

CRAVEABLE BRANDS PTY LTD



Response to the Regulation Impact Statement **(RIS)** issued by the
Franchising Taskforce

Department of Employment, Skills, Small and Family Business
Department of Treasury
Department of the Prime Minister and Cabinet

Executive Summary

This is a submission from Craveable Brands Pty Ltd to the Franchising Taskforce (**Taskforce**) to assist the Taskforce in preparing a response to the Government in respect of the recommendations made in the Parliamentary Joint Committee on Corporations and Financial Services (**Committee**) in the Fairness in Franchising Report (**Report**).

A. Background

Craveable Brands Pty Ltd (**Craveable**) is a wholly owned Australian company operating in the quick service restaurant (QSR) sector and is home to three iconic Australian chicken brands, Red Rooster, Chicken Treat and Oporto.

Currently the group employs 540 people directly across Australia. Through our franchise network our brands employ a further 11,900 people across Australia. Craveable operates a fully franchised system with over 400 franchisees across 570 stores, including both metropolitan and regional locations.

In recent years the shared success of Craveable and its franchisees has been driven by investment in a transformation strategy focused on innovation, enhanced brand positioning and channel expansion.

With its operational genesis in Perth in the 1970's, Craveable has carved a unique place in the Australian corporate landscape.

B. The Craveable Business Model

Craveable has a best practice framework to support its franchisees including:

- extensive induction and development programs;
- ongoing coaching and training through a business consultant structure;
- consistent and regular state meetings;
- a Franchise Advisory Council (FAC); and
- annual conferences to learn, collaborate and build strategies.

A formal governance program is in place to monitor and approve business activities including;

- new store selection;
- lease negotiations and renewals;
- franchisee support and investment; and
- approval of restaurant purchases by franchisees.

C. Craveable Response

In this Submission Craveable:

- sets out each of the draft principles referred to in the Regulation Impact Statement (**RIS**);
- provides a general overview of its position; and
- addresses each of the options referred to in the RIS;

1 Consideration of Draft Principal 1. Prospective franchisees should be able to make reasonable assessments of the value (including costs, obligations, benefits and risks) of a franchise before entering into a contract with a franchisor

General Overview

- 1.1 The disclosure of key terms, conditions and other information in a franchise agreement is a key element of a successful franchising system. However, Craveable is concerned that the complexity of the disclosure requirements under the Franchising Code of Conduct (**Code**) invariably leads to

extremely lengthy disclosure documents. This actually serves to defeat the public policy intent of the Code.

1.2 By way of example, our current disclosure document for each of our Brands is around 347 pages. Craveable considers that the complexity and the length of the disclosure documents actually discourages prospective franchisees from reviewing the content.

1.3 Our view is supported by the ACCC as noted in its submission to the 2013 Franchising Code Review.

1.4 In its submission the ACCC stated:

“There is anecdotal evidence (and complaint data) suggesting that many franchisees do not read, or at least do not understand, the disclosure document they receive before they enter into a Franchise Agreement. This is usually attributed to the length and complexity of most disclosure documents.”¹

1.5 Craveable are of the view that the disclosure document should be simplified (and not expanded) or alternatively Craveable would support the introduction of a one or two page summary document or risk statement that accompanies the disclosure document.

1.6 The use of a risk or summary statement was supported by the ACCC in its 2013 submission referenced above and was also supported in the “Report to the Hon Fran Bailey Minister for Small Business and Tourism October 2006” by the Franchising Code Review Committee.²

1.7 It was also alluded to by the Hon Dr Craig Emerson MP, then Minister for Small Business, when announcing the 2010 amendments to the Code where he asked the franchising sector to deliver a short “Plain English” document for franchisees setting out their rights and responsibilities.

1.8 The statement would be supplemental to the existing disclosure requirements under the Code and would emphasise the key costs, benefits and risks of a franchise system.

Draft Principle 1 - Consideration of Options

1.1.1 Status Quo

Craveable Brands considers that it is in the best interests of the Franchising Industry to amend current disclosure requirements.

1.1.2(a) Electronic and Hard Copy Disclosures

Craveable Brands agree that having access to an electronic copy of the disclosure document would allow franchisees to easily share this information with advisers.

