

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.

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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

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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.

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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.

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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.

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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.

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