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SUBMISSION ON THE DISCUSSION PAPER

"REVIEW OF THE FRANCHISING CODE OF CONDUCT"

Submission by:

<p>[REDACTED]</p> <p>CEO Jani-King (Australia) Pty Ltd</p> <p>*Please note below whether the name of the Respondent is requested to be withheld and kept confidential</p>

Contact details:

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Date of Submission:

<p>21 February 2013</p>

Whether Submission is to be kept confidential or not and able to be released to the public:

<p>The Respondent does not object to the public release of all of this Submission.</p>
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Discussion Questions and Responses:

Part Two: Disclosure under the Franchising Code of Conduct

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?

Response:

The 2010 changes appear to be adequate. However, it is recommended that the ACCC Franchisee Guide Publication contain more specific information regarding the implications of franchisor failure and that consideration be given to making it mandatory that the Franchisor provide a copy of the ACCC Franchisee's Guide Publication to prospective Franchisees.

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

Response:

No

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?

Response:

The 2010 amendments with regard to financial information was substantial and has improved the financial information available to Franchisees. The benefit to Franchisees is that they are made aware of both the nature and the amount of possible expenditure to be incurred by them when operating the franchise.

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

Response:

No

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?

Response:

I am of the view that the amendments have, generally speaking, addressed the concerns about unilateral changes to Franchise Agreements by the Franchisor. Financial, legal and market considerations change, and future amendments to a Franchisor's standard agreement are essential to a healthy franchise system. The requirement that the Disclosure Document reflect the circumstances in which the Franchise Agreement had been amended unilaterally by the Franchisor, provides prospective Franchisees with an overview of the nature of the changes introduced by the Franchisor, and what the motivation behind these changes were. If the changes reflect greed rather than fairness, existing and prospective Franchisees will distance them from the franchisor, whose network would, in turn, decline and stagnate.

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

Response:

Interpretation issues arise as to the meaning of Novation.

Novation is defined as follows: "Novation, in relation to a franchise, means the termination of the franchise and entry into a new franchise with the proposed transferee on the same terms as the terminated franchise". Clause 20(2) then provides "a franchisor must not unreasonably withhold consent to the transfer or novation".

The above provisions have led some Franchisees to take the view that they were entitled to opt for novation (in accordance with the Code), and thereby escape any changes to the then current

version of the Franchise Agreement.

It is suggested that the definition of Novation be reviewed, and that novation should only be an option to the exiting Franchisee if the novation occurs in accordance with the terms of the Franchise Agreement.

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?**

Response:

Yes. Jani-King Is Both an Australian Franchisor and a Master Franchisee of a USA Corporation.

As a Master Franchisee who recently renewed the Master Franchise Agreement, we had access to useful information regarding the US based Master Franchisor, that would, without the changes to the Franchising Code, not have been available to us.

8. **Is the information being provided useful to franchisees?**

Response:

The information that we received as Franchisee was useful to us.

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

Response:

Whilst the additional information to be provided is substantial, they do not appear to be too onerous to disclose.

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

Response:

No.

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

Response:

The removal of the Foreign Franchisor exemption had some positive effects as, to an extent, Foreign Franchisors are subject to the same regime as its Australian Master Franchisees. However, it is suggested that, as far as disclosure is concerned, that Annexure 1 be amended to simplify the disclosure of the Foreign Franchisor information to:

- 1) Avoid duplication.
- 2) Limit the material to relevant information.
- 3) Simplify reading for prospective Australian Unit Franchisees by reflecting only relevant Foreign Franchisor information in a single separate part of Annexure 1.

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

Response:

So far no anecdotal evidence of any issues have come to light. However, consideration should be given to the imposition of penalties where an overseas Head Franchisor is in breach of the Code, and the interaction between Australia and foreign law, in the event that the Foreign Franchisor do not respond to Australian judgements, and the impact on the local Master Franchisee, and its Franchisees.

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

Response:

Yes.

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

Response:

Yes.

Part Three: Good faith in franchising

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?

Response:

The additional disclosure obligation, in our view is adequate. It is noted that the obligation to give a renewal notice under Clause 20 A has not commenced to apply.

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?

Response:

Section 23A contemplates that the Common Law may imply an obligation of good faith into a Franchise Agreement.

However, Clause 23A does not impose an obligation to act in good faith, nor does the Code override a contractual provision that excludes or modifies any implied obligation to act in good faith. This being the case, it would be up to the parties to approach the Courts to obtain a decision as to whether there is an implied obligation to act in good faith or not. In my view this is a fair and balanced position, that should be preserved.

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?

Response:

If an obligation to act in good faith is inserted as a mandatory obligation, it will resolve the current uncertainty as to whether such obligation is implied, and whether it could contractually be excluded.

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

Response:

I am of the view that it would not be wise to attempt to define "good faith". The Common Law should be allowed to evolve and to deal with specific situations, rather than an attempted definition, which would never be able to be interpreted fairly in all circumstances.

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?

Response:

If an obligation was introduced, it should extend only to the parties to the agreement. It should not cover negotiation of the franchise agreement (current misleading and deceptive conduct provisions are adequate). It should be limited to contractual matters including execution of the Franchise Agreement, franchise provisions and dispute resolution.

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?

Response:

It would be very difficult, if not impossible, to prescribe an appropriate consequence for breaching an obligation to act in good faith. In my view, the appropriate consequence, given a wide possible range of circumstances, should be determined by the Courts.

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?

Response:

No submission made in respect of this question.

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?

Response:

No submission made in respect of this question.

Part Four: End of term arrangements for franchise agreements

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?

Response:

Although Clause 20A has not practically commenced to apply, I am of the view that it will be effective in addressing concerns about inappropriate conduct at the end of term of the Franchise Agreement, because it formalises the intent of the Franchisor in relation to the renewal (or otherwise), of the Franchise Agreement, leaving the Franchisee with adequate time to consider:

- a. Its rights under the Franchise Agreement.
- b. The grounds on which the Franchisor intends not to renew (if applicable).
- c. Any other remedies at Common Law or under the Code.

Part Five: Dispute resolution in franchising

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?

Response:

I am not able to provide anecdotal evidence as, over the last ten years, we have always been able to resolve issues with Franchisees amicably.

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

Response:

No submission made in respect of this question.

Part Six: Enforcement of the Franchising Code

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

Response:

Yes. The current enforcement framework works well. In particular, the misleading and deceptive conduct and the unconscionable conduct provisions are effective, and there are a number of cases, clearly demonstrating that these provisions work both for Franchisors and Franchisees.

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

Response:

- a) Targeted education.
- b) Improvement in Code drafting to remove grey areas.
- c) An ability to seek binding rulings from the ACCC (although it is recognised that the ACCC has limited resources).
- d) Remove current interpretational uncertainties.

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

Response:

None. I am aware that a penalty regime is being considered. Penalties do not necessarily change behaviour. If penalties are introduced, they should be balanced, not apply to technical breaches or situations where no loss was suffered. It must not be a 'strict liability' system.

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

Response:

- a) Dispute process under Part 4.
- b) Legal proceedings.
- c) Complaint to the ACCC.
- d) Franchisees may approach a State based Small Business Commissioner for assistance before approaching the ACCC.