1.1.2(b) Separate Information Statement

Craveable Brands supports a separate information statement. As we have noted in our previous submissions, the current disclosure is convoluted and complex which discourages prospective franchisees from reviewing or understanding the content.

1.1.2(c) Increased and formal Financial Disclosure

In general practice, where a franchising business is sold you would expect the seller (whether that be the franchisor (in the case of a company store) or the franchisee (in the case of a franchised store) to provide financial information including a profit and loss statement and sales history.

¹ Australian Competition and Consumer Commission, *ACCC Submission to the 2013 Franchising Code Review* Australia Competition and Consumer Commission, 2013

² Office of Small Business, *Review of the Disclosure Provisions of the Franchising Code of Conduct*, Report to the Hon Fran Bailey MP Minister for Small Business and Tourism, 2006

Accordingly, Craveable Brands supports the seller of a franchised business (whether it be a franchisor or a franchisee) providing a profit and loss statement and sales history.

However, Craveable Brands does not support providing at least two years Business Activity Statements or where that does not exist, the BAS for a comparable site.

Firstly, these are unnecessary if a profit and loss statement and sale transactions are provided. BAS may not always be available to provide in respect of a specific site eg. in the case of a Franchisor store or a store being sold by a multi site operator.

Secondly, how does one properly determine “a comparable franchise site”?

1.1.2(d) Provision of the ACCC’s Franchise Manual

Craveable Brands supports the disclosure including the ACCC’s Franchise Manual.

1.1.2(e) Leasing Disclosure

It is completely unnecessary for a franchisor to provide greater disclosure about leasing arrangements.

There is existing State legislation in place that requires a Franchisor to provide disclosure as to key lease terms. By way of example see:

- Commercial Tenancy (Retail Shops)
- Retail Leases Act 2003 (Vic);
- Commercial Tenancy (Retail Shops) Leases Act 1985 (WA);
- Retail Shop Leases Act 1994 (QLD);
- Retail Leases Act 1994 (NSW);

1.2 Reliability of information provided to prospective franchisees is difficult to assess.

Options 1.2.1 / 1.2.2(c) / 3(a) (b) / 1.2.3

Craveable Brands supports the notion of introducing a national franchisee register.

We consider this would promote best practice as franchisors could compare other disclosure statements and agreements which would promote better documentation.

It is unnecessary for franchisors to make a statement confirming that “to the best of the Franchisor’s knowledge financial statements provided in the disclosure are accurate, correct and compliant with the Code and accounting statements”.

To the extent any information contained in a financial statement were inaccurate then this is likely to constitute ‘misleading and deceptive’ conduct under Australian Consumer Law.

As a consequence the statement adds nothing.

Craveable Brands supports:

- steps to better educate franchisees;
- a requirement that prospective franchisees receive legal and financial advice before entering into a franchise agreement.

We acknowledge however that the requirement for prospective franchisees to obtain legal and financial advice may be an unreasonable proposition for small businesses acquired by franchisees eg. a franchise to operate a mowing round or install TV aerials. Consequently the requirement to obtain legal and financial advice should be qualified so there is no requirement:

- in respect of any sale of a franchised business where the purchase price is below a designated amount; and/or
- the franchisee already has an existing franchise agreement with the franchisor.

1.1.3 Simplified Disclosure

Craveable Brands supports the notion of simplified disclosure for the reasons set out in the General Overview.

2 **Consideration of Draft Principal 2. Franchisees and franchisors should have 'cooling off' time to consider whether the relationship is right for them after signing**

General Overview

- 2.1 For the reasons expressed below, we consider it is unnecessary to make any changes to the cooling off period in the Code.

Draft Principle 2 - Consideration of Options

Options 2.1.1 / 2.1.2 / 2.1.3 / 2.2.1 / 2.2.2 / 2.2.3 / 2.2.4 / 2.3 / 2.3.2 / 2.3.3

Craveable does not consider there is any need to change cooling off periods. Over the course of our journey as a franchisor of three large brands Craveable are not aware of any franchisee utilising the benefit of the cooling off period so there is no reason to extend it.

