

Supplementary Submission

To: Franchising Review Secretariat Unit

From: Derek Sutherland

Date: 25 September 2023

Submission

I refer to my earlier submission and make this supplementary submission on some drafting issues that need to be fixed.

1. Improvement in items of disclosure document

- 1.1 I have outlined some provisions of the Code where I have previously suggested changes to the Code to improve the quality of Items of disclosure and enhance the quality and meaningfulness of a disclosure document (and continuing disclosure) to prospective franchisees.
- 1.2 Attached are some drafting suggestions in Schedule 1 that relate to suggestions to fix other relevant clauses of the Code and Annexure 1.
- 1.3 They should lead to more meaningful disclosure and a better quality of information being given. A more effective decision can then be made by a prospective franchisee.
- 1.4 Clarification and improvement of ambiguous or ineffective provisions or an unintended mischief where there is drafting irregularities improves the transparency and effectiveness and enforcement of the Code.
- 1.5 Some items in the Disclosure Document Annexure 1 and some provisions in the Code are just poorly drafted and there has never been an urgency or perceived desire to fix obvious drafting mistakes to improve its effectiveness. I made similar submissions in 2018/1019.
- 1.6 Deficiencies in the drafting simply result in the wording of the item or clause is open to interpretation. An incorrect interpretation of an item or provision can mean an item is not properly answered and disclosure is useless because the answer provided is "not applicable".

- 1.7 Some items of information deal with similar matters and are scattered across more than 1 item so it may make disclosure less clear to a prospective franchisee.
- 1.8 For example, issues about exclusivity are covered in various items such as Item 9.1 and 9.2, 11.1(b) Item 12 (Online sales) - item 12.4(a) and item 13.2 (History of the Site or territory) which may include disclosure of whether a franchisee who operated in the territory has left the system and currently operates independently of the franchise network within the territory.
- 1.9 A careful review by Treasury and the ACCC in consultation with Stakeholders in this review of the Code can assist to identify those items that could be improved or even a better guide to completion prepared that gives practical examples and tips for completing them.

Disclosure of end of term arrangements - including in clauses 4, 6, 9, 10, 18, 23 and Item 18

- 1.10 I have attached in **Schedule 2** some suggested amendments which could make the end of term issues in the Code much clearer.
- 1.11 Currently end of term issues, including non-renewal of a franchise are one of the largest areas of disputation in the franchising sector. This is particularly evident in disputes in the motor dealership sector where a dealer does not have its dealership renewed at end of term.
- 1.12 The adequacy of disclosure concerning policies of renewal of a franchise and procedures that apply at end of term of varies dramatically and can lead to dispute.
- 1.13 I think disclosure of end of term issues is less effective than it can be. In my opinion this arises primarily because end of term terminology is used inconsistently in the Code and last-minute changes to the Code in 2014 involving end of term concepts was poorly and inconsistently drafted (compared to other existing provisions where those terms were used) when it was rushed to be prescribed.
- 1.14 Unfortunately, lawyers draft franchise agreements using terminology that does not always coincide with terminology used in the Code. This causes confusion particularly where the drafting inconsistently uses terminology which is defined in the Code.
- 1.15 To be able to make an 'informed decision' a prospective franchisee must be given meaningful information. This includes information about end of term arrangements to determine whether it will have an option or right to continue the business and what happens to their right to operate the business (and on what terms) once it reaches end of term of its existing agreement. If a franchisor has the discretion to allow them to continue it should deal with when it must make a decision and give notice of exercise of that discretion.

- 1.16 There is a significant inconsistency in the terminology used in Code about end of term concepts. They are primarily contained in clauses 4, 6, 9, 10, 18, 23 and Item 18. They need to be reviewed and fixed before the clauses in the Code can have effect the way they were intended. This is not a new problem but one that just keeps getting postponed. Refer to the Schedule attached.
- 1.17 Importantly it is well established law that a franchisee has no right to claim compensation at end of term where the agreement expires and there is no option to renew or to enter into a new agreement remaining.
- 1.18 If the franchisee has a contractual right or option to renew or to enter into a new agreement or a contractual right to extend the agreement then compensation may be payable if the franchisor derogates from the grant of rights and does not observe the terms of the contract. If terms are conditional and the franchisee fails to comply with those conditions then no compensation would be payable.
- 1.19 Clause 23 contains an element that deals with whether a franchisee has a right to claim compensation because the 'franchisor does not extend the agreement'. A clear and bizarre example of why I think the clause and end of term concepts are poorly drafted lays in Item 18.1 which is the item that a franchisor has to disclose end of term issues.
- 1.20 Importantly Items 18.1(b) and (c) are poorly drafted. They do not work in at all with the provisions of clause 23 in the way intended.
- 1.21 A franchisor must disclose if the franchisee has an "option to renew" and if so whether the franchisee has a right to compensation at end of the agreement if it is NOT RENEWED and how that compensation is determined. It is bizarre that the code requires that information about a renewal option when Item 18.1(b) which deals with extend does not. Item 18.1(b) deals with whether the franchisee has a right to extend the agreement – the whole basis on which clause 23 of the code appears to have been premised yet they do not even ask a franchisor the correct question about compensation which would be relevant to the franchisees decision. For the avoidance of doubt I am not suggesting that the cure is simply to add to Item 18.1(b) a similar wording to (c) about compensation, I think the problem is more fundamental than that.
- 1.22 In my view clause 23 was originally intended to apply to a situation where the franchisee can compel a franchisor to renew the right to continue to operate the franchise because it has a contractual right or option to renew the agreement or to enter into a new agreement or a contractual right to extend the agreement and the franchisor breaches the agreement and does not renew, extend or enter into a new agreement. In that event the compensation for breach of contract would apply and potentially unconscionable conduct or breach of the good faith obligation. That explains why a disclosure regarding compensation in item 18 was relevant.
- 1.23 I remain of the view that somewhere between Alan Wein's original recommendation and comments that there is no right to compensation at end of term the final drafting of the concepts of extend and renew became confused and the drafting failed to be precise enough to make this clear.

2. Independent advice.

Effectiveness of independent advice

- 2.1 Whilst a franchisor has an overarching obligation not to mislead or deceive a prospective franchisee, prospective franchisees must accept some personal responsibility to:
- (a) undertake a pre contract legal, accounting and business due diligence of the business opportunity - irrespective of their perception of cost or benefit; and
 - (b) seek appropriate advice from experienced legal and accounting professionals to assist them to prepare business plans and make a reasonably informed decision about the business opportunity.
- 2.2 I am not saying it will in all cases prevent worst case experiences, but it will at least lead to a more informed decision being made.
- 2.3 I have seen a number of cases where a franchisee has deliberately chosen not to obtain independent advice before it entered into an agreement but subsequently sought to get out of their contract with a franchisor when it didn't turn out as well as they thought it would.
- 2.4 Whilst the Code provides a degree of protection it should not underwrite decisions made by those who do not seek informed advice and conduct thorough due diligence. In a number of cases I have seen examples where a decision has been made not to proceed with a particular franchise based on sound commercial due diligence.
- 2.5 I have also seen examples where independent advice has been sought but it has been less helpful because the advisor used was inexperienced in franchising.
- 2.6 The various law societies offer specialist accreditation of lawyers in various disciplines including "Business Law" but almost all do not offer a specialty only in "Franchising Law".
- 2.7 There is a significant cost and time involved in preparing a specialist accreditation program. Existing accreditation programs take time and money to develop and the exams are usually extensive and not easy to pass.

