

# DISPUTE RESOLUTION ALERT

## IN THIS ISSUE

### OVERVIEW OF THE DRAFT FRANCHISE INDUSTRY CODE PUBLISHED IN JANUARY 2016

On 29 January 2016, the Commissioner of the Consumer Commission published the long awaited draft Franchise Industry Code (the Code) under s82 of the Consumer Protection Act, No 68 of 2008 (the CPA), for comment. The Code will provide for the establishment of a specialized Franchise Industry Ombud (to be known as the FIO), and the appointment of an Ombudsman, to receive complaints arising from franchise agreements.

# OVERVIEW OF THE DRAFT FRANCHISE INDUSTRY CODE PUBLISHED IN JANUARY 2016

*The Code will help resolve franchise disputes, based on recommendations by the Ombudsman, and thus avoid costly litigation for parties to a franchise dispute.*

*In order to create awareness of the Code and the dispute resolution mechanisms available under the Code, s28 of the Code will require all franchise agreements and disclosure documents, which was introduced by the CPA, to include a notice that the parties are bound by the provisions of the Code and undertake to comply with the Code.*



On 29 January 2016, the Commissioner of the Consumer Commission published the long awaited draft Franchise Industry Code (the Code) under s28 of the Consumer Protection Act, No 68 of 2008 (the CPA), for comment. The Code will provide for the establishment of a specialized Franchise Industry Ombud (to be known as the FIO), and the appointment of an Ombudsman, to receive complaints arising from franchise agreements.

Before becoming despondent about the Code, you should note that the Code will help resolve franchise disputes, based on recommendations by the Ombudsman, and thus avoid costly litigation for parties to a franchise dispute. It will provide for an alternative mechanism of dispute resolution and, although the process will be prescribed and structured, the Ombudsman will be more of a mediator than an arbitrator. What this means, in simple terms, is that the Ombudsman will have no power to make binding awards against any of the parties, but will instead make recommendations, with a view to brokering a consensual settlement between the parties.

The Code will provide for a procedure to initiate franchise related complaints, and for a procedure to ventilate the issues between the parties. Complaints that do not meet the requirements laid down by the Code, will be rejected.

In order to create awareness of the Code and the dispute resolution mechanisms available under the Code, s28 of the Code will require all franchise agreements and disclosure documents, which was introduced by the CPA, to include a notice that the parties are bound by the provisions of the Code and undertake to comply with the Code. This will render the Code contractually applicable to franchisor-franchisee relationships.

In addition, the franchise agreement and disclosure document will be required to contain a notice informing franchisees that they will be entitled to refer any franchise related disputes to the FIO. The process will thus be voluntary and not compulsory.

An important financial feature of the Code is the proposal that the FIO will *inter alia* be funded by way of contributions levied on franchisees and franchisors. Such contributions will be determined by the FIO Board, in consultation with a franchise industry body, representing five or more franchisors and franchisees of five or more franchises. Once determined, the levies will be published on the FIO website, at least two months before such levies are payable. It is therefore important that stakeholders in the franchise industry participate in the process for determining the levies payable by franchisors and franchisees.

To promote efficiency, the Code proposes that the Ombudsman must be a legally qualified person with at least 10 years' dispute resolution experience.

The FIO will have jurisdiction over a wide variety of disputes, ranging from breaches of the CPA to contractual disputes flowing from franchise agreements and disclosure documents. The Ombudsman will further have jurisdiction to entertain questions concerning the interpretation of franchise

# OVERVIEW OF THE DRAFT FRANCHISE INDUSTRY CODE PUBLISHED IN JANUARY 2016

CONTINUED

*In order to better understand the issues between the parties, the Ombudsman will be able to request (but not compel) the parties to attend a hearing, during which the parties will be entitled (with the permission of the Ombudsman), to be represented by any person of their choice, including a legal representative, and to make submissions and cross-examine witnesses at the hearing.*



agreements, breaches thereof and claims for payment of monies, such as royalties, marketing fund contributions and franchise fees. He will also be empowered to receive and entertain complaints concerning the supply of goods under the franchise agreement (including a failure to supply goods), as well as disputes relating to solicitation to enter into franchise agreements.

In order to better understand the issues between the parties, the Ombudsman will be able to request (but not compel) the parties to attend a hearing, during which the parties will be entitled (with the permission of the Ombudsman), to be represented by any person of their choice, including a legal representative, and to make submissions and cross-examine witnesses at the hearing. Cross-examination is a feature of an adversarial system of binding dispute resolution (such as litigation or arbitration) and may create unnecessary conflict, which may in turn hamper the consensual resolution of disputes. It is proposed that, instead of a hearing, provision should rather be made for a roundtable meeting between the Ombudsman and the parties, to promote a spirit of co-operation conducive for consensual dispute resolution. The process whereby a mediator brokers a settlement between parties to a dispute will, in our view, be far more fitting to the consensual dispute resolution objective of the Code.

