

**Name**

Barry Ranson

**Organisation**

I am submitting this response as a long term (20 year) franchisee in the retail sector.

**Which mock-up version of the Key Facts Sheet would best help prospective franchisees to make an informed decision?**

I am not sure what you mean by this. I am happy to proceed with the submission and provide my perspective in relation to the various proposed draft legislative proposals.

**Make a general comment**

I have previously contributed at a couple of stages in this process and although I am having to continually re-enforce my concerns and re-state issues that that I have previously complained about the need to assist those with the capacity to make change in this area is far too important to give up on. So please accept my submission on that basis.

### **Feedback relating to the draft legislation**

Firstly I am a long term Franchisee in a retail franchise group. I have had my small business in Melbourne's north western suburbs for more than twenty years. I have contributed at each stage of this enquiry. I have mixed emotions about what is now almost the end result and I am certainly not dissatisfied with where we have come to. I believe that it has been a huge effort and a difficult one and one that I am happy with. I think that the draft legislation is a huge step in the right direction.

I have felt that those parties representing the franchisors interests made much to do about the problems in franchising being due to prospective franchisees not doing enough by way of due diligence and whilst I believe that prospective franchisees are their own worst enemy at times it can't hurt to have an overabundance of information to assist them to make a decision should they wish to utilise it. I noticed that following the early stages of this enquiry that there was a shift by franchisors in the initial stages from *nothing to see here to maybe there is a problem*

### **Paying Franchisors costs**

One of the wrongs that I had voiced my concerns about previously was that of franchisees being responsible for the payment of franchisors legal fees. This has been addressed in the draft legislation at Schedule 6 on page 25. In my franchise agreement I have a bone of contention with a breach notice fee. The breach notice is used to give franchisees notice that they have breached the franchise agreement, what the breach is and what they need to do to remedy it otherwise the franchise will be terminated. I don't have a problem with the notice per se. What I don't agree with is at the same time that the notice is issued the franchisee is charged a breach notice fee. This fee is contrary to the current franchising code in my view.

In my Franchise agreement at clause 7.16 it reads:

Where the franchisee fails to perform or observe any undertaking or obligation in this agreement or the manuals and the franchisor issues a (sic) breach notice the franchisee must pay to the franchisor the breach notice fee. The breach notice fee is a genuine pre-estimate of the loss and damage that will be suffered by the franchisor as a consequence of issuing a breach notice and does not constitute a penalty. The franchisor may vary the breach notice fee from time to time in its absolute discretion provided the amount is a genuine pre-estimate of the **franchisors costs**.

The Franchisor directly debits franchisees accounts to obtain royalties and marketing and other fees. So the franchisee's business account is debited \$495.00.

The current franchise code states the opposite. The current code expressly opposes the practice of the franchisor getting the franchisee to pay the franchisors legal costs.

The current franchising code at Clause 22 reads:

A franchise agreement must not contain a clause that requires the franchisee to pay to the franchisor costs incurred by the franchisor in relation to settling a dispute under the agreement and if it does the clause is of no effect.

In my franchise the breach notice fee is effectively used as a penalty or fine because some of the reasons for the issue of a breach notice would not really be used as a reason to terminate the franchise.

What effectively happens is that the breach notice fee is used to enforce compliance. It just seems wrong to me that a franchisor can make an allegation, issue a charge or penalty without any consultation then take the money from you and not give it back even though the breach is remedied. Mediation doesn't work when the franchisor isn't willing to make any change and any legal remedy isn't worth it because the cost of this outweighs the fee. The breach notice fee exists as a penalty or fine. It is just not fair. The franchise code is there but it lets you down as a franchisee. There is really nothing that you can do about it. It is an example of a franchisor being arbitrarily a judge, jury and executioner. I consider that it undermines the dispute resolution process.

I do not believe that there is any place for a breach notice fee in a franchise agreement these days. I look at the intention of those who drafted the current franchising code and what their intention was with respect to clause 22. I believe it was to stop franchisees being responsible generally for the franchisor's costs in dispute resolution. I say that my franchise breach notice fee is contrary to clause 22. I hope that Schedule 6 of the draft legislation will fix it but whilst 19A(1) seems clear enough and in the supporting guide it is clear I am not sure why there is a need for 19A(2). It just appears to muddy the waters a bit. In fairness though I don't know what was behind it and what remedy was needed.

### **Capital Expenditure**

This is an improvement to what existed previously and introduces a consultative approach with a need for a justification and how a franchisee can recoup the expenditure. 30A(2) is definitely a necessary inclusion and can only assist franchisees to make informed decisions.

### **Other Provisions of the Exposure Draft**

I support the proposed draft legislative changes and see it a step in the right direction to introduce some fairness into franchising. What needs to occur though is the ability to enforce the code otherwise it will continue to be a toothless tiger.

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