- 2.8 Law Societies may be less interested economically in developing a specialty program when financially the number of persons who may seek that specialty accreditation is low and would not justify the expense. It is always possible for Law Societies to refer prospective franchisees to experienced lawyers listed with that organisation.
- 2.9 Whilst Business Law specialisation is one of the disciplines offered, I suspect that there may not be a large number of experienced specialised advisors interested in doing a dedicated Franchising Law specialist accreditation course each year to attain that accreditation unless it was a sub-specialty of the Business Law program that enabled you to also complete a sub-specialty in that stream¹.
- 2.10 I suspect that most law societies would need to question the viability of doing so and simply rely on the more general "Business Law" accreditation including something on franchising. This may mean that a specialist in that discipline may have some knowledge of it but no experience in advising a franchisor or franchisee.
- 2.11 Currently it is difficult for a franchisor to compel a prospective franchisee to seek independent advice before entering into an agreement. A franchisee may simply elect to sign the waiver rather than incur a cost which they believe is unnecessary or disproportionate the cost of the investment they are to make.
- 2.12 Where the upfront entry cost is low (for example a lawn mowing service franchise where the cost is less than \$30,000), it is difficult to ask a franchisee to incur a cost of seeking independent legal and accounting advice. That cost may be upwards of 10% or more of the upfront cost even though it is in their interests to get that advice.
- 2.13 In my view:
- (a) In that circumstance a prospective franchisee is more likely to decline to seek prior advice and sign the waiver.
 - (b) This is usually because they do not want to spend the money to get advice and they may be more prepared to walk away and lose their entire upfront investment if the venture is not successful (particularly if there is no residual liability arising after the termination).
 - (c) Some stakeholders argue that the Code should make it mandatory for a prospective franchisee wanting to invest upfront more than a minimum threshold (say \$30,000) to seek prior independent legal and accounting advice rather than sign a waiver. If they are to secure a retail shop lease, they may also be compelled to get legal and accounting advice certificates in any event.

¹ I understand this occurs in NSW

- (d) In my view if advice was made mandatory it is most likely that the commercial reality will be that prospective franchisees in lower entry cost franchises (less than \$30,000) will simply shop around to get the cheapest advisor willing to sign an advisor certificate rather than an experienced legal or accounting advisor who can provide them with sound legal, accounting and commercial business advice and assist to evaluate the opportunity and negotiate the agreement to protect their interests. In that case there may be justification in retaining the right a monetary threshold to be included to enable them to elect whether they want to get advice or simply sign the waiver.
- (e) Mandatory advice certificates should not be required if:
 - (i) the transaction involves a simple extension of the term of an existing agreement or holding over (on the same commercial terms);
 - (ii) the transaction involves a new grant or transfer of a franchise agreement where the upfront price is less than a specified amount set by government (eg under \$30,000 – because the cost of getting the advice is disproportional to the investment);
 - (iii) the prospective franchisee is a multi-unit holder signing an agreement the same or substantially the same as it already signed; or
 - (iv) the prospective franchisee is an associate of the franchisor; or
 - (v) the prospective franchisee is a sophisticated investor (for example some motor dealers are in fact very large businesses (not small businesses) with extremely experienced in-house counsel and do not need to seek financial advice).
- (f) If a prospective franchisee investment is less than a specified amount or the prospective franchisee is not a sophisticated investor or multi-unit franchisee then it should be up to the franchisor to decide whether it is required or whether a certificate from the prospective franchisee is a suitable alternative.

3. Effectiveness of dispute resolution under the Code

- 3.1 Mediation remains the preferred and effective method to allow parties access to affordable dispute resolution processes whilst retaining the right to approach the Courts where appropriate. The ADR Process allows for conciliation or mediation as a compulsory process and arbitration is a voluntary process. In my view that works and should not be changed.
- 3.2 In my experience mediation normally will result in an outcome for less serious disputes and in most cases a better outcome than engaging in expensive litigation. This can include negotiating an exit to the system to end the agreement rather than going to Court.

- 3.3 Unfortunately, franchisees have unrealistic expectations of what mediation can achieve and they want a binding decision (right up to the time where it is against them!).
- 3.4 In most cases disputes are initiated by franchisees however many franchisors also use the process to get uncooperative franchisees to the table.

Group mediation

- 3.5 The dispute process involves parties to the agreement. In some (but not all) cases where a common dispute arises amongst groups of franchisees it would be beneficial to allow a group mediation to occur. Group mediation is not appropriate in all disputes. Unfortunately most franchisors simply say not and group mediations just don't happen even where franchisees want to collectively bargaining the new terms offered to the network when the franchisor wants to change the agreement.
- 3.6 It should only be made mandatory for a franchisor to participate in a very **limited range of disputes** such as disputes involving the marketing fund or where changes are being made to the system that affect all (or a group) of franchisees that will be rolled out across the network. These types of disputes should be able to be resolved on a group level (including with involvement by a Franchise Advisory Committee) without the franchisor simply refusing to do a group ADR Process.

4. Adequacy and operation of termination provisions of the Code

- 4.1 In my view it is unnecessary to include a statutory right to terminate for particular grounds (special circumstances) if the franchisee is involved in minor contraventions of the Fair Work Act.
- 4.2 All small businesses struggle to comply and can make mistakes which can be corrected and should not justify termination.
- 4.3 However, where there are more significant systemic breaches it may be warranted to include a systemic breach requirement rather than trying to fit the actions in another heading. There are obviously cases where franchisees should be terminated but franchisors argue that they don't have the contractual power because of the Code process in clause 27 and 29 are problematic.

- 4.4 The imperative for including a statutory right is much stronger where the conduct of the franchisee amounts to a 'serious contravention'² of the Fair Work Act. It is a balance between allowing an opportunity to remedy minor contraventions using the breach notice process as opposed to circumstances where serious contraventions may need an express right and not be restricted by clause 27(4) of the Code.
- 4.5 Where fraud is identified and sufficient evidence to meet the onus of proof the franchisor can rely on clause 29(1)(g) of the Code and terminate the agreement without having to rely on the breach process³. Fraud has a high burden, but morality dictates a franchisee should not hide behind a "process to remedy a breach" when its conduct is so bad that it constitutes fraud. I think the law already differentiates between simply being dishonest and someone committing fraud. You can be dishonest by failing to tell someone something - it doesn't mean that you commit fraud.
- 4.6 One of the arguments I have heard put forward in the debate is that a franchisee that deliberately and systemically breaks the law and underpays their employees (and commits fraud) does extensive damage to the franchise brand to warrant immediate expulsion.
- 4.7 The fabric of trust between them is broken and even if the franchisee does remedy the breach and immediately pay their employees, it has damaged the brand to such an extent by their conduct that it should warrant immediate termination and expulsion from the network. Fraud is an existing example of where that does work however there is an evidentiary burden and process to follow which means the proper process is followed. Under the Code the element is that the franchisee is 'fraudulent in connection with the operation of the business'. This is appropriate because it means the fraud does not have to be against the franchisor alone but could be directed to other persons such as employees, landlords, the tax office, customers and others when the franchisee is operating the business.
- 4.8 The restriction in clause 27(4) (which strangely was not in Oil Code) prevents a franchisor from terminating a franchise agreement for repeated breaches by the franchisee where it has remedied the breach. It can lead to frustration in dealing with serial offenders who do exploit the benefit of the clause. Conversely the Oil Code previously allowed termination where there were repetitive breaches of the agreement at least 3 times⁴ (other than other special circumstance provisions in clauses 36(1)(a) to (f)).
- 4.9 In my view sometimes a franchisee can unfairly take advantage of clause 27(4) of the Code and repeatedly breach the same provision of an agreement (for example always reporting their sales late and then paying their rent or royalties late) knowing they can't be terminated until a notice complying with clause 27 is given and they have a chance to remedy.