Further and in addition, if these periods were extended they could create serious complications. For example, if a franchisee were granted a considerable period of time within which to rescind a franchise agreement this would have significant ramifications in respect of any associated lease. For example, how do you unwind a lease / licence associated with a franchise? Any change to cooling off periods will have the unintended consequence of affecting landlords.

In relation to issues around estimating leasing costs, as previously noted there are already statutory requirements in place in each State requiring franchisors to provide disclosure. See our commentary at 1.1.2(e) Leasing Disclosure.

3 **Consideration of Draft Principal 3. Each party to a franchise agreement should be able to verify the other party is meeting its obligations and is generating value for both parties**

General Overview

- 3.1 Craveable considers that the requirements around the annual reporting of expenditure in marketing funds can be significantly improved.
- 3.2 The Code currently requires franchisors to prepare an annual financial statement for any marketing fund established outlining who contributes to the fund and what the money is spent on.
- 3.3 The Code provides that the financial statement must include sufficient detail so as to provide "meaningful information" to franchisees about the sources of income and items of expenditure.
- 3.4 The Code is deficient in that it does not define what constitutes "meaningful information".
- 3.5 The ACCC recognises that financial statements often contain insufficient information. On 27 September 2017 the ACCC sent out an informational email to the industry to assist identifying the above issues (which included an example of a statement that did not provide "meaningful information"). Whilst this is of some assistance, it does not address the fundamental problem "what information a franchisor is expected to provide".
- 3.6 There is an opportunity for the Taskforce to provide guidance in this area.

Draft Principle 3 - Consideration of Options

Options 3.1.1 / 3.1.2 / 3.1.3

Craveable Brands considers that the Code should provide clarity as to what constitutes "meaningful information" to satisfy the requirements of the Code and address the concerns of the ACCC.

To address this, Craveable Brands supports the notion (proposed by the Committee) that the Auditing and Assurance Standards Board provide a guidance document / template to assist franchisors in preparing annual financial statements.

In this way, reporting becomes uniform across the sector and the quality of the information provided to franchisees is significantly improved ensuring fewer issues / disputes in this area.

Craveable are opposed to increasing the frequency of reporting from annually to quarterly.

In a big franchising network such as ourselves, it takes time to collate all the information necessary to prepare and publish a financial statement. By way of example, it takes us between 2 -3 months to properly prepare a financial statement that meets the requirements of the Code.

To move to quarterly reporting would be a significant administrative burden on franchisors and create significant further costs.

Craveable estimates that across our three brands the cost of reporting quarterly (including a requirement to have the reports audited) could be in the vicinity of \$160,000 per annum.

The Code permits the cost to be deducted from the marketing funds meaning that franchisees would lose the benefit of \$160,000 per annum in marketing.

In any event, Craveable are unsure as to whether there would be any significant upside to quarterly reporting as this does not address the issues raised in the Report notably:

- a lack of clarity around spend;
- franchisor's misuse of funds;
- failing to provide 'meaningful information' in reporting.

Accordingly Craveable supports the view to do it once (annually) but improve the quality of information.

4 Consideration of Draft Principal 4. A healthy franchising model fosters mutually beneficial cooperation between the franchisor and the franchisee, with shared risk and reward, free from exploitation and conflicts of interest

General Overview

- 4.1 In its March 2019 report entitled "Fairness in Franchising" the Committee, in considering rebates, expressed concern that franchisors might "*choose a particular supplier based on the size of the rebate rather than the best price*"³. Additionally the Committee was concerned that franchisors might source inferior products (purely to pocket rebates) and franchisees might not be able to source alternative products from different suppliers.
- 4.2 In a practical sense, commercially it is not in the best interests of franchisors to impact the profitability of franchisees in the long term because franchisors rely on the success of franchisees to generate royalties over a sustainable period of time.
- 4.3 Equally, to the extent that a product is inferior then it is less likely a consumer would buy it, leading to a significant reduction in royalties.
- 4.4 In relation to sourcing products, Craveable includes provisions in each of its Franchise Agreements that permit franchisees to source products from alternative suppliers. The process gives franchisees the opportunity to request the franchisor to evaluate an alternative supplier to procure better quality and/or cheaper supplies.

