approach of franchisees to mediation is exploitative rather than reconciliatory.

25. Does the sector have concerns regarding the operation of the amendments?

ABG can only express its personal views. See above.

26. Is the current enforcement framework adequate to deal with the conduct in the franchising industry?

Yes.

27. How can compliance with the Franchising Code be improved?

ABG is not aware of evidence which suggests that the Code is not being complied with. However, compliance with the Code would be promoted by some reduction in the burden on franchisors.

28. What additional enforcement options, if any, should be considered in response to breaches of the Franchising Code?

The consequences of not complying with the Code are already very serious. Consideration of the need for additional enforcement options can only be necessary if the

Code is not currently successful in achieving its objectives. There is no evidence of that in the Discussion Paper, which approaches the question as if it were purely a matter of principle. At the level of principle, the objectives of the Code do not require further enforcement options. In addition, again at the level of principle, no case has been made for singling out the franchise industry for further enforcement options beyond those for which the Competition and Consumer Act 2010 (Cth) and Australian Consumer Law already provide.

29. What options are available to businesses to address breaches of the Franchising Code, or any other adverse conduct in the franchising industry?

ABG believes that the Competition and Consumer Act and the Australian Consumer Law already provide sufficient options and remedies to address breaches of the Code and adverse conduct in the franchising industry (eg enforcement action can be taken by the ACCC for a breach of the Code). See also response to question 28.

Part 3

Further matters

3.1 Existing form of Code working satisfactorily

As noted in Part 1, there is little factual background in the Discussion Paper. Generally, however, the factual information which is provided supports the view that the Amendments have worked satisfactorily. See p 27 of the Discussion Paper in relation to the number of inquiries made of the ACCC.

ABG also notes the statement in the Discussion Paper (p 27) that 'Griffith University's bi-annual survey of franchisors estimates that approximately 1.5 per cent of franchisees are in dispute with their franchisor'. This seems a good indication that the Code is working well. In further support of this finding, ABG's level of dispute is even smaller. It is not currently in dispute with any of its 58 franchisees.

3.2 No need for further restrictions

The Code is, however, quite a blunt instrument. It embodies a 'lowest common denominator' philosophy under which, generally:

- all franchisors are treated alike;
- little or no allowance is made for the fact that, as in ABG's case, some franchisors have been in business a long time, while others are new and untested; and
- there is no allowance for size, and therefore the relative cost of the financial burden of the Code for franchisors.

As pointed out above, the Code regulates (and, therefore, to some extent restricts) the business of a franchisor to a far greater extent than it regulates that of a franchisee. In general, franchisors must be content with their contractual rights, and rights under certain provisions of the Australian Consumer Law. From that perspective, any suggestion that good faith should be made explicit in the Code is simply a suggestion that further restrictions — beyond the significant number of obligations and restrictions already set out in the Australian Consumer Law, the Code (as currently drafted) and the common law — should be placed on the exercise by franchisors of their contractual rights. From a commercial perspective, this will have a deleterious effect on a franchisor's willingness to undertake franchising activities.

3.3 State inquiries into franchising regulation

On pages 9 and 10 of the Discussion Paper, reference is made to some initiatives which will further regulate and restrict franchises at the State level. ABG understands that active steps are being taken in some jurisdictions to enact legislation which would lead to the regulation of franchising on terms which differ from those of the Code. This is an alarming

prospect for a national franchisor such as ABG. One of the driving forces behind the replacement of the Trade Practices Act by the Competition and Consumer Act, and the adoption by all States and Territories of the Australian Consumer Law, was the importance of uniformity of regulation. That would be undermined by the presence of additional regimes.

To contemplate that ABG might be required to comply with two or more franchise regulation regimes is very disturbing indeed. Even for a franchisor intending to offer franchises solely in a jurisdiction which imposed such a regime, there is a real potential to discourage franchising activities.

In light of the above, ABG holds the very strong opinion that there should be a moratorium on amending the Code until the position under State law is clarified.

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I would be happy to elaborate on any of the above matters.



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