Statutory or contractual right

² As intended by recent additional reforms to the Fair Work Act made with responsible franchisor provisions

³Appeal decision in Chahal Group Pty Ltd & Anor-v- 7 Eleven Stores Pty Ltd

⁴ Clause 36(1)(g) of Oil Code

- 4.10 Making a change to clause 29 to include serious contravention of the Fair Work Act as a special circumstance right to terminate would limit the application to exercise of a contractual right to terminate **only if the agreement contains a provision** that allows it.
- 4.11 That is because it is a contractual right and not a statutory right. This could mean its application is limited to future agreements, not current agreements, if they are silent on that issue. Making the ability to terminate a statutory right raises the issues of why other rights to terminate under clause 29 should not also be statutory rights. That would require a change to wording to the whole of clause 29.

Better approach – amend definition of serious offence

- 4.12 An alternative drafting mechanism to avoid making it a statutory right and to avoid having the problem of it only applying to future agreements would be to amend the Code to expand the existing definition of 'serious offence'.
- 4.13 Currently a serious offence is limited to certain criminal offences where they are liable to imprisonment for a period not less than 5 years or a contravention of the Corporations Act.
- 4.14 Simply expanding that definition may mean that Clause 29(1)(e) can be used by a franchisor to terminate agreements that were entered into before the change to the definition is made.
- 4.15 This is because many agreements already define 'serious offence' in a way that just adopts the code definition from time to time.
- 4.16 Unfortunately, some do not and instead simply restate each of the elements of the definition set out in the code as at the time it was entered into. Whilst this may offer a solution to most, it will not unfortunately help others who don't use that method until they next renew those agreements.
- 4.17 I think the existing breach process does allow a franchisor an appropriate remedy as well as the ability to terminate immediately if the franchisee operates fraudulently but requires them to obtain evidence of that fraud before doing so.

5. Imposition of restraints of trade - clause 23

- 5.1 I am unaware of any circumstance where clause 23 has been successfully argued in Court by a franchisee seeking to avoid a restraint.
- 5.2 Despite that a franchisee may have successfully relied upon this clause. There is no reported Court judgement I can find where such relief has been sought and granted.

5.3 Clause 23 is of little or no use to automotive franchisees as they normally do not contain a restraint of trade at end of term, only sometimes will they prevent carrying on multiple different dealership brands during the term.

5.4 Alan Wein in his 2013 Report and commentary on goodwill and restraints of trade stated:

*"On the other hand, no recommendation has been made that franchisees receive an exit payment or goodwill payment at end of the term of their franchise agreement. This would interfere with fundamental principles of contract and property law. However, a recommendation has been made relating to the use of restraint of trade clauses in the context of franchisors not renewing franchise agreements in certain circumstances."*⁵
(Emphasis added)

This recommendation was summarised in clause 12 of the summary:⁶

The Code be amended to state that, if all of the following conditions are satisfied:

a. the franchisee wishes to have the franchise agreement renewed on substantially the same terms;

b. the franchisee is not in breach of the agreement;

c. the agreement does not contain provisions allowing a franchisee to make a claim for compensation in the event that the franchise is not renewed;

d. the franchisee abides by all confidentiality clauses in the agreement and does not infringe the intellectual property of the franchisor; and

e. the franchisor does not renew the franchise agreement; any restraint of trade clauses in the franchise agreement which prevent the franchisee from carrying on a similar business in competition with the franchisor, are not enforceable by the franchisor against the franchisee.

5.5 Interestingly Mr Wein noted that:

"Timing of renewal advice

⁵ Page vii of Executive Summary of the Review of the Franchising code of Conduct Report to the Hon Gary Gray and the Hon Bernie Ripoll by Alan Wein 30 April 2013.

⁶ Page x of the Report

As noted above, the 2010 amendments to the Code require franchisors to advise franchisees of their intention in relation to renewal of the franchise agreement at least six months prior to the end of the term."

The wording of Clause 18 now does not refer to 'renew' or to a renewal at all – clause 18 and 47 only relate to an extension of the term of a franchise agreement or to a new agreement.

5.6 On page 107 of his report Mr Wein Stated:

"Nonetheless, there should not be a general overarching right to compensation for franchisees at the end of a fixed term franchise agreement. Making such a recommendation would substantially and fundamentally change long established legal principles of property and contract law. There would also be a risk of greater cost and uncertainty in the industry and possible unintended consequences from any such change to contractual rights.

While appreciating the contribution made by franchisees to the development of their franchise site or territory, a franchisee should expect that the franchise period should be no longer than the negotiated terms of the contract. Any equitable right to compensation for a franchisee whose franchise is not renewed must lie with the courts and any statutory right that may exist under the ACL.

Arguably, adequate remedies already exist if a franchisor fails to renew a franchise agreement in a situation where the franchisee has complied with all the conditions for renewal. Unlawful refusal will amount to a breach of the agreement by repudiation or possibly unconscionable conduct. However, if the agreement does not provide for renewal, the franchisee knows before entering into the agreement that the franchisee's rights under the agreement will terminate on the expiry of the term. In that situation the franchisee should not be entitled to compensation."

5.7 On my reading of the Alan Wein Report, it is clear to me that he was referring to a right a franchisee may have to compensation of a franchisor does not renew the franchise in circumstances where the franchisee has a right or option to renew the franchise (by way of renewing the agreement or entering into a new agreement to give effect to the renewal). He does not mention the word "extend" in that recommendation however he does state that a franchisee should not be entitled to compensation if the agreement does not provide for renewal.

5.8 The Governments response to the recommendation made by Mr Wein was set out in the *"Franchising in Australia: Striking a balance or tipping the balance?"* 29 November 2013.

5.9 In relation to restraints of trade and goodwill:

6. The report stated that the Corporations and Financial Services Committee considered the following matters related to end of agreement arrangements:
- (a) whether there should be an automatic right of renewal at the end of the first term of a franchise agreement or whether non-renewal by a franchisor should only be permitted where 'good cause' can be shown;
 - (b) the circumstances in which a franchisor should be able to terminate an agreement, including potential abuses of current termination provisions within the Code (churning);
 - (c) whether a payment for the franchisee's contributed value to the business (goodwill) should be mandated if the agreement is terminated or not renewed for any reason.

7. The Regulatory Impact Statement for the 2010 amendments states:

"... there is a common belief among franchisees, even when their agreements are for a fixed term, that they would be entitled to renew their agreement when it expires.

However, franchising by definition involves a franchisor granting a franchisee a right to carry on the business under a franchise business model offered and controlled by the franchisor for a specified period of time. The franchisee pays the franchisor a fee in exchange for the use of the franchisor's brand and systems. There is neither an automatic right of renewal of franchise agreements nor a right to compensation (via an exit payment) for franchisees if a franchisor decides not to renew a franchise agreement."