³ Paragraph 8.23

Draft Principle 4 - Consideration of Options

Options 4.1.1 / 4.1.2 / 4.1.3

Supplier rebates enable a sharing of the benefits that accrue from the purchasing power of a larger group of franchisees.

Whilst franchisors can collect rebates from suppliers, this is not the only means of achieving this.

There are other franchise models that do not rely on rebates but apply a higher royalty rate or in larger models, some franchisors supply all the goods and services directly to franchisees but with a mark-up.

Rebate income is an aspect of business in Australia that occurs in a number of industries including the franchising sector. It is well entrenched in franchise systems and as a consequence it may be practically difficult to implement change in this area without affecting the profitability of franchisors.

The Committee recommends consideration be given to amending the Code so that all supplier rebates are disclosed as a percentage of the full purchase price on each transaction and the franchisor detail in percentage terms what proportion of the rebate is retained by the franchisors or directed to franchisees via direct payments, training, marketing, subsidised goods and administration expenses.

Craveable considers this would add considerable complexity to disclosures (noting current issues around complexity).

Further, Craveable are unsure franchisees would derive any benefit from this information as different franchise systems offer different products and therefore may not be directly comparable.

In any event, in our experience this is unlikely to be determinative to a franchisee. The key information influencing a franchisee's decision (whether to enter into a franchise agreement) is likely to be profitability evidenced by annual profit and loss statements.

There are also other issues that need to be considered:

- Including the administrative burden and cost on a franchisor in providing this information;
- the fact that franchisor's are contractually likely to be under an obligation to keep this type of information confidential. Typically all supply agreements contain a provision to this effect and any requirements introduced into the Code might create contractual liability for franchisors under their supply contracts.

In any event, Craveable considers that information about supply restrictions, rebates, volume and setting maximum prices are already disclosed to franchisees in the disclosure process.

Further detail may only provide complexity and the information provided may not be meaningful anyway.

Options 4.2.1 / 4.2.2 / 4.2.3

Option 4.2.2 proposes the introduction of an obligation on the Franchisor to ensure Franchisee's receive a return on capital expenditure. There are obvious practical limitations to this proposal – like what is an appropriate return, how do you gauge it, what if the business declines due to the poor operation of the franchisee or extraneous circumstances.

As franchisor's derive royalties from franchisees it is naturally in the best interests of both franchisor and franchisee that any capital expenditure provide a return on investment to the franchisee so commercial interests are likely to ensure the right decision is made.

Also the need for capital expenditure might arise as a result of the provisions of the lease of the site not the franchise agreement – ie the obligation is owed to the landlord not the franchisor meaning that the franchisor / franchisee in this instance would not have any choice but to undertake the expenditure or be in breach of the lease with the landlord.

For all these reasons we consider it is unnecessary to make any changes regarding capital expenditure.

Options 4.3.1 / 4.3.2 / 4.3.3

Craveable Brands is opposed to precluding a franchisor from unilaterally varying a franchise agreement. In our franchise agreements we reserve the right upon the exercise of an option to implement our most recent version of the franchise agreement (save and except for commercial terms such as Royalties which must remain the same). This is very important. To the extent an issue arises (take underpayments of employees by way of example) franchisors should have the right to introduce new provisions when the franchise agreement is renewed to address current issues.

This matter was previously considered by the Rudd government following the Parliamentary Inquiry into Franchising in 2010. The Hon Dr Craig Emerson MP as the Minister for Small Business at the time stated:

“there may be legitimate business reasons for such variations to occur”

Further and in any event, to the extent that this right is unfair then it would be caught by the Unfair Contracts provisions of the Australian Consumer Law.

As for recommendation 9.28, a proposal to preclude franchisors from unilaterally varying our manuals, policies and procedures Craveable Brands oppose this recommendation noting that it is extremely important to have the flexibility to amend manuals, policies and procedures.