Ultimately, the Ombudsman will be entitled to provide the parties with his views on the dispute, and recommend a basis on which he proposes the dispute be resolved. If the parties accept the recommendation,

it will be recorded in writing (similar to a settlement agreement brokered through mediation), which will then be binding and enforceable. If on the other hand the Ombudsman's recommendations are not accepted by the parties, the dispute resolution process will fail and the Ombudsman will be entitled to close the complaint. He will have no authority to make a binding award against any of the parties.

With that in mind, a curious feature of the draft Code is that it provides for a party to a dispute to seek an award for damages against the other party, with the rider that the party seeking the damages award may reserve the right to request an award for damages in another forum (such as an arbitration tribunal or High Court).

Considering that the Ombudsman can only make recommendations, he will have no authority to make an award for damages, without both parties' consent. It would accordingly be more appropriate for the Code to state that the Ombudsman can confirm an agreement between the parties, as to the liability and amount of damages to be paid by one party to the other. The word "award" will cause confusion and should in our view be avoided.

Finally, it is necessary to mention that where parties have agreed on another form of dispute resolution, such as arbitration, the dispute resolution clause in their franchise agreement will take precedence over the mechanism provided for in the Code, unless the mechanism is inconsistent with the CPA or excludes its application.

# OVERVIEW OF THE DRAFT FRANCHISE INDUSTRY CODE PUBLISHED IN JANUARY 2016

CONTINUED

*Although there are some minor drafting aspects to be looked at in the Code, it is a welcome development for the franchise industry, where good relationships between franchisors and franchisees are key to the growth of any franchised business and the franchise industry as a whole.*

Although there are some minor drafting aspects to be looked at in the Code, it is a welcome development for the franchise industry, where good relationships between franchisors and franchisees are key to the growth of any franchised business and the franchise industry as a whole. Hopefully the non-confrontational

dispute resolution style proposed by the Code will result in efficient dispute resolution, so that franchisors and franchisees can stay out of court and get on with business.

.....  
*Lucinde Rhoodie  
and Freddie Terblanche*



Ranks us in  
**BAND 2**  
Dispute  
Resolution

**2013**  
**HIGHEST RANKING**  
of Client Satisfaction  
amongst African Firms



**NO.1**  
**6**  
YEARS IN A ROW  
for client service excellence  
**#6YearsInARow**



*The*  
**LEGAL 500**  
**2015**  
Ranks us in  
**TIER 2**  
Dispute Resolution  
Recommends us in  
**DISPUTE RESOLUTION**

## OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



**Tim Fletcher**  
National Practice Head  
Director  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



**Grant Ford**  
Regional Practice Head  
Director  
T +27 (0)21 405 6111  
E grant.ford@cdhlegal.com

**Adine Abro**  
Director  
T +27 (0)11 562 1009  
E adine.abro@cdhlegal.com

**Roy Barendse**  
Director  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

**Eugene Bester**  
Director  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

**Sonia de Vries**  
Director  
T +27 (0)11 562 1892  
E sonia.devries@cdhlegal.com

**Lionel Egypt**  
Director  
T +27 (0)21 481 6400  
E lionel.egypt@cdhlegal.com

**Jackwell Feris**  
Director  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

**Thabile Fuhrmann**  
Director  
T +27 (0)11 562 1331  
E thabile.fuhrmann@cdhlegal.com

**Craig Hindley**  
Director  
T +27 (0)21 405 6188  
E craig.hindley@cdhlegal.com

**Anja Hofmeyr**  
Director  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

**Willem Janse van Rensburg**  
Director  
T +27 (0)11 562 1110  
E willem.jansevanrensburg@cdhlegal.com

**Julian Jones**  
Director  
T +27 (0)11 562 1189  
E julian.jones@cdhlegal.com

**Richard Marcus**  
Director  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

**Burton Meyer**  
Director  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

**Rishaban Moodley**  
Director  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com

**Nick Muller**  
Director  
T +27 (0)21 481 6385  
E nick.muller@cdhlegal.com

**Byron O'Connor**  
Director  
T +27 (0)11 562 1140  
E byron.oconnor@cdhlegal.com

**Marius Potgieter**  
Director  
T +27 (0)11 562 1142  
E marius.potgieter@cdhlegal.com

**Lucinde Rhoodie**  
Director  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

**Willie van Wyk**  
Director  
T +27 (0)11 562 1057  
E willie.vanwyk@cdhlegal.com

**Joe Whittle**  
Director  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

**Jonathan Witts-Hewinson**  
Director  
T +27 (0)11 562 1146  
E witts@cdhlegal.com

**Pieter Conradie**  
Executive Consultant  
T +27 (0)11 562 1071  
E pieter.conradie@cdhlegal.com

### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2016 0893/FEB