I suspect the latter sentence is correct only where there is (a) no contractual right or option to renew the agreement or to enter into a new agreement or (b) no contractual right to extend the agreement remaining.

Government Response

8. The former Labor Government accepted Mr Weins recommendation, stating that:

" the Government will also ensure that restraint of trade clauses are unenforceable not only in cases of non-renewal ... but also where the franchisor has not extended a franchise agreement, and where the franchisor has terminated the franchise agreement 'without cause' and the other conditions set out in the recommendation are met."

8.1 The drafting of clause 23 does not reflect this response at all, particularly the latter reference to termination without cause primarily because there was a change of Government and the then Minister for Small Business Bruce Billson changed the Governments response.

8.2 The Explanatory Statement provided⁷:

“ *An extension of the term of a franchise agreement, 'occurs when the period of the agreement is extended, other than because of an option exercisable by the franchisee during the term of the agreement'.*

*A definition of **renew** has been introduced, so that renewal of a franchise agreement 'occurs when the franchisee exercises an option during the term of the agreement to renew the agreement'.*

Whether or not an extension or a renewal has taken place, depends on whether or not the franchisee has exercised an option. The definition of renewal does not exclude a conditional renewal or some level of negotiation between the franchisor and franchisee. Further, the agreement entered into by the parties does not have to be identical to the agreement that already exists. The franchise agreement may contain provisions that place conditions, such as sales targets or licensing requirements, on the franchisee's right to exercise its option to renew the agreement. “

8.3 There was also a diagram to explain the difference between extend and renew.

8.4 In relation to clause 23 of the Code the Explanatory Statement provided:

In the context of franchising, a restraint of trade clause seeks to impose a restriction on a franchisee's ability to open a business similar to the one conducted under the franchise agreement once the franchise arrangement has ended. As a general principle, in Australian law the test of the validity of a restraint of trade clause is whether it is 'justified as reasonable in the interests of both the parties.'[\[15\]](#)

The purpose of clause 23 is to limit the enforceability of a valid restraint of trade clause in a franchise agreement, or an ancillary document, if a narrow set of conditions can be met by the franchisee. Clause 23 applies only to restraint of trade clauses designed to prevent competition by a former franchisee. It does not apply to other restraint clauses, such as those that prevent a former franchisee approaching staff of the franchisor or using the franchise's intellectual property. For the clause to apply, all the conditions set out in subclause 23(1) must apply, though some conditions have options within them.

⁷ Page 6 of the Explanatory Statement

Paragraph 23(1)(a) provides that a franchisee must indicate, in writing, that it wants to 'extend the agreement on substantially the same terms' as the franchisor's then current franchise agreement (not necessarily the agreement the franchisee is on at the time the agreement ends).

At the same time, paragraph 23(1)(a) is intended to ensure the franchisor cannot offer the franchisee a substantially different agreement to that offered to other franchisees or prospective franchisees. In this regard the parties are reminded that their conduct in relation to the franchise agreement is still subject to the obligation to act in good faith in clause 6, even though the agreement has ended.

Whether or not a former franchisee is in breach of the agreement should, for the purposes of paragraph 23(1)(b), be assessed at the time the agreement expires.

Paragraph 23(1)(e) requires that the former franchisee has not received genuine compensation for goodwill at the expiry of the agreement. For example, compensation does not include compensation for goods returned or a rebate on moneys paid by the franchisee to the franchisor under the agreement. Subparagraph 23(1)(e)(i) does not mean that a franchisee will be assumed to have contributed to the goodwill in the franchised business and does not create a right to be compensated for any such contribution. In some cases the franchise agreement will not allow the franchisee to claim compensation for goodwill, in which case subparagraph 23(1)(e)(ii) will apply.

Where it can be shown that the former franchisee has contributed to the growth of the franchised business and has thereby generated goodwill in the franchised business, it is considered reasonable that the former franchisee be compensated for that, if it is to be limited by a restraint of trade clause. Whether the compensation offered is genuine should be decided having regard to the circumstances of the case.

Clause 23 is intended to provide relief in special circumstances where a franchisee, through no fault of its own, has not had its franchise agreement extended by the franchisor. Preventing a former franchisee from continuing a similar business in an area, when it has materially contributed to the goodwill in the franchised business, would allow the franchisor to make a windfall gain in the value of the franchised business, with no opportunity for the former franchisee to leverage customer relationships it formed and local knowledge it gained while a franchisee.

The provision does not prevent a franchisor taking action where it believes a former franchisee has breached a restraint of trade clause. The onus will be on the former franchisee to show that it comes within the exception contained in clause 23. It is strongly recommended that a former franchisee seek legal advice on the applicability of clause 23 before acting contrary to a restraint of trade clause.

This clause is disapplied for certain pre-commencement agreements to avoid raising constitutional issues (see subclauses 3(4) and (5)).”

What is the mischief and unintended consequence

- 8.5 In my view Clause 23 fails to achieve the purpose for which it was originally intended and doesn't align with the recommendation by Mr Wein.
- 8.6 Possibly the intent of the Minister was to cast a broader net and to capture any circumstance where the franchisee does not get to extend, renew the existing agreement or to enter into a new agreement where compensation is not paid to a franchisee for goodwill at end of term.
- 8.7 Unfortunately, the drafting in my opinion means the clause is designed to fail. The policy intent is to a degree unclear by virtue of the poor drafting.
- 8.8 Clause 23 requires all 5 elements to be present to relieve a franchisee from a restraint of trade. It is based on a fundamental trigger that the franchisee has given written notice “*seeking to extend the agreement*” and the franchisor ‘*does not extend the agreement*’.
- 8.9 The thrust of the Alan Wein Review recommendation was to include a clause to allow a franchisee to be relieved from any restraint if it had a right or option to renew or to enter into a new agreement at end of term, but the franchisor did not either renew the existing agreement or enter into a new agreement and did not allow the franchisee to claim or get genuine compensation for non-renewal.
- 8.10 The clause was intended to limit its availability to circumstances where at the time of the request the franchisee had not been in breach and had not infringed the franchisor's IP during the term. Finally, the franchisee had to have a right to claim compensation and either the compensation offered was nominal or not genuine or it didn't allow the franchisee to claim compensation.
- 8.11 Clause 23 does not achieve that. In my view it is effectively and commercially useless to a franchisee as it cannot be applied. Not only that, but the disclosure in Item 18.1 of the disclosure document is inconsistent with it.
- 8.12 I say that because the qualifying words in 23(1)(a)(i) and (ii) refer to the terms of the franchise agreement that would have applied if they were able to extend and they relate more to a renewal or new agreement than an extension of an existing agreement.
- 8.13 If the clause really was intended to be apply to not “extending the agreement”, then the words “franchisor's current franchise agreement” make no sense and should not have been used and the words ‘franchisee's current agreement’ should have appeared in clause 23(1)(a)(i).

- 8.14 Clause 23(1)(a)(ii) contemplates the franchisee having to extend on the terms of a new form of agreement, so paragraph (i) seems to be a mistake or overlap and prevents a franchisee seeking to extend on the terms of the franchisee's actual current agreement.