By way of example in *City of Kwinana v Australian Fast Foods Pty Ltd (AFF)* (the latter being one of our subsidiary companies) AFF was prosecuted for a contravention of s20(1) of the Food Act 2008 WA (**Act**) for allegedly supplying food by way of sale that was not of the nature or substance demanded by the purchaser.

The case involved a new cooking process undertaken by AFF after acquiring new ovens. AFF relied on a due diligence defence – namely that it had appropriately amended its manuals in relation to cooking chickens to account for the imposition of new ovens and thereby taken all reasonable care that a reasonable person would have taken in the circumstances.

The defence was successful and the complaint was dismissed by the Magistrate.

If AFF had have been precluded from amending its manual regarding cooking processes to be implemented for the new ovens it would never have been able to run the “due diligence defence”.

This case highlights the need for franchisors to have the flexibility to amend its manuals as and when required particularly as they relate to processes and practices.

5 Consideration of Draft Principal 5. Where disagreements turn into disputes, there is a resolution process that is fair, timely and cost effective for both parties

General Overview

- 5.1 In our general experience, mediation is a very effective tool in determining disputes in the franchising sector. It is cost effective (typically the cost to each party is around \$1,500) and expeditious (usually the mediation proceeds within 1 to 2 months following the notification of a dispute).
- 5.2 It is also highly successful. In its Submission to the Committee, the Department of Jobs and Small Businesses noted that during the calendar year 2017, 149 mediations proceeded and that the success rate was 80%⁴.

⁴ See Submissions 20: paragraph 4.1.20

- 5.3 Given the high success rate combined with the fact that the mediation process is expeditious and cost effective Craveable does not consider that there is any reason to consider alternative forms of resolving disputes.

Draft Principle 5 - Consideration of Options

Options 5.1.1 / 5.1.2 / 5.1.3

Having regard to the above there appears to be no reason why we should consider alternative dispute resolutions.

Further the cost of alternative means of dispute such as arbitration are likely to be extremely high.

Arbitration is also more complex as it requires engaging lawyers and significant legal argument meaning that franchisors are likely to be far more favoured by arbitration given they have deeper pockets and can afford to raise and argue complex legal arguments.

6 Consideration of Draft Principal 6. Franchisees and franchisors should be able to exit in a way that is reasonable to both parties

General Overview

- 6.1 Craveable is extremely concerned with the notion that consideration be given to amend the Code to entitle franchisees to not only exit franchise agreements in certain circumstances but to be paid a sum for goodwill upon expiry.

- 6.2 The issue of goodwill has been considered in detail in two previous Parliamentary Inquiries:

- an inquiry into the efficiency of current laws regulating the franchisee / franchisor relationship conducted by the Economic and Finance Committee of the South Australian Parliament in 2007 (**SA Inquiry**); and
- an inquiry into the Franchising Bill 2010 conducted by the Economics and Industry Standards Committee of the Western Australian Parliament in 2010 (**WA Inquiry**).

- 6.3 In the course of the SA Inquiry and the WA Inquiry it was noted that:

“the traditional view is that goodwill belongs to the franchisor. The franchisee simply acquires the right to participate in a business system for a term specified by the franchise agreement. Absent contractual provisions to the contrary, the franchisee has no right to assign or to have the agreement renewed and on termination or non-renewal has no entitlement to be compensated by the franchisor despite the franchisee’s purchase of, or contribution to goodwill”⁵ ...

- 6.4 This view was confirmed by the Federal Court in Ranoa Pty Ltd v BP Oil Distribution Ltd and Amor (1989) 91 ALR 251.

- 6.5 As it turns out we also considered the implication of goodwill in the context of the WA Inquiry and sought external advice from Ernst & Young at the time. A copy of that advice is **annexed** to our response. In that advice it was noted:

“that the allocation of intangible value ... such as brands and trade marks as well as goodwill would predominantly accrue to the franchisor ...”

In that advice Ernst & Young noted that it was possible that a franchisee might generate some goodwill:

⁵ A. Terry and PD Guigni, “Freedom of Contract, Business Format Franchising and Problem of Goodwill”, Australian Business Law Review, vol. 23, no. 4, August 1995, pp. 241-258 at p.242.

