

**From:** Gerrard, Gerry  
**Sent:** Thursday, 7 February 2013 9:48 AM  
**To:** Franchising Code Review  
**Cc:** Gerrard, Gerry  
**Subject:** Bakers Delight Holdings Ltd - Response to Code Review

Attention: Alan Wein

Good Morning.

As General Manager of Bakers Delight Holdings Ltd, I submit the following information for consideration as part of the review of the Franchising Code of Conduct.

**The recent amendments to the Code:**

The 2010 amendments to the Franchising Code of Conduct (“the Code”) primarily focused on franchisor disclosure obligations. The amendments introduced additional disclosure obligations and in so doing increased the burden on franchisors requiring additional information to be included in their disclosure documents. The end result is longer, more cumbersome disclosure documents. I highlight that the Bakers Delight Disclosure Document is now some 288 pages in length.

It is noted that under clause 6A of the Code, the purposes of the disclosure document are:

- a. to give to a prospective franchisee or a franchisee proposing to enter into, renew or extend an existing franchise agreement, information from the franchisor to help the franchisee make a reasonably informed decision about the franchise; and
- b. to give a franchisee, current information from the franchisor that is material to the running of the franchised business.

Bakers Delight Holdings Ltd fully supports the purposes of the Code and the need for a Code of Conduct, however, we do not believe the Annexure A disclosure document achieves this purpose. The disclosure obligations imposed on franchisors by the Code are extensive and disclosure documents are lengthy documents (often duplicating much of the information that is already contained in the franchise agreement) and as a result are unlikely to be read, let alone understood by franchisees. Specifically, sections 8, 9, 10 of the Annexure A disclosure document simply repeat what is in the franchise agreement and sections 15-17 cross reference to the franchise agreement. This adds unnecessary length to the disclosure document and does not give a franchisee any additional information.

The better approach may be to compel franchisees to:

- a. seek professional advice (legal and accounting advice); and
- b. undertake an approved training program before embarking upon buying a franchise.

I highlight here, that I have used the word ‘compel’ intentionally. I want to protect the current or prospective franchisee from what is a very significant purchasing decision and, on the flip-side, I do not want to be in Mediation in the coming years with a former franchisee who says that they didn’t get legal advice entering into the agreement and it becomes the franchisor’s issue because the

former franchisee was not reasonably expected to read, understand and apply 288+ pages of information.

### **Good Faith:**

Bakers Delight Holdings Ltd supports the introduction of a statutory obligation to act in good faith, provided it is imposed on both parties to the franchise agreement and it is clearly defined with examples of what constitutes a lack of good faith. Bakers Delight Holdings Ltd has been and is currently at, a severe disadvantage from former disgruntled franchisees who extensively use social media, traditional media outlets and local, state and federal politicians to influence their position prior to, leading up to, and throughout the Mediation period. For this reason, good faith obligation must be imparted to both the franchisor and the franchisee. The irony in this regard is that Bakers Delight Holdings Ltd has had a number of former franchisees using the abovementioned avenues saying that the franchisor needs to act in good faith and hasn't; this act in itself is not good faith – and so *both* parties need to be bound in this regard.

### **End of Term Issues:**

Bakers Delight Holdings Ltd opposes the introduction of automatic renewal rights for franchisees, or possible compensation to franchisees, at the end of a franchise.

The inclusion of Section 17C in the disclosure document has provided a summary to franchisees of what will occur at the end of a franchise agreement, however, in our experience, this section is not being clearly understood at the point at which the franchise agreement ends for whatever reason (ie when it finishes, the franchisees, mostly, do not realise what is/is going to occur).

It may be more appropriate to include a statement in the warning on the front page of the Disclosure Document, that the franchise agreement only gives a franchisee rights to operate a franchised business for a finite period of time and, naturally, no one (including the franchisor) will guarantee their business' value at the end. It is a business, not a property.

The message that needs to get across to franchisees is that a franchise agreement may not give the franchisee any option to renew and even if it does, it will be subject to conditions. Accordingly, at the end of the franchise agreement, the franchisee may only be left with plant and equipment, which the franchisor may or may not buy, at its obligation. Franchisees need to be made aware of this right at the outset and again this can be achieved by *compelling* franchisees to seek professional advice (essentially legal and accounting advice) and undertaking appropriate training programs before embarking upon buying a franchise. These changes would help to resolve a number of disputes from naïve franchisees who believe that business should have a certain value (which in itself varies from franchisee to franchisee) at agreement-end.

A franchisor should not be penalised for a franchisee's failure to read and/or understand the franchisor's disclosure document and/or seek appropriate advice. In turn, franchisees should not be compensated for failing to understand that the franchise agreement is a licence for a specified period of time. Franchisees are business investors with their own capital at risk – they need to conduct their own due diligence and seek advice as they would if they were setting up their own small business.

Furthermore, in franchising the brand belongs to the franchisor and the franchisor determines how the brand is run and managed. With an established franchise network such as the one Bakers Delight Holdings Ltd manages, the goodwill is attributable to the franchisor's efforts over a long

period of decades (not the individual franchisee's). In fact this is usually why a franchisee is attracted to the particular network rather than going at it alone.

If a franchisor has behaved in an opportunistic manner there are already a multitude of other laws that franchisees can avail themselves of – misleading or deceptive conduct, unconscionable conduct and breach of contract.

**Civil Pecuniary Penalties:**

Bakers Delight Holdings Ltd's view is that there are sufficient remedies available under the Competition and Consumer Act and there is no need for additional civil pecuniary penalties to be imposed.

I am experienced in, and responsible for, many Mediations and Disputes with Bakers Delight Holdings Ltd former and current franchisees and these changes I am suggesting would go a long way to assisting the franchisees in understanding their position and to assist the franchisor to run a smoother, less antagonistic operation. I note that the disputes at Bakers Delight Holdings Ltd at any one point in time are significantly less than half of one per cent of the total number of franchisees in the network, but they are time consuming, frustrating and emotional for the franchisees themselves and if the franchisees were better educated at the start of their franchise about the phases and conditions of the agreement they are entering into, all sides would be better placed and I have no doubt that disputes would diminish and plummet.

I would welcome either an opportunity to be involved in this Franchising Code of Conduct review or to discuss my submission in person. As a result, I invite you to contact me directly (alternative contact details below) if you require anything further, or anything herein explained or clarified.

Regards,

Gerry.

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**Gerry Gerrard | General Manager of Property, Projects,  
Supply Chain, Legal, Franchising & Leasing**  
Bakers Delight Holdings Ltd