Elements more applicable to a notice seeking to exercise a right or option to renew or to enter into a new agreement

- 8.15 In my view it is commercially extremely unlikely for a franchisee to be able to satisfy all of them because 3 of those elements technically cannot be satisfied by any franchisee. In my view the clause was intended originally to apply where a franchisee had a right or option to renew the agreement and could not (because it could not satisfy a precondition for renewal or meet the criteria for a new agreement).
- 8.16 Clauses 23(1)(a) and (d) are linked to the word "extend" the agreement. Paragraph (e) assumes that a franchisee at end of term where there is no right to renew or enter into a new agreement has a right to claim compensation if they seek to 'extend the agreement' and are denied. This does not even take into account that the franchisee may or may not have a conditional right or option remaining to renew the agreement or to enter into a new agreement.
- 8.17 Clause 23(1)(a) requires a franchisee to give a notice "seeking to extend the agreement". It then references the terms on which an extension would occur which.
- 8.18 It should have said seeking to 'exercise a right or option to renew the agreement or to enter into a new agreement'. My rational is that if the franchisor has granted a right to renew or option to enter into a new agreement and doesn't allow a franchisee to do so it would expose itself to a claim for compensation for derogating from the grant of those rights.
- 8.19 The current settled law is that absent an express contractual right to extend, the franchisee simply has no right to claim compensation at expiry for loss of goodwill if it asks for an extension and is denied. In fact, the obligation to act in good faith expressly states that a franchisor will not breach that obligation by not negotiating to include such a right or to give effect to the agreement at end of term.
- 8.20 Accordingly absent a right or option to renew or to enter into a new agreement the franchisee cannot satisfy the clause.
- 8.21 The word "extend" is defined, so is 'renew'. **The definitions are mutually exclusive.** They both relate to an existing agreement. You either extend the existing agreement (continue it) or renew the agreement (rollover the agreement on substantially the same terms). If you look at the wording of Item 18.1(a) the Code assumes that there may also be a right to renew the agreement or to enter into a new agreement. That makes sense as most agreements require the franchisee to sign a new agreement on the then current terms offered rather than the terms of the existing agreement.

- 8.22 At law a franchisor may breach the agreement if it derogates from the rights granted. If there is an option or right to renew the agreement but the terms of the agreement offered on a renewal are so different to the option clause that they amount to a derogation then it may derogate from the grant of those rights. It is a matter of contract as to whether as a consequence of the exercise of the option whether the franchisor has complied with the terms of the contract and offered a 'renewal' or something totally different.
- 8.23 Bizarrely Item 18.1(c) is the ONLY place where a franchisor is required to specify if the franchisee has an option to renew the franchise agreement and if it does whether the franchisee is entitled to compensation at the end of the term if the agreement is NOT renewed and if so how is that determined.
- 8.24 There is NO corresponding obligation to disclose if a franchisee is entitled to compensation at the end of the term if the agreement is NOT extended. This inconsistency does not sit well with clause 23(1)(e) refers to compensation or whether the agreement allows the franchisee to claim compensation – but only if the franchisor does not extend the agreement.
- 8.25 Accordingly, clause 23 appears too difficult to satisfy where the franchisee exercises a right or option and given written notice to “renew the agreement or to enter into a new agreement”.
- 8.26 If the franchisor has a discretion not to renew or argues the franchisee does not qualify because it was in breach there will be a dispute as to whether the franchisee has been denied its contractual bargain to get a further term. It may be entitled to compensation and to seek an order to relieve it from the post term restraint but that is an expensive and time consuming process when clause 23 was intended to give a clear relief from the restraint.
- 8.27 Refer to **Schedule 2** with some suggested changes to be made to Clause 23 which may fix this if it reflects the true legislative intent and what Government is seeking to achieve.

Schedule 1 – General suggested amendments to the Code and Annexure 1 Disclosure Document

Point No	Clause or item	Comment	Suggested improvement
1.	Definitions	electronic signature	<p>Rational for amendment:</p> <ul style="list-style-type: none"> (a) When the ETA provisions were removed from the former code the definition of electronic signature was left in even though it is not used anywhere else in the Code. (b) There was no similar definition in Oil Code. (c) Whilst the electronic transaction act allows for delivery of the disclosure document electronically there is ambiguity whether it allows a copy to be given to the franchisee to have an electronic signature. <p>Recommend:</p> <p>Amend clause 8(4) to expressly recognise that the disclosure document and Director's statements and declarations can use an electronic signature.</p>
2.	Clause 7 and 12 and Item 7	Master franchises	<p>Rational for amendment:</p> <ul style="list-style-type: none"> (a) The former Code allowed a master franchisee and master franchisor to prepare a joint disclosure document to give to a franchisee if they were both parties to the agreement.

			<p>(b) The new Code changed the definitions and removed the reference to a joint disclosure document.</p> <p>(c) The explanatory Statement to the Code included the following:</p> <p>Clause 7 exempts a master franchisor from compliance with this Part in relation to a subfranchisee.</p> <p>The effect of this clause is to remove the requirement in the 1998 Code for master franchisors to provide a disclosure document to subfranchisees unless the master franchisor is a party to the franchise agreement. Such disclosure was generally found to be of little benefit to the subfranchisees and often regarded as irrelevant and unnecessary.</p> <p>(d) It is unclear if the master franchisee and master franchisor are both parties to the franchise agreement can give a joint disclosure document (and reduce duplication and size of disclosure).</p> <p>(e) Do each of them have to give a disclosure document simply because they are a party to the franchise agreement. A master franchisor may otherwise participate as a franchisor as well if it controls the choice of suppliers or other things like control of a marketing fund to which the franchisee contributes or otherwise have a contractual right to step in and undertake obligations of a master franchisee if the master franchise agreement ends for any reason.</p> <p>(f) A master franchisor could therefore be caught by paragraphs (a) or (b) of the definition of a 'franchisor'.</p> <p>(g) Whilst disclosure obligations are normally shifted to the franchisor who grants the franchise there is still confusion of some Code obligations to sub-franchisees where for example the master franchisor (or some other entity) operates or controls a marketing</p>
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			<p>or cooperative fund to which contributions from franchisees are applied from their Fund.</p> <p>Recommend:</p> <p>(a) Clarify (by including a drafting note) or amend clause 7 to make it clear whether a master franchisor can either give a joint disclosure document or a separate disclosure document if it is required to give a disclosure document to a franchisee.</p>
3.	Clause 10	Mandatory advice	<p>Rational for amendment:</p> <p>(a) Some stakeholders have argued that it should be mandatory for a prospective franchisee to obtain legal and accounting advice from experienced / accredited franchising lawyers and accountants and to give those certificates to the franchisor.</p> <p>(b) Many lawyers refuse for insurance reasons to provide certificates.</p> <p>(c) Others have argued that there should be exemptions or carve-outs so those advice certificates are not needed in cases including where the franchisee is a multi-unit franchisee, a sophisticated investor or the value of the transaction is more than a specified monetary threshold.</p> <p>(d) The Reviewer should consider whether clause 10 should be amended and whether there are circumstances where the franchisee should be compelled to obtain either certificates and/or advice. For example, where earnings information is provided, or the upfront price is more than a specified \$ amount threshold.</p> <p>(e) In this way a qualifying multi-unit franchisee could simply elect to provide a statement as required under clause 10(2)(b)(ii) of the Code rather than get the advice or certificate.</p>