“If the franchisee is able to generate higher profits compared to other franchisees operating under the same system ... albeit such matters as location may have an impact ...”

Ernst & Young concluded that:

“Where the earnings are all in line with or below the earnings of other franchisees, the individual franchisee intangible value is probably not present ...”

6.6 In context it follows that the goodwill in the franchising sector largely resides with the franchisor meaning that there is little if no goodwill attributable to franchisees unless the parties contractually agree to change their position.

6.7 To the extent that a franchisee did garner higher profits in comparison to others then commercially a franchisor would not want to see the franchisee exit the system anyway as the franchisor indirectly benefits through increased royalties.

6.8 The position is probably best summed up by Maurice Roussety and Lorelle Frazer of Griffith University in a seminar paper entitled “Goodwill in Franchising – a precursory examination” published in December 2014 where they conclude:

“there is no established methodology to identify and value such goodwill. This creates a hot-house for potential conflict that benefits neither franchisor nor franchisee ...”⁶

6.9 It should be noted that the imposition of an obligation to compensate a franchisee for goodwill at the expiry of the franchise also ignores certain issues such as:

- what if the franchisee detracts from the overall goodwill of the brand during the term; and
- what happens in the case of a franchise agreement that is dependent on a lease to operate a store and the lease is at an end (because typically the term of a franchise agreement is tied to the term of a lease).

6.10 In any event , it is our experience that in circumstances of breach, the franchisor typically compensates the franchisee indirectly by:

- paying out the franchisee’s financiers out of sales proceeds so as to ensure the franchisor can resell the assets in the business free from encumbrances;
- in the case of termination due to the underpayment of the franchisee’s employees by applying any sales proceeds towards repayment of those employees.

Draft Principle 6 - Consideration of Options

6.1.1 Status Quo

For reasons outlined in 6.1.2 below, Craveable Brands considers that there should be no changes to exit arrangements.

6.1.2(a) Additional Requirements where the Franchisor is Terminating in Special Circumstances

The circumstances in which a franchisor can terminate immediately without a breach notice are already very narrow and limited. By way of example they include dangers to public health and safety and fraud. In the event of a serious danger to public health does the Committee really want to delay the termination? This is not in the interests of the public.

The implementation of this Recommendation would also have the effect of precluding a Franchisor from terminating a franchise agreement immediately on the basis of fraud unless the Franchisee had been convicted. In our experience typically fraud involves the underpayment of franchisee’s employees and a systematic production of fraudulent records to cover up the underpayments.

⁶ “Investigating the Goodwill Issue in Franchising : An Exploratory Analysis” by M Roussety, L Frazer and E Douglas ‘Australian Business Law Review’ Volume 44 pp158-174

In those instances the franchisee should not be given a right to frustrate termination.

Further, in the event that a franchisor wrongly terminated (for fraud) the franchisee would be in a position to institute proceedings for damages or for an injunction precluding the termination anyway.

6.1.2(b) Provide Statutory Termination Rights to Franchisees

The Committee has proposed a convoluted table (see figure 11.1 of the Report) that sets out four scenarios relating to the exit of a franchisee and entitles a franchisee to exit the system and receive compensation in specific circumstances.

These scenarios attempt to overly simplify matters that can otherwise be extremely complicated and we consider there are a number of issues associated with the implementation of those recommendations including the following:

- what if the franchisee is solely responsible for over gearing eg. by buying an expensive motor vehicle;
- what if the franchisee is a poor operator or has contributed in a negative way to the reputation of the Brand.
- what if the franchisee owes significant monies to the franchisor (eg. in respect of occupancy payments etc);
- how do you take account of the fact that any lease tied to the franchise agreement is typically held by the franchisor so any exit by a franchisee would create significant liability on a franchisor (when a franchisor committed to a lease with the expectation the franchisee would continue to operate the store throughout the term of the franchise agreement and lease);
- it ignores the fact that good franchisors will typically provide relief for franchisees in genuine need (eg. relief from royalties or occupancy fees);
- it ignores extraneous conditions beyond the control of a franchisor such as:
 - a steep increase in rent;
 - re-designing of road layouts or redevelopment of a shopping centre;
 - the closure of large a business in the vicinity of the store that significantly impacts on franchisee sales;
 - competitors opening up in close proximity.