			<p>Recommend:</p> <p>(a) Independent Advice Certificates should not be mandatory if the transaction involves:</p> <ul style="list-style-type: none"> (i) a simple extension of the term of an existing agreement or holding over (on the same commercial terms); (ii) a new grant or transfer of a franchise agreement where the upfront price is less than a specified amount set by government (eg under \$30,000 – because the cost of getting the advice is disproportional to the investment); (iii) a franchisee who is a multi-unit franchisee in the same system; (iv) a person or company who would otherwise be considered to be a sophisticated investor⁸; or (v) the franchisor entering into an agreement with an associate of the franchisor. <p>(b) Independent legal and accounting certificates should be mandatory where:</p> <ul style="list-style-type: none"> (i) earnings information is given (including financial performance representations) or (ii) there is a purchase of an existing established franchise.
4.	Clause 31	AUASB Guidance statement for marketing and cooperative funds	<p>Rational for amendment:</p> <p>Transparency and the inadequacy of and the lack of guidance for preparing current financial statements and audit reports that contain more meaningful information for prospective</p>

⁸ Some franchisees particularly master franchisees and dealer groups are in fact public companies

			<p>franchisees. The AUASB prepared GS018 for financial statements under Item 21, but no equivalent has been done for marketing funds and cooperative funds.</p> <p>Recommend:</p> <p>(a) Government instruct the Australian Audit and Assurance Board to prepare an audit guidance statement for marketing and cooperative fund audits relating to financial reporting obligations under the Code including clauses 15, 31 and item 15 of Annexure 1.</p>
Items of disclosure in Annexure 1			
1.	Item 1.1(c)	Insert a note allowing 'electronic signature'	Refer to suggested amendment above.
2.	Item 4	Item 4.2(b) judgements other than civil	<p>Clarify whether Item 4.1(b) requires details of current and former proceedings and judgements of that kind to be disclosed. Also clarify whether in Item 4.2(b) the words "<i>paragraph 4.1(a)</i>" should be amended to read "<i>paragraph 4.1</i>".</p> <p>Item 4.2(b) is currently limited to disclosure of judgements for 'civil' proceedings in the last 5 years.</p> <p>Recommend:</p> <p>(a) Clarify and if necessary amend Item 4.1(b) to make it clear if this item requires disclosure of a prosecution by (or judgement obtained by) Fair Work Ombudsman of a responsible franchisor entity under amendments made to the Fair Work Act 2009 for failing to take reasonable steps.</p>

			<p>(b) Expand Item 4.2(b) to require disclosure of civil judgements for a maximum of 5 years but also judgements and Court enforceable undertakings obtained by a public agency, and judgements involving criminal proceedings that are commenced before the disclosure document is prepared. Item 4.1(b) could strictly be interpreted to require disclosure of any proceedings at any time in the past and it is not limited to a time frame (such as 5 years in Item 4.2(b) or 10 years in Item 4.2(a) or (c).</p> <p>(c) Amending Item 4.2(b) would then make it consistent with continuous disclosure of judgements under Clause 17.3(c) of the Code.</p> <p>(d) Items 4.3(f) and (g) relate to concluded proceedings once a judgement is made or the proceeding ends. They assume those judgements are to be disclosed when Item 4.2(b) does not actually say they have to be disclosed. Whilst continuous disclosure of judgements is contemplated in clause 17(3) it just has not been added to Item 4 yet to oblige it to be included.</p>
3.	Item 4.1(b), 4.2(b) and Item 17.3(c)	Disclose proceedings and judgements against franchisor/ associate for contraventions of S558B of FWA	<p>Recommend:</p> <p>Amend and expand Item 4.1(b), 4.2(b) and Clause 17(3)(c) of the Code to require disclosure of any proceedings or judgements arising from the recent amendments to the <i>Fair Work Act</i> if a franchisor who is a responsible franchisor entity contravenes S558B of the <i>Fair Work Act</i> or an associate is held liable as an accessory under S550 to that contravention. The Fair Work Act empowers Fair Work to prosecute and proceedings and judgements under this regime are not currently expressly included under Items 4.1(a) or (b) and Item 4.2.</p>
4.	Item 6	Disclosure of events where consent has been withheld	<p>Recommend:</p> <p>Consider whether item 6.4 should add a new disclosure for the number of agreements in which "<i>the franchisor has withheld or revoked its consent to transfer of the franchise</i>".</p>

5.	Item 9	Geographical exclusivity of a franchise limited to a site	<p>(a) Improve the drafting of Items 9, 11.1(b) 12.2, 12.4 and 13 to improve disclosure of geographical exclusivity issues particular in a reasonable geographic area around a site.</p> <p>(b) Include a warning statement in Item 13 in bold and size 12 font as follows:</p> <p><i>If the prospective franchisee is buying an existing franchised business it should before signing a contract of purchase seek legal advice on including an appropriate restraint of trade clause in the contract. Refer to item 13.2. A franchisor may not have a right or obligation to enforce a contractual restraint against a former franchisee.</i></p>
6.	Item 9	History of enforcing restraints against former franchisees	<p>(a) Rationale for amendment:</p> <p>(b) Item 18.1(h) requires disclosure of whether the franchise agreement contains a restraint of trade or similar clause.</p> <p>(c) The item does not currently require any information to be disclosed about whether the franchisor has previously sought to enforce a restraint against a franchisee. Or whether a former franchisee has given notice under clause 23.1(a) to extend the agreement and satisfied the elements of that clause as a consequence the restraint has been unenforceable.</p> <p>Recommendation:</p> <p>(a) Consider whether Item 18.1(h) should be expanded to require disclosure of those circumstances.</p> <p>(b) If a restraint of trade is included in the agreement require a franchisor to include a warning statement as to whether a franchisor is obliged to take steps to prevent a former franchisee breaching any contractual restraint by continuing to operate in the</p>

			<p>territory or in a geographical proximity to the site and if the franchisor has ever taken action to enforce it.</p> <p>(c) If it has the discretion, it should also indicate its policy or the basis on which it will exercise that discretion and take that action. In some cases, despite having a contractual right to enforce a restraint, the cost of doing so may prevent a franchisor from doing so.</p>
7.	Item 12.2(c)	Online sales competition issues	<p>Rational for amendment:</p> <p>Item 12.2(c) assumes there is a territory when the business may be limited to a site. As there is no territory there is in most cases no disclosure.</p> <p>Recommend:</p> <p>Amend to also require disclosure of online sales in a geographic area surrounding the site. Government should specify the reasonable geographical area.</p> <p>Amend so it reads as follows. Changes are underlined.</p> <p><i>"the extent to which those goods or services may be supplied outside the territory <u>or in a reasonable geographical area surrounding the site of the franchise</u>"</i></p>
8.	Item 12.4	Online sales competition issues	<p>Recommend:</p> <p>Expand to include disclosure of online sales in a geographic area surrounding the site. Government should specify the reasonable geographical area.</p> <p>Amend Item 12.4 to make it consistent with changes to item 9. Changes are underlined.</p>

			<i>(a) the extent to which those goods or services may be supplied in the territory of the franchise or to locations within a reasonable geographic area surrounding the site of the franchise;</i>
9.	Item 15.1(g)	Expenses requiring a vote	<p>Recommend:</p> <p>Amend clause 15 or Item 15 to require a franchisor to disclose if the fund was used in the last financial year to pay for any expenses that required approval by the franchisee under clause 31(3)(a)(iii) of the Code.</p> <p>If so, a franchisor should provide details of that vote and expense and outcome of the vote.</p>
10.	Item 15 / Clause 15	Fund contributions to other international funds	<p>Rationale:</p> <p>In some cases, a marketing fund administered by a master franchisee may require contributions to be made to another international fund.</p> <p>Recommend:</p> <p>Item 15 should require disclosure of the amount and /or % of funds required to be contributed or paid to another fund and whether the franchisee will be provided with an annual financial statement and audit report of that other fund.</p>
11.	Item 15.1(h)	Marketing and Cooperative fund disclosure to outline basis of charging of goods and service supplied to fund by the franchisor or associate	<p>Rational for the amendment:</p> <p>Often a significant component of the fund is used to reimburse the franchisor or an associate for providing goods or services to the fund. Whilst you do have to give details of the goods and services the wording of the item does not go further than a Yes/ No answer and what those goods and services are. It fundamentally does not refer to the amount or how it is calculated or</p>

			<p>charged so there is a lack of transparency of payments to the franchisor or an associate and how they are calculated.</p> <p>Recommend:</p> <p>Amend Item 15.1(h) of Annexure 1 to add the words "<i>and the amount payable or the basis on which the franchisor or associate calculates and charges the cost of those goods or services to be paid by the fund;</i>"</p>
12.	Item 18	Fix inconsistencies in drafting and make Item 18 more meaningful about end of term disclosure	<p>Recommend:</p> <p>(a) Refer to my previous submission in relation to Item 18.3, 18.4 and 18.5 warning statements.</p> <p>(b) Refer also to the separate schedule of suggested amendments attached to this submission dealing with 'renew' and 'extend' and end of term provisions in the Code.</p>
13.	Item 21.4	Amend the 4 month audit report window to 11 months if the exemption under clause 8(7) & (8) is applied	<p>Rationale for the amendment:</p> <p>(a) A franchisor should not be compelled to go to the expense and trouble of obtaining an audit report within 4 months even though it qualifies for and applies the exemption from the obligation to update its disclosure document at that time. The time frame for getting and relying on an audit report should be longer (and go back to 11 months) if the franchisor applies the exemption</p> <p>(b) The prospective franchisee is not affected by this change as the franchisor can still obtain an audit report within the 2-month disclosure window required by clause 16.1(a) and clause 8(8) or before it enters into an agreement.</p> <p>(c) In Alan Wein's review the recommendation to change the audit report window period to 4 months was based on the fact that a franchisor should get the audit report within that</p>

			<p>period to align with its update obligation. It didn't contemplate the delay process under clause 8(7) and (8).</p> <p>Recommend:</p> <p>(a) Amend Item 21.4 after the words "<i>within 4 months</i>" to add the words "<i>or 11 months (if the exemption in clause 8(7) has been applied)....</i>".</p> <p>(b) Alternatively amend clause 8 of the Code to add the following:</p> <p>“(9) This subclause applies if the franchisor has in accordance with subclause (7) delayed updating its disclosure document and subsequently has to comply with subclause (8) or intends to enter into a franchise agreement. A franchisor can delay obtaining an audit report from a registered company auditor to give with the disclosure document, provided the audit report is obtained within 11 months after the end of the financial year to which the disclosure document relates. “</p> <p>(c) This would allow a franchisor to obtain and give an audit report prepared after the 4 months window expires if it applied the exemption in clause 8(7) & (8) but subsequently (after the 4 month period) receives a request under clause 16(1)(a) of the Code to give an updated disclosure document or intends to enter into a franchise agreement.</p> <p>(d) Without this change a franchisor would be compelled to give financial reports when it wants to obtain an audit report outside that 4 month window or incur the expense of an audit report even if it applied the exemption.</p> <p>(e) The benefit of the exemption and ability for a franchisor to save costs is undermined if a franchisor has to go to the expense of obtaining an audit report within 4 months even if it has been able to apply the update exemption. It may obtain the audit report but never have to rely upon it.</p>
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			(f) At that time the former code did not include the ability to apply an exemption to delay updating the disclosure document and is therefore out of step with commercial practice.
14.	Item 21	Fix inconsistent drafting for consolidated entities	Amend item 21.4(b): Make it consistent with items 21.5 and 21.6 so that the audit report can be for the " <i>franchisor or if the franchisor is part of a consolidated entity, the consolidated entity</i> ".
15.	Item 21 & Clause 15	Registered company auditors	<p>Rationale: Transparency and clarity</p> <p>Recommend:</p> <p>Amend the Code to add a drafting note to make it clear that any audit report required under Item 21 such as for items 21.4, 21.5 or 21.6 and any audit report required for the annual marketing or cooperative fund statement must be prepared by a registered company auditor.</p>
16.	Item 22	Other details	<p>Divide Item 22 into 2 parts like the former code to allow a franchisor to disclose other information it may want to give. I think this was accidentally removed when the old code was redrafted.</p> <p>In that way change the heading and add Item 22.2 Other details</p> <p>Item 22 Updates and other details</p> <ol style="list-style-type: none"> 1. Item 22.1 covers the Information regarding the existing wording relating to Clause 17 disclosure in Item 22.1; and 2. Item 22.2 Other details

			Under this heading it is clear a franchisor can insert other details.
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Schedule 2 - Suggested amendments to the Code and Annexure 1 Disclosure Document – end of term issues and clause 23

Point No	Clause or item	Comment	Suggested improvement
These recommendations relate to clause 4, 6(7), 9, 10, 18 and 23 and Item 18 of the Annexure 1 Disclosure Document (and various other places where the expressions renew, renewal, renewed, extend, extension or extended are found.			
1.	Definitions Clause 4	'renew the franchise'	<p>Recommend:</p> <p>Add the following definition:</p> <p>'renew the franchise' means in respect to the rights and obligations under a franchise agreement at the end of the term of a franchise agreement to:</p> <ul style="list-style-type: none"> (a) extend the term of the franchise agreement; (b) renew the franchise agreement; or (c) enter into a new agreement.
2.		renew the franchise agreement	<p>renew the franchise agreement and renewal of the franchise agreement in relation to an agreement occurs when the franchisee is able:</p> <ul style="list-style-type: none"> (a) to renew the agreement on the same or substantially the same commercial terms as the franchisee's existing franchise agreement; or

			(b) to enter into a new agreement on terms which may be different to the commercial terms of the franchisee's existing agreement.
3.		enter into a new agreement	enter into a new agreement means to enter into a new franchise agreement on the terms that would apply to a prospective franchisee. <i>{Drafting note - often referred to as the then current terms offered by the franchisor}</i>
4.		renewal	occurs when the franchisee is able to renew the franchise.
5.		extend	Amend (b) to read: (b) in relation to the term of a franchise agreement, occurs when the period of the agreement is extended, other than because of an option exercisable by the franchisee during the term of the agreement and 'extension' and 'extended' in relation to the term of the agreement have a similar meaning.
6.		contractual right to renew the franchise	means where the existing franchise agreement contains: (a) a contractual right (conditional or not) to extend the term of the agreement; or (b) a contractual right or option (conditional or not) to: (i) renew the franchise agreement; or (ii) enter into a new agreement.