Effectively, the franchisor is being asked to underwrite the performance of the franchisee in these instances – yet landlord’s do not underwrite the performance of their tenants.

The situation is best summed up by Mr Giles at paragraph 11.44 of the Report who describes the artificial creation of a right for franchisees to exit as “nebulous”.

In these circumstances, any attempt to introduce artificial means for a franchisee to exit contrary to their contractual agreement (and also avoid liability or at least limit liability) is likely to be a significant financial burden on franchisors, which would have a significant if not catastrophic impact on the viability of the franchising sector in Australia.

6.1.2(c) Holding Rent Payments

Recommendation 20.3 does not reflect what actually happens in the franchising sector.

Typically the franchisor pays rent directly to the landlord then recovers the monies from the franchisee.

There is no practical reason to introduce this recommendation – if the Lease is in the franchisor’s name then the franchisor is compelled to pay rent (irrespective of whether it is received beforehand or not from the franchisee) as otherwise the Lease may be terminated and the franchisor (not the franchisee) would be primarily liable for breach and consequent damages.

6.1.3 Clarify the Termination Process

Craveable Brands supports educating franchisees on the termination process.

Option 6.2.1 / 6.2.2

Craveable Brands does not consider it necessary to change the Code in respect of restraint of trade clauses.

At common law these clauses are only enforceable if reasonable – so there is no need to legislate in this area.

Option 6.3.1 / 6.3.2 / 6.3.3 – Rights in Regards to Goodwill

As noted in our overview, generally experts in the franchising sector do not regard a franchisee as having any significant goodwill at the expiry of their franchise agreement because the goodwill largely resides with the franchisor, having established supply chains, systems and operating procedures, manuals, having chosen the location of the business (and typically holding the head lease of the business premises) and creating all trade marks and intellectual property associated with the Brand.

We note that the Taskforce acknowledges that identifying goodwill in a franchise arrangement is a complex task. There is considerable case law to support this conclusion.⁷

Craveable Brands supports the notion of educating franchisees in this space and if necessary amending disclosure to assist in this understanding.

7 Consideration of Draft Principal 7. The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency

Draft Principle 7 - Consideration of Options

Option 7.1.1 / 7.1.2

Craveable Brands does not have a position on whether the provisions of the Oil Code should mirror the Franchising Code of Conduct.

D. Conclusion

The franchising sector is a mature and important part of the Australian economy, employing hundreds of thousands of Australians.

Craveable considers that the majority of franchisors are not only compliant with the Franchising Code but are keen to ensure the effectiveness and sustainability of franchising systems in Australia. This certainly represents the position of Craveable.

Craveable considers that as a whole the Franchising Code is working effectively and do not believe that broad-ranging changes are necessary.

Craveable do however recognise the need to improve the sector and therefore advocate:

- that the Code be amended to require franchisees to obtain legal and financial advice before entering into a franchise agreement;

⁷ Murray Pest Management Pty Ltd v A&J Bilske Pty Ltd [2012] NTJC 55, BB Australia Pty Ltd v Karioi Pty Ltd [2010] NSWCA 347 and “Investigating the Goodwill Issue in Franchising : An Exploratory Analysis” by M Roussety, L Frazer and E Douglas ‘Australian Business Law Review’ Volume 44 pp158-174

- that a registry be set up where franchisors can lodge their standard documents to allow franchisors to adopt best practice in the industry;
- that the Code be amended to require franchisors to disclose key costs, benefits and risks in the franchise system in a short summary statement accompanying the disclosure;
- that the Code be amended to require franchisees to provide profit and loss statements to prospective purchasers and in the case of the sale of company stores, franchisors do the same;
- that the Auditing and Assurance Standards Board provide a guidance document / template to assist franchisors in preparing annual financial statements for marketing funds; and
- that the Taskforce consider the appointment of a franchising ombudsman to oversee the sector and manage complaints and disputes (and in appropriate cases refer matters to the ACCC).



Brett Houldin
Chief Executive Officer

Dated: 29th November 2019