7.		extension of the term of the franchise agreement	occurs when a franchisor extends the term of the franchise agreement but does not include an overholding.
8.		overholding	occurs where the franchisee is allowed, with the consent of the franchisor to overhold the franchise agreement on the terms set out in the franchise agreement or as agreed to by the parties at the time of the overholding.
9.	Clause 6(7)	Good faith	<p>amend to make it consistent and to read:</p> <p>(7) If the franchise agreement does not give the franchisee the contractual right to renew the franchise this does not mean that the franchisor has not acted in good faith in negotiating or giving effect to the agreement at end of term.</p> <p>Consider whether the words “renewal or extension of the franchise agreement need amending to be consistent.</p>
10.	Clause 9(2) and 10(1)(b)		<p>Amend paragraph (2)(a) so it reads “renew the franchise agreement” – to be consistent with the new definition.</p> <p>Consider whether paragraph 10(1)(b) and (d) and 10(3) need amendment to be consistent - eg should say renew the franchise agreement.</p>
11.	Clause 18	End of term notice	<p>Amend to read:</p> <p>(1) The franchisor must notify the franchisee, in writing whether the franchisor intends to renew the franchise or not renew the franchise.</p>

			<p>(2)</p> <p>(3) If the franchisor intends to renew the franchise, the franchisor's notice must include a statement to the effect that, subject to subclause 16(2), the franchisee may request a disclosure document under clause 16.</p> <p><i>{Drafting note clause 18(3) of the Code contains different to wording to clause 47(4) when they actually should be the same – the wording in clause 47(4) is better and more up to date}</i></p>
12.	Clause 23		<p>(1) A restraint of trade clause in a franchise agreement has no effect after the agreement expires if:</p> <p>(b) the franchisee has a contractual right to renew the franchise and had given written notice to the franchisor seeking to renew the franchise on substantially the same terms as those:</p> <p>(i) that are contained in the franchisee's current franchise agreement; or</p> <p>(ii) that apply to other franchisees or would apply to a prospective franchisee entering into a new franchise agreement; and</p> <p>(c)</p> <p>(d)</p> <p>(e) if the contractual right to renew the franchise is conditional and the franchisee has complied with those conditions, but the franchisor does not renew the franchise for some other reason; and</p> <p>(f) either:</p>

			<p>(i) the franchisee claimed compensation for goodwill because the franchisor would not renew the franchise, but the compensation given was merely a nominal amount and did not provide genuine compensation for the loss of opportunity in selling established goodwill; or</p> <p>(ii) the agreement did not allow the franchisee to claim compensation for the loss of opportunity in selling established goodwill in the event that the franchisor did not renew the franchise.</p>
13.	Clause 47	Part 5	<p>Rational for amendment: Make similar changes that are made to clause 18 to this clause for consistency.</p> <p>Clause 47</p> <p>(1) The franchisor must notify the franchisee in writing whether the franchisor intends to renew the franchise or not renew the franchise.</p> <p>(2)</p> <p>(3)</p> <p>(4) If the franchisor intends to renew the franchise, the franchisor's notice must include a statement to the effect that, subject to subclause 16(2), the franchisee may request a disclosure document under clause 16.</p>
14.		Renewal/ extension and use in other parts of the Code	<p>There may be other places in the Code or Item 18 where expressions renew, extend, renewal or extension are used that need to be checked and amended as necessary for consistency.</p>

Items of disclosure in Annexure 1

15.	Item 6.4(e)	Disclosure of end of term decisions	<p>Recommend:</p> <p>Amend Item 6.4(e) - expand circumstances to require disclosure of other end of term concepts to read:</p> <p><i>"the franchisor did not renew the franchise".</i></p>
16.	Item 18	Fix inconsistencies in drafting and make Item 18 more meaningful about end of term disclosure	<p>Recommend:</p> <p>Amend Item 18.1(a). Some agreements contain clauses that are not strictly an option but a right to apply to renew.</p> <p>(a) whether the prospective franchisee will have a contractual right to renew the franchise and if so, the processes the franchisor will use to determine whether to renew the franchise and details of the contractual conditions that would apply <i>{drafting note for example the franchisee has a conditional option to enter into a new agreement};</i></p>
17.			<p>Amend clause (b) and (c) and combine them to read:</p> <p>(b) If the prospective franchisee will have a contractual right to renew the franchise – whether the prospective franchisee will be entitled to compensation at the end of the agreement if the franchisor does not renew the franchise because either:</p> <p>(i) The franchisee does not satisfy the contractual conditions to renew the franchise <i>{drafting note for example the franchisee is in breach};</i> or</p>

			<div><div>(ii)The franchisee does satisfy the contractual conditions to renew the franchise, but the franchisor does not renew the franchise for another reason {drafting note for example the franchisor has a discretion whether to renew and just doesn't want them in the system}.</div><div>(c)If the prospective franchisee does not have a contractual right to renew the franchise whether the franchisee is entitled to compensation at the end of the agreement if the franchisor does not exercise a discretion to renew the franchise.</div><div>{Drafting note (b) applies where there is an express contractual right to renew the franchise where (c) applies where the franchisor has a discretion where there is say no renewal option remaining. The changes to Item 18 also depend on a determination of when compensation is or is not payable at end of term for clarity to a prospective franchisee and should cross refer to clause 23}</div></div>						
18.	Items 18.3-18.5	<div>Warning statements</div> <div>The warning statements in Item 18.3 18.4, 18.5 are confusing and inconsistent.</div> <div>Recommend that we suggest they finally fix the Warning Statement issue by changing them so you have to include such of the following statements as are relevant in bold 12 point type font:</div> <table><tr><td>Item 18.3</td><td>Whether the franchisee has the right or option (conditional or otherwise) to renew or extend the term of the agreement or able to hold over or to enter into a new agreement when it expires:</td></tr><tr><td colspan="2">In relation to the following statements include only the relevant words that apply below (eg <u>*does/does not*</u> - insert which one applies) in bold size 12 font</td></tr><tr><td>Renew</td><td>The franchisee <u>*does/does not*</u> have the option to renew the franchise agreement when it expires.</td></tr></table>		Item 18.3	Whether the franchisee has the right or option (conditional or otherwise) to renew or extend the term of the agreement or able to hold over or to enter into a new agreement when it expires:	In relation to the following statements include only the relevant words that apply below (eg <u>*does/does not*</u> - insert which one applies) in bold size 12 font		Renew	The franchisee <u>*does/does not*</u> have the option to renew the franchise agreement when it expires.
Item 18.3	Whether the franchisee has the right or option (conditional or otherwise) to renew or extend the term of the agreement or able to hold over or to enter into a new agreement when it expires:								
In relation to the following statements include only the relevant words that apply below (eg <u>*does/does not*</u> - insert which one applies) in bold size 12 font									
Renew	The franchisee <u>*does/does not*</u> have the option to renew the franchise agreement when it expires.								

		Extend	The franchisee <u>*can/cannot*</u> extend the term of the franchise agreement when it expires.
		Overholding	The franchisee <u>*can/cannot*</u> overhold the franchise agreement without the consent of the franchisor when it expires.
		New Agreement	The franchisee <u>*does/does not*</u> have the right or option to require the franchisor to enter into a new franchise agreement when it expires.
		Item 18.4	Warning Statement:
		The following warning statement applies:	
		<p>If the franchisee does not have a right or option to renew, extend or hold over the agreement or to enter into a new agreement at the expiry of the franchise agreement the franchise agreement ends, and the franchisee no longer has the right to carry on the franchised business.</p> <p>The franchisor may, but does not have to, extend the term of the agreement or hold over of the agreement or enter into a new agreement at expiry of the term.</p>	